

## CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

SEPTEMBER 2020

### LEVEL 3 - UNIT 8 – WILLS & SUCCESSION

#### **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

The test for mental capacity and the rules of intestacy are now well answered by candidates.

The Inheritance Provision for Family and Dependants Act 1975 is not as well understood as it should be; candidates need to familiarise themselves with this.

## CANDIDATE PERFORMANCE FOR EACH QUESTION

### **Section A**

#### Question 1

Well answered by most, although some failed to say why the intestacy rules are not sufficient or are too harsh.

#### Question 2

Few mentioned a privileged Will as a way in which property may pass without a formal Will. Most referred to joint tenancy or the intestacy rules; a few made reference to *donatio mortis causa*.

#### Question 3

Generally, some good responses.

#### Question 4

Performance was weaker in this question.

#### Question 5

Generally, well answered.

#### Question 6

Most candidates are unfamiliar with the ways in which a surviving spouse can exercise a right to continue to live in the marital home.

#### Question 7

Generally, well answered.

#### Question 8

Nearly every candidate produced the correct response to this question.

#### Question 9

Generally, well answered.

#### Question 10

Generally, well answered.

#### Question 11

Surprisingly, some weak responses. Common failings were being too vague as to the nature of the relationship between the applicant and the deceased, and the time limits involved.

### **Section B**

#### **Scenario 1**

In some cases, the rules on Wills in contemplation of marriage were not clearly defined. Revocation is always a popular topic which achieves some encouraging results. The stronger candidates methodically applied the facts of the scenario to Ben's case.

The clauses for inclusion in a Will if the testator owns a business were well cited.

#### **Scenario 2**

Mental capacity is always popular with candidates, with some impressive results. Again, the more successful candidates methodically applied the facts of the scenario to the case in part 2, although some missed out on marks for not doing this. The rules relating to requirements to make a Will and *donatio mortis causa* produced some good results.

### Scenario 3

A less popular question, although the candidates that did select this were able to explain how the intestacy rules work. However, they were less successful in outlining what constitutes reasonable financial provision.

## SUGGESTED ANSWERS

### LEVEL 3 - UNIT 8 – WILLS & SUCCESSION

#### SECTION A

1. There are a number of reasons why a person might make a Will. These include the fact that the intestacy rules may be unsuitable for the testator's circumstances. A person may also wish to appoint guardians for minor children, protect vulnerable beneficiaries with the use of trust arrangements; mitigate inheritance tax; or appoint the executors of their choice.
2. Three circumstances, excluding intestacy, when the formal requirements to make a Will are not applicable are when the deceased is able to make a privileged Will; they have made a valid *donatio mortis causa*; and where property has passed by survivorship.
3. The benefit to personal representatives of including a receipts clause in a Will is that it will exonerate them from any further liability in respect of that gift.
4. The circumstances in which a legacy will abate are where it is a gift of personal property and the estate is solvent, but there are insufficient funds to pay all the legacies in full.
5. The effect of divorce on a Will is as if the former spouse had died. It does not revoke the Will but, unless the Will provides otherwise, any gifts to the former spouse will fail and any appointment of the spouse as Executor will fail.
6. A surviving spouse can continue to live in a house solely owned by their spouse who has died intestate by asking the administrators to appropriate the property to them. In the event that the property is worth more than the spouse's entitlement, they will need to make up the value which will be calculated at the date of appropriation. The spouse must exercise their right within 12 months of death.
7. An executor may renounce entitlement to act as an executor under s.5 Administration of Estates Act (AEA) 1925. This must be done in writing and must form part of the application for the grant of representation. The executor must not have intermeddled or they will not be able to renounce.
8. Where there is an executor able and willing to act a grant of probate should be applied for.

9. The circumstances in which the Probate Registry may require an affidavit of due execution are stated under r.12 Non-Contentious Probate Rules (NCPR) 1987. These are where a testator has left a Will, but the Will contains no attestation clause; the attestation clause is insufficient; there is doubt if the will has been validly executed such as a blind or illiterate testator, the signature of the testator appearing after those of the witnesses, or the witnesses appeared to sign at different times.
10. A surviving co-habitee can make a claim under the Inheritance (Provision for Family and Dependents) Act (IPFDA) 1975, if he/she was living in the same household as the deceased as at the date of death, as his/her spouse or civil partner, for a period of two or more years prior to the death (s.1 (1A) – (1B) IPFDA 1975). The claim must be made within six months of the date of issue of the grant of representation.

## **SECTION B**

### **Scenario 1 Questions**

1. In order for the Will to be valid after Ben and Zara married, Ben will have needed to have stated that it was made in contemplation of marriage, and that the Will should not be revoked by his expected marriage. Zara will have needed to have been specifically named in the Will. If this has not been done then the Will would have been automatically revoked when Ben married Zara under s.18 Wills Act (WA) 1837.
2. (a) Revocation of Wills is governed by s.20 WA 1837, which provides that a Will is revoked by the testator, or by someone else in his presence and at his direction, by burning, tearing or otherwise destroying the Will. The testator must have intended to revoke the Will. Accidental destruction, or destruction whilst the testator is drunk/of unsound mind would not revoke the Will.  
  
(b) In this scenario, Ben's Will has been torn, which is within the definition. Ben may have torn the Will himself during the move. However, in this situation it seems unlikely that it was Ben's intention to revoke the Will and therefore the Will would not have been revoked.
3. (a) The legacy of the coin collection left to Zara is a specific gift. This is because the coin collection is an item clearly identified in Ben's Will, by the use of the word 'my'.  
  
