CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2020

LEVEL 6 – UNIT 14 – LAW OF WILLS AND 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 January 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

General observations

Candidates who performed well did so because they were well prepared. In particular they had:

- A broad knowledge across the specification and were able to show good knowledge of the law with appropriate citation, and good understanding through analysis.
- Good knowledge of recent case law e.g. the Ilott case.
- Developed good answer technique and were able to answer the question as set and in an appropriate level of detail for Level 6.
- Read the question carefully and were able to answer as the question instructed.

Candidates who performed less well did so for the following reasons:

- Some did not read the question carefully to identify exactly what was required in the answer e.g. Section A Question 2.
- Some did not adequately plan their answer in outline – instead they launched straight into writing and then went off the question topic and onto another topic.

- Some did not answer in sufficient detail for Level 6 e.g. the Banks v Goodfellow test in section B Question 3, where more was required than simply to identify the 3 aspects of the test.

Candidates were generally better at answering Section B problem questions where the scenario and questions tend to encourage a methodical answer which states the law and then applies, rather than Section A essay questions.

CANDIDATE PERFORMANCE FOR EACH QUESTION

SECTION A

Candidates tend to find the essay questions more challenging, and performance is weaker than for the Section B questions. Essay questions require evidence of knowledge relevant to the question in appropriate detail and with appropriate citation. Candidates are then required to show understanding through analysis. A common area for improvement is in the skill of analysis with many answers being descriptive only.

In some cases, candidates also had a tendency to wander from the focus of the question into an area that was not relevant e.g. Section A, Question 1 where some candidates wrote about the rules of construction. It is therefore suggested that candidates consider spending a few minutes planning an outline of their answer.

Question 1
Very few candidates answered this question which generated mixed performance. The question asked candidates to analyse how the courts have applied the rules contained in ss.24 and s.34 Wills Act in deciding how gifts should be construed. Weaker candidates focussed on the word "construction" and wrote about the rules of construction rather than about s.24 and s.34.

Question 2
This was the most popular essay question. But performance was disappointing. Where this occurred, it was because either the question was not read carefully or because of a lack of the breadth of knowledge and understanding required. The question focus was the formalities in s.9 Wills Act 1837 and testamentary capacity. A significant number of candidates did not perform well because they wrote about mental capacity, in some cases in some detail, with answers including reference to the Banks v Goodfellow test and the Mental Capacity Act 2005 which was not what the question required.

Question 3
This was not a popular question. Well prepared candidates were able to achieve good marks. In part (a), weaker performance was seen where candidates were not able to identify the 3 broad categories of breach of duty and/or were not able to explain and give examples.

Performance in part (b) required candidates to identify a number of ways in which a personal representative can be protected from liability and to be able to explain them. Well prepared candidates were able to do this, while weaker performance was seen where candidates were not able to provide a clear and accurate description in an appropriate level of detail.

Question 4
This was a popular question and it elicited the best performance. Candidates generally showed a good level of knowledge of claims made by children under the Inheritance (Provision for Family and Dependants) Act 1975, well supported by case examples and knowledge of changes by the Inheritance and Trustees' Powers Act 2014. Weaker performance was due to a lack of knowledge of "children" or of "a person treated as a child of the family" or of the approach re adult children.

SECTION B

Candidates should be aware that, although not requested in problem questions, statutory and case law citation is still required.

Candidates need to ensure that for problem questions they come to a final conclusion on the issue raised e.g. in Question 2 concluding whether each of the legacies is valid.

Question 1
This question (and also question 4) was less popular, however candidates produced some good answers and very good performance was seen from a significant number of well-prepared candidates. Better performance was seen from candidates who were able to produce the correct calculations, including the abated pecuniary legacies, and a clear list of the statutory order of payment which they then applied.

Question 2
This was a popular question and it produced the best performance. Candidates who performed well were able to identify and explain the relevant law, with reference to relevant cases to illustrate, and to apply it accurately.

Weaker performance was seen from candidates who:

- Failed to recognise that in Zeta's case, although there was latent ambiguity, extrinsic evidence could be produced based on what Yasmin had said to Oswald. A detailed discussion of approaches to construction was not required.
- Failed to conclude whether each legacy was valid or invalid.
- Based advice regarding the gift of residue to Lloyd, who had pre-deceased, on s.33 Wills Act. These candidates failed to recognise that, as Lloyd was Yasmin's spouse, this section did not apply.

Question 3
Another popular question which produced good performance.

Part (a) Better candidates were able to show appropriate knowledge of the Banks v Goodfellow test and to apply it to Victoria with clear reference to information in the scenario.

A significant number of candidates wrote at length about the Mental Capacity Act 2005, with some failing to recognise that Banks remains the leading case. Candidates in many cases also wrote about the Golden Rule and precautions that might be taken which was not relevant here as part (a) involved a homemade will.

Weaker candidates failed to use appropriate facts from the scenario to show understanding and to support analysis.

Performance in (b) was variable.

Question 4
This question was less popular and was the weakest performing of the Section B questions. Part (a) was generally answered well. For part (b) candidates tended not to discuss The Besty (the rock with the drawing valued at £200,000) in terms of the possibility of it being an investment and so not a personal chattel. And weaker candidates did not discuss the position re Faria if she died before becoming 18.

SUGGESTED ANSWERS

LEVEL 6 – UNIT 14 – LAW OF WILLS AND SUCCESSION

SECTION A

Question 1
Section 24 Wills Act 1837 (WA 1837) sets out the rules for construing how gifts in a will should be applied. The date from which a will speaks is a question of construction. S.24 states that a will is to be read and takes effect as if it had been executed immediately before the death of the testator when considering any gifts of real or personal property referred to in the will.

