

CILEX

CPQ

A6 – Wills, Probate and Private Client

Advanced Stage

2021

A6: Wills, Probate and Private Client

The aim of this module is to give you the essential knowledge and understanding of the law relating to trusts together with the law and procedure relating to the drafting and construction of Wills and intestacy. On completion of the module, you will be able to draft a basic Will and codicil. Throughout, you must be able to recognise risks and consider appropriate steps to mitigate them.

The module covers:

1. Equitable Principles Underlying Wills and Probate
2. Creation of Trusts
3. Risk management in Wills and Probate
4. The role of the Personal Representatives
5. Will drafting - preliminary considerations
6. Content and structure of a Will
7. Mirror and Mutual Wills; classes of gift; failure of gifts
8. Capacity to make a Will
9. Revocation and alteration of Wills
10. Wills - gifts; key administrative clauses in Wills
11. Intestacy

Learning Outcomes

By the end of this module a trainee will be able to:

1. Describe and apply the underpinning laws relevant to Wills and trusts
2. Understand the particular risks in relation Will drafting and be able to take steps to mitigate those risks
3. Draft a straightforward, valid Will and codicil which give effect to the client's instructions
4. Analyse a situation and apply the intestacy rules
5. Identify situations that potentially give rise to conflicts of interest, issues of professional ethics or other issues under the Code of Conduct

Linked online assessment: A6

| | |
|--|--|
| <p>1. Equitable Principles Underlying Wills and Probate</p> | <p>In a private client department, there must be an awareness of the laws of equity, being able to identify and explain the nature and terms of various trusts. Therefore, you will need to know the following:</p> <ul style="list-style-type: none"> a) Common law and equity <ul style="list-style-type: none"> • How and why the law of equity developed • The relationship between the common law and equity today b) Trusts <ul style="list-style-type: none"> • The nature of a trust • The role of trustees • Different types of trust with examples - life insurance, trusts created in lifetime, discretionary trusts and interest in possession trusts c) Equitable remedies |
| <p>2. Creation of Trusts</p> | <p>Understanding how a trust is created together with examples of trusts that can be created without a formal trust deed and to be able to advise clients accordingly will be required. Therefore, you will need to know the following:</p> <ul style="list-style-type: none"> a) Why have a trust – client motivations b) Creation of a trust <ul style="list-style-type: none"> • The three certainties <ul style="list-style-type: none"> ○ Intention ○ Subject matter ○ Objects c) Types of trust <ul style="list-style-type: none"> • Trusts that are not in writing • Secret trusts and half secret trusts – when and how they are created; the risks of them and potential alternatives • Purpose trusts • Personal injury trusts (in outline); set up to hold payment received as a result of injury; bare trust; discretionary trust; beneficiary; impact on benefits |
| <p>3. Risk management in Wills and Probate</p> | <p>A trainee in the private client department must be able to recognise risk and ways to mitigate risk to protect themselves and the firm. Therefore, you need to know the following:</p> |

| | |
|---|--|
| | <p>a) Key risks</p> <ul style="list-style-type: none"> • Taking instructions from your client; recognising duress and undue influence • Will draftsman's capabilities • Duty of care; White v Jones [1995] • Assessment of capacity; the 'Golden Rule' • Recognising and avoiding conflicts of interest • Clients whose first language is not English • Requirement for speed if preparing a 'death bed' Will • Will signing • Dealing with a notice of severance when co-owned land is referred to in a Will <p>b) Mitigating risk</p> <ul style="list-style-type: none"> • Face to face meetings • Attendance notes • Capacity report • Use of checklists • Deadlines <p>c) Rights, remedies and powers of beneficiaries</p> |
| <p>4. The role of Personal Representatives</p> | <p>It is important to must understand the role of a personal representative and the associated risks. Therefore, you will need to know the following:</p> <p>a) Powers, duties and liabilities of personal representatives</p> <ul style="list-style-type: none"> • s25 Administration of Estate Act 1925 • Appropriations • s31 and s32 Trustee Act 1925 • Trustee Act 2000 powers • The administrative year • Charging to act <p>b) Protection available to personal representatives</p> <ul style="list-style-type: none"> • s27 Trustee Act adverts • Missing beneficiaries • Court applications |
| <p>5. Will drafting - preliminary considerations</p> | <p>When drafting a Will, understanding the key preliminary considerations that will affect the content of a Will and how to offer advice in relation to it, will be required. Therefore, you will need to know the following:</p> <p>a) Appointment of executors and trustees</p> <ul style="list-style-type: none"> • Lay or Professional; trust corporation |