(b) Wayne will receive Ben's bakery business worth £250,000, together with the bread slicing machine and the delivery van that Ben used in his business.
4. (a) If a testator owns a business then a Will should include the following clauses:
  - power to continue to run the business for as long as the PRs think fit;
  - power to use assets other than those in use at the date of death;
  - indemnity for the PRs against personal liability;
  - power to employ staff and managers to run the business

- (b) If there is a charity named as a beneficiary in a Will, then the Will should include a receipt clause. This will allow the executors to accept a receipt from anyone at the charity who says that they are the proper person to give it to on behalf of the charity. The Will should also include an amalgamation clause, which will prevent the gift from failing in the event that the charity has changed its name or joined another charity by the time of the testator's death.

### Scenario 2 Questions

1.
  - (a) Under the test in Banks v Goodfellow (1870), the testator should understand the nature and effect of their act; the extent of their property; and the moral claims to which they ought to have regard.
  - (b) The test under the Mental Capacity Act (MCA) 2005 states that a person lacks mental capacity if they are unable to make a decision for themselves because of an impairment of, or disturbance in the functioning of, the mind or brain. That they are 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 or communicate their decision.
2. Afolabi appears to have capacity to make a Will as, even though he is on heavy medication and tires easily, he appears to understand the information relevant to making a Will, such as what he owns, including his car. Afolabi knows Iris and his daughters' moral claims to his estate. He appears to be able to retain the information, to give instructions to Oliver and to communicate those instructions, as Oliver has drawn up the Will on the basis of the instructions given by Afolabi.
3.
  - (a) The rules relating to the formal requirements to make a Will are set out in s.9 Wills Act (WA) 1837. These state that there is no need for a formal attestation clause, provided the Will is in writing and is appropriately signed and dated by the testator in the simultaneous presence of two witnesses, who also sign the Will and the testator and witnesses are all present together while this happens. It must be the intention of the testator that his signature give effect to the Will.
  - (b) Taking the above into account, the Will is valid because Oliver has written out the Will and Afolabi signed and dated the Will. The Will appears to have been appropriately signed and witnessed by Oliver and his wife and all three of them were together during the entire signing and witnessing process. As the Will is homemade, it is unlikely that there will be an appropriate attestation clause, but this will not cause the Will to be invalid.
4.
  - (a) The gift of the car appears to be a valid *donatio mortis causa*. For this it must be made in contemplation of death, contingent on death and the donor must part with some dominion over the property before death. Afolabi knew that he was ill and was not expecting to live, which is enough, even though he did not die for another two months. In addition, Afolabi did hand the keys to Nadine, which is sufficient to transfer the car even if he had not signed the log book. (Sen v Headley (1991)).

- (b) If Afolabi did not have the designer watch at the date of his death, the gift would adeem and the gift would fail. Therefore, Nadine would not receive the watch. As the Will speaks from the date of death, the executors would not have to buy her a replacement designer watch.

### **Scenario 3 Questions**

1. As James had not made a Will, his estate would be distributed under the intestacy provisions. These are set out in s.46 Administration of Estates Act (AEA) 1925 as amended. As both of his parents are dead, James's estate would pass upon the Statutory Trusts set out in s.33 AEA 1925 (as amended), which provide an obligation to pay for the funeral and administration expenses, settle his debts and distribute the residue, according to the statutory entitlements, to his siblings of the whole blood (Mark, Steve and Ellie) in equal shares. As Ellie is under 18, her share would be held on statutory trusts. Carys would not receive anything as she is a stepsister. Lucy will have no entitlement under the intestacy provisions, other than the joint account which will pass by survivorship.
2.
  - (a) R.22 Non-Contentious Probate Rules (NCPR) 1987 sets out the order of entitlement to be an administrator of an intestate's estate and this follows the same order as entitlement to the estate itself. Therefore, Mark and Steve could deal with the estate as beneficiaries. Both Mark and Steve would need to act as Ellie is a minor.
  - (b) The power of administrators derives from the Grant of Letters of Administration, so Mark and Steve do not have power to deal with the assets of James's estate before it is issued.
3.
  - (a) Lucy will be entitled to reasonable financial provision at the maintenance standard, to provide her with reasonable money for her maintenance, because she was not married to James but was his cohabitee.
  - (b) When making a decision for reasonable financial provision for Lucy, the Court will take into account Lucy's needs and resources both now and those that she is likely to have in the foreseeable future. This would include the fact that she does not have a home to live in, and that she will not earn very much as a part-time shop assistant. They will also take into account the financial needs and resources of any beneficiary of James's estate, namely Mark, Steve and especially Ellie and James's obligations towards Lucy and towards Ellie. In addition, they will take into account the size and nature of his estate, which includes £200,000 cash and a £450,000 house, and Lucy's conduct. Also, as Lucy and James were cohabitees, they will look at Lucy's age, and the length of time they had lived together in the same household as man and wife. Lucy is 32 and they were living together for three years. They will also take into account any contribution Lucy made to James' family such as taking care of Ellie, which still continues.
4. If Lucy and James had been married without children, and Lucy survives for 28 days, Lucy would receive the entire estate as surviving spouse. In this scenario, Mark, Steve and Ellie would receive nothing.