However, when identifying or describing the beneficiary, normally the will speaks from the date when it was made.

It is important to note that these rules are subject to a contrary intention contained in the will. In the absence of a contrary intention, property acquired after the date of the will passes under a devise or bequest in the will. An example is in Re Kempthorne (1930), where "all my freehold land" passed the freehold land that the testator owned at death and not just that at the time the will was made. The same principle applied in Re Evans (1909) and Re Bancroft (1928).

As a gift of residue clearly means residue at the time of death, it might seem that s.24 WA 1837 has no application to general or residuary legacies. However, it can apply to general legacies in situations where, for example, there is a legacy of a specific number of shares in a named company and that company has subsequently been reorganised and has issued new shares to replace the previously issued shares. The effect of s.24 WA 1837 is, *prima facie*, to give the same number of new shares to the legatee because they are described as at the date of death.

Section.24 WA 1837 also applies to specific shares, so that if a testator gives all his shares in a company to a legatee then that legatee is entitled to receive all the shares that the testator owned in that company at the time of his death.

Section.24 WA 1837 specifically states that the contrary intention must appear in the will itself. There may be difficulty in determining when a contrary intention appears due to a reference, for example, to the present time, or a detailed description of the gift. Consequently, the court has had to interpret

the language used by the testator indicating the present time, where, for example, the word "now", has been used as this can amount to a contrary intention because it suggests the date of the will. Examples include Wagstaffe v Wagstaffe (1869), Re Edwards (1890) and Re Willis (1911).

The courts have also had to interpret the language used by the testator when giving a detailed description of the property being gifted. If the gift has been described with such particularity as to show that the testator intended to designate an object in existence at the date when the will was made, this would amount to a contrary intention, and so s.24 WA 1837 does not apply. In Re Sikes (1927) the testator bequeathed "my piano" to a friend. By the time of her death she had sold her original piano and acquired another piano. The court decided that the replacement piano was not included in the gift because there was a contrary intention shown through the use of the word "my". Another example is Re Gibson (1866). These cases appear to say that no specific legacy, other than a specific generic legacy will survive ademption due to s.24 WA 1837.

Consequently, a gift of, for example, "my car", will be adeemed where the testator has replaced the car by the time of his death.

A problem arises where a testator acquires a different interest in the property gifted at a later date. In Re Fleming's Will Trusts (1974), the testator made a gift of "my leasehold house…", of which the testator was the lessee at the date of his will, but he later acquired the freehold reversion. The court decided that the gift passed the testator's entire interest in the property at his death. Simply stating the interest in the land, the testator held at the date of the will, does not amount to a contrary intention and consequently the beneficiaries took the freehold reversion.

Section.24 WA 1837 does not affect the construction of a will with regard to the object of a gift, so the will speaks from its date as to the object of a gift subject to any contrary intention. For example, a beneficiary referred to as "my sister's husband" is taken as the person answering the description at the date of the will. Examples include Re Whorwood (1887) and Re Daniels (1918). It should be noted that this rule does not apply to a class gift.

Section 34 WA 1837 provides for the republication of a will by re-execution or by a codicil to the will. If a codicil is to republish the will then it must contain some reference to the will. The confirmed will is treated as operating from the date of the codicil so far as the subject matter of the gift is concerned, subject to any contrary intention. Similarly, republication means the will speaks from the date of the codicil as to the beneficiaries of the gift, again subject to any contrary intention. In Re Reeves (1928), a testator made a will giving "all my interest in my present lease" to his daughter. At the date of his will the testator held a lease due to expire in 1924. The testator subsequently took out a new lease for a term of 12 years, and by a codicil made in 1926 confirmed his will. The court decided that the daughter was entitled to the new lease because the testator had confirmed his will. In Re Hardyman (1925) a gift was made by will to the wife of X. The testatrix confirmed the will by codicil after she knew that X's wife had died. The court decided that the subsequent wife of X was entitled to take the gift.

Question 2

The formality rules in s.9 Wills Act 1837 as amended by s.17 of the Administration of Justice Act 1982 (AJA 1982) apply to all testators making a valid will in England and Wales, other than those who are privileged personnel on active service. The formalities recognise the importance of the act of will making and the essential need for reliable evidence of the testator's testamentary intention.

Under s.9(a) a will must be 'in writing', which should provide evidence of the testator's intention. But there is no definition of what constitutes 'in writing'. The general approach of the court is that it need not be written on paper; provided there is a permanent visual form it can be written on any surface. For example, in Re Murray (1963) the will was written on a cigarette packet and in Hodson v Barnes (1926), it was written on a hen's eggshell.

Furthermore, a will can be written in any language provided there is reliable evidence as to its meaning. For example, the Court of Appeal in Re Berger (1989) granted probate to a will written in Hebrew and in Kell v Charmer (1856) jewellery symbols were used in the testator's will.

Section 9(a) also requires that the will must be 'signed by the testator' to confirm that what is written relates to the testator. Again, this is left undefined and is clearly ambiguous. The Court has widely and flexibly interpreted the word 'signed', provided what is written is intended to represent the testator's signature. For example, initials; In the Goods of Savory (1851); a thumbprint, In the Estate of Finn (1935) and the words "your loving mother", In the Estate of Cook (1960) were all accepted as signatures. Moreover, in Re Chalcraft (1948) "E Chal" was accepted as a valid signature where the testatrix slipped into a coma since she had in the circumstances done the "best she could have done".