| | |
|--|---|
| | <ul style="list-style-type: none"> • Responsibility and risk • Conflicts • Charging <p>b) Charging clauses</p> <ul style="list-style-type: none"> • Purpose • Risks • Law Society guidance <p>c) Guardians</p> <ul style="list-style-type: none"> • Explanation of parental responsibly • Joint Guardians • Choice of guardians; same people as trustees? • Willingness to act <p>d) Foreign element</p> <ul style="list-style-type: none"> • Foreign Property/Domicile (in outline) • Does client have overseas property/existing foreign Will? • Are these to be encompassed or revoked? • EU Succession Regulation (Brussels IV) • Elections that can be made if the property in Spain <p>e) Assets that fall outside the Will</p> <ul style="list-style-type: none"> • Who will inherit these assets? • Jointly owned assets • Life insurance • Death in service • Pensions • Donationes mortis causa • Consider nominations, severance or creating a trust <p>f) Claims that may be made against the estate</p> <ul style="list-style-type: none"> • Considerations when Will drafting • Letters of wishes <p>g) Other Wills</p> <ul style="list-style-type: none"> • Living Wills • Statutory Wills |
| <p>6. Content and structure of a Will</p> | <p>To support a client in drafting a Will requires an appreciation of the format and content of a Will. Therefore, you will need to know the following:</p> <p>a) Purpose of a Will</p> <ul style="list-style-type: none"> • Tax advantages; options for basic IHT planning • Overview of the tax implications of trusts in Wills |

| | |
|---|--|
| | <ul style="list-style-type: none"> • Care home fee planning • Choice of executors • Appointing guardians • Appointing trustees • Making provisions to avoid the intestacy rules • Deciding recipients and timing of inheritance • Charitable giving and its effect on IHT <p>b) Format and structure of a Will</p> <ul style="list-style-type: none"> • s9 Will Act 1837 • In writing • Signature; Payne v Payne [2018]; signature by another • With intent; Marley v Rawlings [2014] • Witnesses; s15 Will Act 1837 • Attestation clause • CPR Part 8 • s24 Wills Act 1937 <p>c) Codicil</p> <ul style="list-style-type: none"> • Content of a codicil • The risks of making a codicil |
| <p>7. Mirror and Mutual Wills; classes of gift; failure of gifts</p> | <p>A trainee in the private client department must be aware of mirror Wills and mutual Wills and the different classes of gifts. Therefore, you will need to know the following:</p> <p>a) Mirror Wills and mutual Wills</p> <ul style="list-style-type: none"> • The difference between them • The implications of a mutual Will <p>b) Gifts</p> <ul style="list-style-type: none"> • Class gifts and class closing rules • Immediate vested gift and deferred vested gift • Contingent gifts • Early closing • Gifts to children by description; legitimate; legitimated; illegitimate and adopted • Gender recognition • Surrogacy and fertilisation treatment <p>c) Failure of gifts</p> <ul style="list-style-type: none"> • Lapse • Commorientes rule – S184 LPA 1925 & survivorship clauses • S33 Will Act 1837 • Ademption • Forfeiture Act 1982 & EDP (FRLS) Act 2011 • Disclaimer |