Also, another person can sign on behalf of the testator provided it is undertaken by the direction of the testator and in his presence. The phrase "by his direction" requires a positive communication from the testator to the other person as held in Barrett v Bem (2012). Concerning "presence", this essentially means the testator must be able to object to or assent to the signature made on his behalf. Not many testators are aware of the presence requirement, let alone the duality of it: mental and physical presence. There is no clear requirement of the capacity necessary of the 'other person'. Remarkably, it appears that a minor can sign as another person as they can be a witness to a will, and witnesses can sign on behalf of the testator (Smith v Harris (1845)). This possibility seems implausible given that minors cannot make valid wills. Of course, if a beneficiary signs as the other person suspicion will be raised (Barrett) but is this enough?

Under s.9b it must "appear" that the testator intended by his signature to give effect to the will. S.9b relaxed and simplified the rule regarding the position of the testator's signature and applies on or after 1 January 1983 (AJA 1982). Now, a testator may place his signature anywhere in the will provided he intended to give effect to the will. For example, a testatrix may write her name in the attestation clause, as held in Weatherhill v Pearce (1995). The word "appear" may be resolved by extrinsic evidence.

In Marley v Rawlings (2014) the testator and his wife made mirror wills, but each accidentally signed the other's will. The Supreme Court found that when Mr Rawlings signed his wife's will he had intended by his signature to give

effect to the will (s.9(b). The clerical error, resulting in the content of the will being meaningless under s.21(1)(a) (or (b)) AJA 1982 could be rectified by s.20 AJA 1982. As a cautionary measure, the court in Re White (1991) held that the making of the will and the signature must be one operation (Wood v Smith (1992) CA).

Under s.9(c) the testator's signature must be made or acknowledged in the simultaneous presence of two or more witnesses. Mental presence merely requires the witnesses to be conscious of the act of writing by the testator: Smith v Smith (1866). Thus, if a witness, although present in the same room, is unaware that the testator is writing the requirement is not satisfied, as held in Brown v Skirrow (1902). Physical presence requires an unobstructed line of sight between the witness and the testator at the moment of execution. Remarkably, the test is not whether the witness has in fact seen the testator writing but whether he could have seen the testator writing if he had chosen to do so (In the case of Benjamin (1934), Brown v Skirrow (1902)).

A testator's acknowledgement of his previously made signature is not defined by the Act, but it may be either expressly or impliedly made usually by conduct. For example, by gesturing to the will or by directly asking someone to witness it (Weatherhill). No particular form of words is necessary (Hudson v Parker (1844)). The witnesses need not even know that the document is a will. They must, however, be conscious of the words or conduct that construe the acknowledgment, and they must be able to see the signature or have the opportunity to do so. Therefore, if the signature is covered this will not amount to a valid acknowledgement (In the Goods of Gunstan (1882)).

Section 9(d) requires that each witness either attests and signs the will or acknowledges his own signature, in the presence of the testator. Presence has the same dual meaning, but it is the testator who must be both mentally and physically present, a classic illustration is Casson v Dade (1781). s9(c) & (d) requires a specific order, which must be followed: the testator must first sign or acknowledge his signature in the simultaneous presence of at least two witnesses and then the witnesses must sign or acknowledge their respective signatures. If a witness signs the will before the testator has completed the first stage, the execution is invalid: Re Davies (1951). In Couser v Couser (1996) the wife's protestations constituted an acknowledgement of her signature.

Section 9(d) does not require an attestation clause which would reinforce the written document as evidence of intention. However, an attestation clause should be included as its presence raises a robust presumption of due execution. Strong evidence is needed to rebut the presumption (Sherrington v Sherrington (2005)) and Page 7 of 17 Channon v Perkins (2005)). However, if an attestation clause is not included an affidavit of due execution in accordance with r12(2) NCPR 1987 will be required.

In conclusion, it is submitted that the s9 formalities which should ensure that there is reliable evidence of testamentary intention (a written document, signed by the testator, in the presence of witnesses) are not "easily and generally understood". For example, most testators are unaware of the intricacies of the rules concerned with valid signatures, apparent intentions, and the particular order that must be followed when testators and witnesses sign the will. So, the s.9 formalities may not provide the robust evidence of intention that was intended.

Question 3(a)
A PR may be held liable whenever he breaches a duty of his office and causes a loss. Such a personal representative is personally liable to make up any loss caused to the deceased's creditors or beneficiaries of the estate.

It should be noted a personal representative who is also a trustee may additionally be liable for a breach of trust, which may give rise to personal liability even though no loss has been incurred.

There are three broad categories to consider:

Firstly, the personal representative may misappropriate the deceased's property by, for example, using the deceased's assets for his personal use as in Re Morgan (1881).

Secondly, the personal representative, even in good faith, may wrongly administer the deceased's estate and thereby commit maladministration. This can occur where the assets of the estate are applied contrary to the will or relevant statute. For example, a personal representative who fails to correctly administer an insolvent estate according to the prescribed order of the Insolvency Act 1986 and the Administration of Estates Deceased Persons Order 1986 and pays an ordinary creditor before a preferred creditor (see Re Fludyer (1898). Another example is where a personal representative has wasted the assets, for instance, because he has incurred unjustifiable expenses, or settled debts which do not need to be paid (Re Rownson (1885) or wrongly disposed of estate assets of value. In Thompson v Thompson (1821) a personal representative was liable when he surrendered the deceased's leasehold estate for no value instead of selling it at a premium (contrast Rowley v Adams (1839). Other examples include, but are not limited to, failure to obtain a grant of representation promptly, to pay the deceased's debts or collect in assets diligently (Re Tankard (1942)) or to distribute the estate correctly, as in Re Whorwood (1887).

Finally, the personal representative may be liable if he omits to take reasonable care in preserving estate assets (Job v Job (1877)). But there will be no liability if reasonable care has been taken for example where an accidental fire has destroyed an asset, or assets have been taken in a robbery.

Additionally, under s.1 Trustee Act 2000, a statutory duty of care applies to personal representatives and requires them to act with reasonable care and skill when carrying out their duties.

3(b)
There are many ways in which a personal representative, who is liable, may be relieved or protected from liability, some of which are examined below.

A personal representative may be protected from liability against a sui juris beneficiary or creditor who has acquiesced in the breach with full knowledge of all the facts. As an extra safeguard, the personal representative should obtain a written release from the person consenting to the breach of duty, although, it would not provide protection where the personal representative commits a fraudulent act.

Further, under s.62 TA 1925, the court may order that the personal representative's loss, which he has incurred from meeting his liability towards

any other non-consenting beneficiary or creditor, be indemnified by impounding the consenting beneficiary or creditor's interest.

An exclusion clause in the will may relieve or limit the liability of a personal representative, except for fraudulent acts, so far as beneficiaries are concerned, but the clause does not affect the rights of creditors.

Alternatively, under s.61 TA 1925 the court has discretionary power to grant relief where the personal representative has acted honestly, reasonably, and ought fairly to be excused for the breach. However, if the personal representative is a paid professional, he is less likely to be granted relief, examples include Bogg v Raper (1998) and Re Evans (1999).

The personal representative may also protect themselves from any unknown beneficiaries or creditors by taking out a s.27 TA 1925 notice. This requires that an advertisement has been placed in the London Gazette and in a local newspaper where the deceased lived, and any other court-ordered advertisement issued. In which case, after the expiration of the stipulated time limit of two months for interested persons to come forward, the personal representative can distribute the estate without being liable for unknown claims. However, protection is not afforded where the personal representative has knowledge of a beneficiary or creditor but is merely unable to find him. In this situation, the personal representative ought to obtain a Benjamin Order for protection, which permits distribution of the estate on the footing that the beneficiary (creditor) has predeceased the deceased, as in Re Benjamin (1902).

Alternatively, an indemnity from the overpaid beneficiaries or an insurance policy could be taken out. Section 27 does not protect against claims under the Inheritance (Provision for Family and Dependants) Act 1975. However, if the personal representative waits six months from the grant of representation to distribute the estate, and no claim has been made, he will be protected from liability.

Protection may also be found where the right to take action becomes statute barred by the Limitation Act 1980. For example, normally beneficiaries have twelve years, whilst creditors have six years to bring a claim for a debt.

Furthermore, if a personal representative successfully pleads *plene administravit* or *plene administravit praetor* against a creditor of the estate, the claim is settled only from future assets or from those the personal representative still holds as he has duly administered all other assets.

Claims for rectification of a will must be made within six months. Therefore, personal representatives who have waited until after six months to distribute the estate will be protected, provided that no claim has been made during this period.

Where the deceased's estate includes leasehold property, the personal representative may be liable for any unpaid rent and breaches of covenant at the date of death, and in certain leases he may also be liable for the deceased's continuing liability under the doctrine of privity of contract. Provided the personal representative does not enter into possession of the leasehold premises, he is also liable for liabilities that arise during the administration period but will not be personally liable. Protection concerning these liabilities after he has assigned the lease is found under s.26 TA 1925.

However, if he has entered into possession, he becomes personally liable and should seek indemnity protection from the beneficiaries or create an estate indemnity fund.

Finally, where an estate is subject to contingent liabilities, the personal representatives will be protected if they have set aside an indemnity fund, obtained an indemnity from the beneficiaries or insured against the risk of the liability being enforced.

Question 4

Under the Inheritance (Provision for Family and Dependants) Act 1975 (IPFDA 1975), as amended by the Inheritance and Trustees' Powers Act 2014 (ITPA 2014), the Court has a discretionary power to vary the deceased's will or the intestacy rules if it can be shown that reasonable financial provision has not been made.

All applicants, including 'children', must initially prove that the deceased died domiciled in England and Wales (see Cyganik v Agulian (2005)) and must apply to the Court within six months of the grant of representation (s.4).

Since 1 October 2014 an application can be made before a grant has been taken out (ITPA 2014, Para 6, Sched 2).

Children must establish locus standi within two of the six categories of applicant, either under s.1(1)(c) or s.1(1)(d). Under s.1(1)(c) applications are brought by children of the deceased, which includes an illegitimate child, a child en ventre sa mère (s25) and an adopted child of the deceased (s.67 Adoption and Children Act 2002 (ACA 2002)). However, a stepchild is not included.

Under s.1(1)(d) any person who was treated by the deceased as a child of the family may apply, such as a stepchild. Previously, stepchildren had to trace their relationship through a marriage or civil partnership to which the deceased was a party, Re Callaghan (1984) and Re Leach (1985). However, the ITPA 2014 has effectively removed this requirement by including 'any family in which the deceased at any time stood in the role of a parent' (Sched 2, para 2). Furthermore, a family also now includes 'a family of which the deceased is the only member' (s.1(2A). Consequently, the word 'family' now reflects modern society to include stepchildren of unmarried de facto relationships, single-parent relationships, step-relationships and children of cohabitees.

Under both categories, children of any age may apply, Re Coventry (1979).

Once locus standi is established the Court must consider a two-stage test:

1. Whether the deceased's estate makes reasonable financial provision for the applicant and if it does not

2. What provision ought to be made.

The test is objective and not based on the subjective intentions of the deceased (Re Goodwin (1968)).