| | |
|---|---|
| | <ul style="list-style-type: none"> • S15 Wills Act 1837 • Uncertainty • Illegal, immoral or contrary to public policy <p>d) Extrinsic evidence</p> <ul style="list-style-type: none"> • s 21 Administration of Justice Act • Interpretation of a Will |
| <p>8. Capacity to make a Will</p> | <p>A trainee in the private client department must understand the capacity requirements to make a Will. Therefore, you will need to know the following:</p> <p>a) Testamentary capacity</p> <ul style="list-style-type: none"> • The rules relating to capacity to make a Will and intention • Banks v Goodfellow [1870]; sound mind, sound memory and sound understanding; Key v Key [2010] • Burden on proofing capacity • Capacity to execute a Will; Parker v Felgate [1883] • Burden of proving capacity • Obtaining a capacity report <p>b) Knowledge and Approval</p> <ul style="list-style-type: none"> • Presumption in favour • Absence of presumption; deaf/dumb testator; inability to write; blind; illiterate; directed another to sign on their behalf <p>c) Undertaking Mental Capacity Assessment training</p> |
| <p>9. Revocation and alteration of Wills</p> | <p>A request may be made for a Will to be revoked and you should understand the effect of alterations and other actions that can affect the validity of a Will. You also need to know how Wills can be rectified if there are errors. Therefore, you will need to know the following:</p> <p>a) Revocation of Wills</p> <ul style="list-style-type: none"> • By marriage/civil partnership • s18 Will Act 1837 • Effect of divorce • Revocation by a later Will or codicil • Destruction; s20 Wills Act 1837; Cheese v Lovejoy [1877], Re Adams [1990] • Intention to revoke • Conditional revocation • Lost and destroyed Wills |

| | |
|--|--|
| | <ul style="list-style-type: none"> • R54 NCPR procedure • Ferneley v Napier and Others [2010] • Severance of joint tenancy <p>b) Alterations to Wills</p> <ul style="list-style-type: none"> • s21 Wills Act 1837 • Republication and how this can affect interpretation and construction of an earlier Will • Revival – s22 Wills Act 1837 • Incorporation by reference; doctrine of incorporation – dispositive, identifiable and in existence • Rectification; omitting, changing and supplying words; s20 Administration of Justice Act 1982 |
| <p>10. Wills - gifts; key administrative clauses in Wills</p> | <p>There are different types of gift, and you must be aware of the practical and professional conduct implications in relation to them and key administrative clauses to include in a Will. Therefore, you need to know the following:</p> <p>a) Gifts</p> <ul style="list-style-type: none"> • Specific, general, demonstrative and pecuniary gifts • Tax • Gifts to minors • Contingent gifts • Gifts contingent on age - possible effect on Residential Nil Rate Band • Expenses - carriage and insurance <p>b) Gifts to the draftsman</p> <ul style="list-style-type: none"> • Professional Conduct • Law Society Guidance • Wintle v Nye [1959] <p>c) Gifts to unincorporated associations</p> <ul style="list-style-type: none"> • The four options <p>d) Charitable gifts</p> <ul style="list-style-type: none"> • Identification • Cy pres • Receipt clause • Taxation purposes <p>e) Residuary gifts</p> <ul style="list-style-type: none"> • Provision for payment of debts and legacies • Absolute gift • Successive interests |

| | |
|-----------------------------|--|
| | <ul style="list-style-type: none"> • Contingent interest • Substitutional gifts <p>f) Survivorship clauses</p> <ul style="list-style-type: none"> • s184 Law of Property Act 1925 • IHT considerations <p>g) Administrative Powers</p> <ul style="list-style-type: none"> • Appropriation without consent • Consultation with beneficiaries - s11 Trusts of Land and Appointment of Trustees Act 1996 • Receipt clause • Business • Investment • s3 and s 32 Trustee Act 1925 • Standard Administrative Provisions <p>h) Attestation clauses</p> <ul style="list-style-type: none"> • Standard • Special cases <p>i) STEP administrative provisions</p> |
| <p>11. Intestacy</p> | <p>A trainee in the private client department must know and be able to apply the rules of intestacy. Therefore, you will need to know the following:</p> <p>a) Intestacy</p> <ul style="list-style-type: none"> • The difference between intestacy and partial intestacy and how to avoid a partial intestacy • Inheritance and Trustees Powers Act 2014 • The statutory rules relating to the devolution of estates on intestacy, s47 Administration of Estates Act 1925; the statutory trusts • The order of beneficial entitlement; s46 Administration of Estates Act 1925 • The entitlement of spouses / civil partners; the 28-day survivorship condition; S46(2A) Administration of Estates Act 1925; the right to elect to take the matrimonial home • Bona vacantia • Unclaimed estates list • The position of co-habitees |