Unlike the surviving spouse, 'children' cannot apply for provision simply based on their relationship of 'child and parent'. Reasonable financial provision

means "such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance", s.1(2)(b). In Re Dennis (1981) the court held that maintenance only included payments which enabled an applicant in the future to discharge the cost of his daily living at whatever standard of living was appropriate to that individual. The statement in Dennis has been approved in Ilott v Mitson (2017).

Lord Hughes stated maintenance does not extend to 'any or everything which it would be desirable for a claimant to have'. It was also held that maintenance can include the provision of housing, albeit by a life interest rather than a capital sum.

Claims for financial provision by adult children have been problematic, especially by adults who are able-bodied and earn a living. The courts' attitude has been that simply being poor and in needy circumstances will be insufficient to show that it is unreasonable that no provision or too little provision was made by the deceased.

Courts look for a "special circumstance", such as a moral obligation owed by a deceased parent. In Re Coventry (1980) Oliver J stated that the adult child of the deceased 'must' establish some sort of moral claim beyond the fact of a blood relationship in order to be maintained at the expense of the deceased's estate. Coventry was interpreted as having established a general rule, see Re Jennings (1994). However, the Court of Appeal in Re Hancock (1998) stated that a moral obligation or other special circumstance was not a prerequisite for all adult children in order to succeed in their application, although those in employment with an earning capacity for the foreseeable future were unlikely to succeed without it. This approach was followed by the Court of Appeal in Espinosa v Burke (1999) and has been recently confirmed by the Supreme Court in Ilott where Lord Hughes stated there is 'no requirement for a moral claim as a sine qua non for all applications by adult children'.

Moreover, Coventry was interpreted as following a similar line of reasoning as that set out in Hancock and not having insisted on proof of a moral obligation in all adult cases.

The general guidelines in s.3(1) I(PFD)A 1975 assist the Court in deciding whether the deceased has made reasonable financial provision. These include the financial resources and needs of the applicant, any obligations and responsibilities owed towards the applicant, the size and nature of the estate, any physical or mental disability of the applicant and any other relevant matter. A recent illustration can be seen in Ilott. The applicant was the only child of the deceased. She had left home when she was 17 to live with a man whom she later married. Her unforgiving mother made no provision for her daughter in her will, with most of her estate left to three charities. The deceased attached a letter to her will stating that her daughter had deserted her for a man and that was why she had not provided for her. The Supreme Court overturned the Court of Appeal's decision to increase the award to £143,000 and upheld the original award to her of £50,000. Concerning a 'child of the deceased' and a 'child of the family' the additional particular guideline to which the Court must have regard is the manner in which the child was being, or in which he might expect to be, educated or trained.

In addition, children of the family claims require the court to also consider whether the deceased assumed responsibility for the child, for how long and

on what basis, whether he knew the child was not his own and the liability of any other person to maintain the child: s.3 (3) I (PFD) A 1975.

The amendments made by the ITPA 2014 improve the position of a 'child of the family' and brings the 1975 Act up to date with a contemporary understanding of what a family is. However, as the Supreme Court decision in Ilott shows the position of adult children remains weak, proof of a moral obligation may no longer be seen as a 'sine qua non', but it remains a critical factor in determining success.

SECTION B

Question 1

Melanie's estate is solvent because there are sufficient assets to discharge the testator's entire funeral, testamentary and administration expenses debts and liabilities.

However, as Melanie's will does not provide full directions stating from which part of her estate they are to be paid, Dan should, firstly, be advised to consider the debts secured on the two properties owned by Melanie.

Secondly, he should then consider the incidence of the unsecured debts.

In a solvent estate, the rules that regulate the payment of secured debts are contained in section 35(1) AEA 1925. Section 35 states that property charged with debt during the testator's lifetime is primarily liable for the payment of the debt upon his death unless the deceased has shown a contrary intention either in the will, deed or in some other document (Ross v Perrin-Hughes 2004). It is important to appreciate that s.35 makes no difference to the secured creditor's right to be paid; if the mortgages are not paid the mortgage company may seek payment from any asset out of the deceased's estate or force a sale of the property (s.35(3).

As Melanie has clearly expressed in her will that Dan is to take her house "free of charge" she has shown a contrary intention to the application of s.35 and consequently, Dan is not liable for the payment of the mortgage, which instead is paid out of Melanie's estate.

However, concerning the gift of her luxury yacht as Melanie has not in the will, or otherwise, shown a contrary intention to vary s.35 Kim is responsible for paying the mortgage. Kim is not personally liable to the mortgage company for the debt, but if he fails to pay the mortgage, again, the mortgage company is likely to force a sale of the yacht.

The debts and liabilities of Melanie's estate now amount to £100,000 (the mortgage incurred on The White Place, the country house, plus the £50,000 from other unsecured debts), which leaves a total of £150,000 to be paid for debts and liabilities.

However, Melanie has left three pecuniary legacies in clause 3 and 4, amounting to £70,000. Therefore, a total of £220,000 is required in order to satisfy Melanie's debts and legacies.

The assets amount to a total of £200,000 (which excludes the value of the two properties devised to Dan and Kim), which means the estate has a shortfall of £20,000.

To determine the payment of unsecured debts (including the mortgage on The White Place) Dan must follow s.34(3) AEA 1925 and the statutory order of priority laid out in Part II Sch 1 AEA 1925.

Although the statutory order can be varied by the testator (but not by the courts), Melanie's will does not make any such variation.

The statutory order is needed to regulate the burden of the debts and liabilities between the beneficiaries. However, creditors are not bound by the rules, and they can obtain payment out of any assets of the estate.

The first category of property to be used to pay the testator's unsecured debts is property undisposed of by the will, subject to the retention of a fund sufficient to meet any pecuniary legacies (Para 1).

This usually relates to a lapsed share of residue, however, as Melanie has left her residuary estate to Iona there is no property falling into this category.

The second category of property to be used is the residuary estate, subject to the retention of a fund sufficient to meet any pecuniary legacies (Para 2). As there are no other remaining gifts in the will, besides those previously discussed the residuary estate consists of the total £200,000 of Melanie's assets. It is clear to see that the residuary estate is insufficient to pay the unsecured debts and liabilities of the estate, amounting to £150,000 together with the legacies referred to in clauses 3 and 4 of Melanie's will amounting to £70,000, which total £220,000.

Therefore, there is nothing in the residuary estate for Iona to receive. When £70,000 is set aside for the pecuniary legacies, £130,000 remaining in the residuary estate is used to pay off the debts and liabilities, leaving a total of £20,000 debts and liabilities still to be paid.

The next two respective categories are property specifically given by the deceased only for the payments of debts and expenses (Para 3), and property the deceased has charged with the payment of debts and expenses (Para 4). Melanie's estate does not consist of any such property. Therefore, Dan must look to the next category from which to pay the remaining £20,000.

The fifth category is the pecuniary legacy fund of £70,000 that has been set aside (Para 5). This will be used to pay the remaining £20,000 debts and liabilities, which will leave a pecuniary legacy fund of £50,000. Consequently, there is only £50,000 available to discharge the legacies, which means the legacies must abate rateably.

The result is that Emily will receive £ 40,000 and Sol and Hilary will each receive £5,000.

As a final note, the other categories, which include, for example, property that the testator has specifically devised or bequeathed (Para 6), are clearly not required.

Question 2

Clause (i)

The issue here is that both direct and circumstantial extrinsic evidence reveals a latent ambiguity concerning the words used by Yasmin in the gift of 'my sports car' to Zeta.

Under s.21 Administration of Justice Act 1982 (AJA 1982), the court can admit extrinsic evidence where any part of the will is meaningless; the words used in the will show a patent ambiguity; or extrinsic evidence, but not the testator's intention, shows a latent ambiguity in light of the surrounding circumstances. Therefore, under s.21(c) extrinsic evidence that there are two sports cars can be admitted to show that there is a latent ambiguity. To resolve the ambiguity, direct evidence that Yasmin had told Oswald that she wanted Zeta to receive the MGF can now be used (Re Jackson (1933), Pinnel v Anison (2005), Marley v Rawlings (2014)). Thus, Zeta will be able to take the MGF.

Clause (ii)

There are two issues concerning the gift to Xander. The first is whether Yasmin's alterations are valid, especially considering that only she has initialled them. Since the substituted amount of '£20,000' is written in pencil it is merely deliberative and as such is invalid (In the Goods of Bellamy (1886)). This leaves consideration of the effect of the alteration by way of interlineation through the original amount of £10,000, as this was made in ink.

If the alteration was made before the will was executed, it would be valid. However, when applying for probate, unattested alterations, such as the one made by Yasmin (only she has attested the alteration), require affidavit evidence as to their presence at the time the will was executed (r14 Non-Contentious Probate Rules 1987 (NCPR 1987). Since neither of Yasmin's witnesses recalls seeing the alteration at the time of execution a presumption arises that it was made thereafter (Cooper v Bockett (1846)).

Under s21 Wills Act 1837 (WA 1837) alterations made after the will are only valid if the alteration itself has been executed or the will is re-executed according to s.9 WA 1837.

Execution of the alteration requires only the initials of the testator and the witnesses in the margin of the will opposite the alteration (In the Goods of Blewitt (1880)). As only Yasmin has signed the alteration and there is no evidence of re-execution of the will the alteration is invalid.

Section 21 further states that an invalid alteration will only have any effect if the original wording is not "apparent". "Apparent" means that the original words must be able to be read only by natural methods without interfering with the will, such as using a magnifying glass or holding the will up to the light, see Re Itter (1950).

As the original £10,000 is obviously "apparent" the striking through will not have any effect.

Therefore, the gift of £10,000 to Xander remains valid.

The second issue concerns the uncertainty that has been caused by Yasmin using the word "son" when in fact Xander is not her son. The general principle of construction is that words are first given their natural, ordinary, grammatical meaning at the date of the will (Perrin v Morgan (1943)). However, if the ordinary, grammatical meaning does not make sense, then a secondary meaning may be construed. Often revealed when taking into account the surrounding circumstances, which includes evidence of the language the testator used, at the time the testator made his will under the armchair rule (Boyes v Cook (1880)). For example, in Re Smalley (1929) the court held that the expression "wife" could be given a secondary meaning referring instead to a common law spouse based on the surrounding circumstances. Similarly, in Thorn v Dickens (1906) the words "all to mother" were given a secondary meaning as referring to the testator's wife (see also Re Fish (1893) and Charter v Charter (1874)). Applying the armchair rule, since the surrounding circumstance would reveal that Yasmin regarded Xander as her son and often referred to her as such, the word "son" can be given a secondary meaning; thus, Xander can take £10,000.

Clause (iii)
The same rules as to the alteration being valid in clause (ii) apply to this alteration. However, the issue with this alteration is that unlike that in clause (ii) the original wording has been obliterated and is not "apparent" (s.21 WA 1837): it cannot be discovered by the use of natural means without interfering with the will. Thus, Theo would take nothing, as probate will be granted with a blank space: the obliteration amounts to a partial revocation of the will as that appears to be Yasmin's intention (In the Estate of Hamer (1943).

However, the doctrine of conditional revocation can save the gift. The effect is that if the original legacy is revoked conditionally on the new legacy taking effect, any means can be used to discover what lies beneath the obliteration including "forbidden methods" such as infra-red photography or removing strips of paper and even the admission of extrinsic evidence (Re Itter). Therefore, if any of these methods reveal the original amount the gift to Theo will be valid, and probate is granted with the original amount.

Clause (iv)
The gift of 'Mountain View' is a specific gift of a particular existing part of Yasmin's estate (Bothamley v Sherson (1875)). Specific gifts are subject to failure under the doctrine of ademption if the subject matter of the gift is not in the testator's estate at his death.

Furthermore, under the rule in Lawes v Bennett (1785) if a testator specifically devises land and afterwards grants to another an option to purchase that land the exercise of the option even after the testator's death converts the land into money from the date the option was granted, so that the specific devise is adeemed. Therefore, 'Mountain View' is adeemed when Will exercised his option two weeks ago. However, Jack is not entitled to the sale proceeds, which fall into the residuary estate (Weeding v Weeding (1860)) instead he receives the rents and profits from the date of Yasmin's death until the exercise of the option (Re Marley (1915).

Clause (v)
As Yasmin's husband has predeceased Yasmin and there is no substitutionary beneficiary in the will, the gift of the residuary estate fails under the doctrine of lapse.

The effect is that it falls to be dealt with upon a partial intestacy, governed by the Administration of Estates Act 1925 (AEA 1925) as amended by Inheritance and Trustees' Powers Act 2014. The personal representatives will hold the residuary estate on trust with power to sell, and will first pay any funeral, testamentary and administration expenses, debts and liabilities (s.33(1) & (2) AEA 1925) subject to the provisions contained in the will (s.49 AEA 1925). Under s.46 and s.47 (AEA 1925) as there is no surviving spouse the residuary estate is held on trust for her only daughter Zeta.

Question 3(a)
A valid will requires the testator to have mental capacity to make a will and knowledge and approval of the contents of the will. If either is missing the will is invalid. The Mental Capacity Act 2005 (MCA) introduced uncertainty regarding the correct test for testamentary mental capacity, specifically s.1, 2 & 3. However, recent case law (Scammell v Farmer (2008), Re Walker (2014) and Simon v Byford (2014) and also Elliott v Simmonds (2016)) appears to assert that the correct test is still that from the leading case in Banks v Goodfellow (1870).

The 'Banks' test has three fundamental requirements.

Firstly, that the testator understands that he is making a will that takes effect upon his death and not some other document. This requirement clearly seems to be met as evidenced by Victoria's last statement made to her witnesses, "Umberto has been really helpful with making my will, so I have left him a little something".

Secondly, that he has a general recollection of his property, but he need not recall every item (Waters v Waters (1848)) or the exact value of his home (Schrader v Schrader (2013)). Again, there is nothing to suggest that this requirement has not been met. Victoria has simply left all her estate to Umberto; indeed, this fact may indicate that a lower degree of mental capacity is required (see In the Estate of Park (1954)).

Thirdly, Victoria must be able to recall persons who may have a moral claim against her estate. But such a testator is free to leave his property to whomever he chooses (Boughton v Knight (1873)) even if moved by mean or capricious motives (Fuller v Strum 2002)). This requirement appears to be an issue since Victoria from 2014 'often forgot who they (her sons) were and on separate occasions referred to them as strangers'.

Bradley should be advised that the time for assessing Victoria's mental capacity is generally at the date of execution and that a testator with dementia at that date may still have mental capacity. For example, in Ewing v Bennett (2001) the Court of Appeal upheld a will where the testatrix was in the early stages of dementia, the fact that she lacked mental capacity after execution was irrelevant. However, from 2014 Victoria's dementia had worsened, and it is highly likely that at the time Victoria executed her will, two weeks before her death she was in the later stages of dementia.

Affidavit evidence will be required from Victoria's doctor and the staff at the nursing home. Further support that Victoria had not recalled her sons may be found from the fact that she had omitted to leave them anything yet her earlier professional will left her residuary estate equally between them. Therefore, although mental capacity is issue specific and an imprecise line as held by the Court of Appeal in Hoff v Atherton (2005) sufficient evidence shows that it is likely that Victoria lacked mental capacity when she executed her homemade will. In which case, the propounder of the will, presumably Umberto, must prove that Victoria had mental capacity (Barry v Butlin (1838)), if not the will is invalid.

The requirement of knowledge and approval of the contents of the will (a derivative from animus testandi) is that the testator knew and approved every part of his will at the time he executed it.

Specifically, Victoria must have understood and approved of the single gift in her will to Umberto (Guardhouse v Blackburn (1866)). If the will is duly executed and the testator has capacity a presumption of knowledge and approval arises but not where there are suspicious circumstances in which case the burden of proof lies on the propounder of the will (Butlin), presumably Umberto.

Under the suspicious circumstances doctrine, whenever a beneficiary writes or prepares a will this "is a circumstance that excites the suspicion of the court" as held in Butlin and by the House of Lords in Wintle v Nye (1959). In Wintle, the testatrix was held not to have knowledge and approval of the will where the solicitor prepared the will and subsequent codicil and increasingly benefited.

The witnesses' evidence that Victoria said "Umberto has been really helpful with making my will, so I have left him a little something" suggests that Umberto was involved in the making of Victoria's will. It also suggests that Victoria, perhaps, was unaware of the significant gift of all her estate left to Umberto in her will. Furthermore, the fact that the gift is so large will also increase the suspicion of the court (Wintle).

The extent of Umberto's involvement requires examination, for example, who printed the will, as it clearly was not in Victoria's handwriting. Therefore, it is highly likely that Umberto will also have the burden of proving that Victoria knew and approved her will.

If Umberto fails, the homemade will is invalid despite the revocation clause.

3(b)
Generally, testators must have mental capacity at the time they execute their will. In December 2015 when Victoria executed her will she was confused and unable to recollect any of the gifts she had previously given instructions for or remember certain names and addresses of family members (for a similar case see Wood v Smith (1992)). In Key v Key (2010) the court recognised for the first time that the effects of bereavement on a testator could negatively impact upon his mental capacity.

In Re Wilson (2013) the testatrix's will was held invalid due to her deep grief at the recent death of her brother.

Applying Key and Wilson, it appears that Victoria's will is invalid due to lack of mental capacity at the time she executed her will as she was suffering from bereavement following the tragic death of Gigi, which clearly affected her mental capacity.

However, under the rule in Parker v Felgate (1883) an exception applies if a testator lacking mental capacity at execution is capable of understanding and does understand that he is executing a will which his solicitor has prepared according to his previously given instructions (Re Flynn (1982)). The will must contain the testator's instructions, and the testator must have had mental capacity when passing on his instructions, both of which appear to be present: there is nothing to suggest otherwise.

Therefore, although the rule is applied with caution (Battan Singh v Amirchand (1948)) if Victoria understood that she was executing her will for which she had previously given instructions to her solicitor, the rule in Parker will save the will from being declared invalid.

Furthermore, although eleven months have passed since Victoria gave instructions, this will not of itself prevent the rule from being applied. In Perrins v Holland and Others (2010) the Court of Appeal approved the rule 18 months between the giving of instructions and the signing of the will.

Question 4(a)
Aaron's original will, made seven years ago has been revoked by his marriage to Priya. We therefore need to consider the rules of intestacy in his estate and consider who is entitled to take out the grant.

The order of priority for taking the grant is set out in rules 20 and 22 Non-Contentious Probate Rules (NCPR) 1987. These state that as Aaron's surviving spouse, Priya will have priority entitlement to take out grant.

However, this situation is complicated by the fact that a minority interest (Faria) arises. As a result, two personal representatives will normally be required unless the court exercises its discretion set out in s114(2) SCA 1981 to allow Priya to act alone.

In the circumstances, this may be applicable here. However, if the court does not allow this, Quentin is the likely to be best positioned if the court does not grant Priya leave to apply alone.

The personal representatives in Aaron's estate will apply for letters of administration as there is no valid will.

4(b)
The rules governing the entitlement under an intestacy are set out in s.33 AEA 1925. These rules apply to both partial and total intestacy and impose a trust with a power to sell on undisposed estate to deal with funeral and administration expenses, settle debts, distribute correctly.

Under S.46 AEA 1925 the order and extent of entitlement on intestacy are set out – as amended by the Inheritance and Trustees' Powers Act (ITPA) 2014.

The rules state that entitlement starts with the surviving spouse and then issue, parents, brothers and sisters of whole and half-blood, grandparents, uncles, etc.

As such, Priya is primarily entitled to Aaron's estate. In accordance with s46 (2A) AEA 1925, she must survive Aaron by at least 28 days before she can inherit. If she does, she is entitled to Aaron's personal possessions, a statutory legacy of £250,000 plus interest from the date of death until payment, and half of the residue.

The other half of the residue will be held on statutory trust for Faria until she attains the age of 18 years (or if she marries or enters a civil partnership if earlier).

Personal possessions are defined in s55 (i)(x) AEA 1925 (as amended) and include tangible moveable property other than such property which consists of money or was used by the intestate solely or mainly for business purposes, or was held at the intestate's death solely as an investment.

The question here is whether the cars are personal possessions, as in Re Crispin's Will Trust (1974), or whether their dominant purpose was for business, as in Re McCulloch (1981). If the latter, they fall outside s55(i)(x) AEA 1925. The two more valuable cars that are rented out for weddings and films may not be considered personal possessions.

In terms of the house contents, Aaron used his laptop and computer "for work" and as result they may not be personal possessions in accordance with the s55(i)(x) AEA. We need to apply the Re MacCulloch and Re Chaplin dominant purpose test to conclude whether these items fall within the definition. As far as the cars are concerned, the relevant cases to consider are Re Reynolds and Re Crispin (1974).

The Besty – does it come within the definition of a picture or a print and hence a personal chattel? However, this is valuable and could be argued to be an investment and therefore fall outside s55(i)(x) AEA 1925. The question also arises as to whether this is "movable" within the terms of the section as it is painted on a "large rock" in the garden.

The family home (£500,000) was in Aaron's sole name but Priya has the right to have this appropriated to her. Section 41 AEA 1925 gives the personal representatives a general power to appropriate assets, including houses, to beneficiaries instead of their cash equivalent.

If she is the sole personal representative, she must give notice to the court, or appoint a second personal representative. She cannot obtain the consent of the other beneficiary because Faria is a minor. In Kane v Radley-Kane and Others (1998), a widow appropriated shares to herself, a transaction in which her duty and interests conflicted. This was a breach of what is known as the self-dealing rule that a purchase by a trustee of trust property is voidable at the option of a beneficiary.

If Priya wishes to appropriate the property to herself she will have to apply to the court. The home is valued at the date of the appropriation and not the date of Aaron's death – Re Collins (1975). As its value will exceed the value of her share of the estate, she will have to pay equality money, as in Re Phelps (1980).