

CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2019

LEVEL 6 – UNIT 21 - 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 January 2019 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 January 2019 examination paper was a challenging honours level paper which covered 80% of the learning outcomes in the Unit Specification. Congratulations to those candidates who passed the exam and those that did not should be encouraged and supported to resit.

Weaker candidates showed lack of knowledge, skills and very poor preparation in some areas of the examination paper. The written style in some of the answers were weak, making it hard to understand some of the points made. A few candidates amalgamated all parts of each question together.

General Advice to Candidates

- Prepare for at least 80% of the learning outcomes.
- Prepare thoroughly and give sufficient time for preparation. Candidates are encouraged to revise thoroughly prior to the exam. Attempt timed past papers. Plan a structure that suits but make sure there is a plan in place.

Candidates are encouraged to test their plan in their preparation.

- Read the questions thoroughly. Candidates are encouraged to manage their time particularly where questions are split into parts. Always attempt all

questions. Candidates should spend less time giving background information and focus on the key points particularly if they are running out of time. If necessary, use bullet points.

- Candidates should use the reading time to carefully read, understand, select and plan the questions they are strongest in. Consider answering your strongest question first.
- Candidates should always remember to write legibly and address as many issues as they can in a structured, clear and coherent manner. Address how the law applies to the facts given – if no application is given marks are lost. When writing short introductions and conclusions, where necessary, ensure they contain relevant points not already repeated.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1- This question tested candidates' knowledge on entitlement to the Grant of Representation, entitled on an intestacy and an inheritance act claim. Being able to advise clients on whether they have an inheritance act claim and the factors involved is important. Most candidates answered this question reasonably well. It was possible to obtain a good mark by applying the law to the facts of the question. Most candidates showed very clear understanding of what was required and a good level of understanding of the subject.

Question 2 – This question tested candidates' knowledge on avenues to challenge a will and deeds of variation. Some candidates wasted time stating that the daughters could make an inheritance act claim. On the whole there was not enough application of the law to the facts in the question. For example, it was not enough to talk about the four areas of Banks v Goodfellow – they needed to be applied to the facts given to get maximum marks.

Question 3 – This question tested candidates' knowledge on the categories of assets that will be exempt from Inheritance Tax (IHT) and how IHT is calculated. Weaker candidates amalgamated the lifetime gifts with the estate on death and did not appreciate that the residential nil rate bands cannot be used against a failed potential exempt transfer. There was a very broad range of marks for this question.

Question 4 – This question tested candidates' knowledge on the detailed consideration of a Will and Estate distribution. Candidates were expected to consider the execution and alteration of a Will. Application of the law to the facts was needed. A surprising number of candidates thought that gifts made to a former civil partner fail if the will is made after the divorce. In general, most candidates answered this question reasonably well. Most candidates showed a clear understanding of what was required and a good level of understanding of the subject.

SUGGESTED ANSWERS

JANUARY 2019

LEVEL 6 – UNIT 21 - PROBATE PRACTICE

Question 1

"You inherit the joint bank account by survivorship. As Yolanda did not leave a Will her estate passes under the intestacy rules as set out in the Administration of Estates Act 1925 and as you were not married to Yolanda you are not entitled to any of her estate.

Where a person dies without a surviving spouse or civil partner their issue has the next right to inherit. Issue take on the statutory trusts. This means that only issue who are living at the date of the intestate's death can take and they must reach 18, or marry, or form a civil partnership earlier. No one can take whose parent is alive.

Bartek and Julia fulfil those conditions and will take 1/3 of the estate each. These interests are vested.

Anna predeceased Yolanda and so is entitled to nothing. However, the statutory trusts provide that where a deceased person over the age of 18 (or married or in a civil partnership prior to that date) leaves issue who survive, the issue take the share their parent would have taken provided they reach the age of 18 or marry or form a civil partnership earlier.

Anna left two children, so her 1/3rd will be divided equally. Tony will take half of Anna's share (1/6th). This interest is vested. The other half will be held for Marcel (1/6th). His interest is contingent on reaching 18, or marrying, or forming a civil partnership earlier. If he dies without fulfilling the contingency, then he is treated as if he never existed and his interest will pass to Tony.

Yolanda's estate passing under the intestacy rules is £300,000 being half the value of the house and the cash ISA. The memorandum of severance means that Yolanda's half of the property does not pass by survivorship to you. Bartek and Julia receive £100,000 each and Tony and Marcel £50,000 each."

(b)

"A grant of letters of administration is made if there is no will. The order of entitlement is governed by r22 NCPA 1987. Anna's children Bartek and Julia rank equally alongside Tony as the issue of a child who has predeceased.

Marcel as a minor cannot take a grant.

As Marcel is a minor the grant of administration must be made to not fewer than two individuals. Whichever two of Bartek, Julia and Tony apply first will be entitled to the grant without prior notice to the third of them. There is no need to clear anyone off before the application."

1(c)

"Yolanda has attempted to make a *donatio mortis causa* before her operation.

She was contemplating her imminent death from the heart operation and the death was conditional on death occurring. By handing over the keys to the deed box she had attempted to make a gift of her 50% of the property. She did not die from the heart operation and you had handed the keys back and so the gift fails."

(d)

"You could make a claim under the Inheritance (Provision for Family and Dependents) Act 1975:

- under Section 1(1) (ba), as a person who during the whole of the period of two years ending immediately before the date when the deceased died, was living in the same household as the deceased, and as the husband or wife of the deceased; and
- under s1(1)(e) as a person who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased.

A person is to be treated as being maintained by the deceased only if the deceased was making a substantial contribution in money or money's worth towards the reasonable needs of that person, other than a contribution made for full valuable consideration pursuant to an arrangement of a commercial nature.

It appears clear that you are eligible to make a claim in both categories. Being eligible to make a claim does not, however, mean you will be successful. You must show that reasonable financial provision was not made for your maintenance and must bring the application within six months of the date of the grant of representation (or get the leave of the court to make a late application).

Yolanda must have been domiciled in England and Wales.

There are common guidelines which the court takes into account in relation to all applicants: the financial needs and resources of the applicant, any other applicant and any beneficiary; any obligations and responsibilities that the deceased had to the applicant; the size and nature of the estate; any physical or mental disability of any applicant or beneficiary; and any other relevant matter.

There are additional guidelines, which are specific to each category.

In the case of a cohabitee, the court will have regard to:

- (a) the age of the applicant and the length of the period during which the applicant lived as the husband of the deceased and in the same household as the deceased;
- (b) the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family

In the case of persons maintained by the deceased, the court will have regard to:

- (a) the length of time for which and basis on which the deceased maintained the applicant, and to the extent of the contribution made by way of maintenance;
- (b) whether and, if so, to what extent the deceased assumed responsibility for the maintenance of the applicant.

There are two questions:

1. Is the existing provision reasonable? This is a value judgement made by the judge
2. Should provision be made and if so what provision?

Your chances of success are good. In your favour is the fact that your financial resources are poor, you had a very long relationship with Yolanda, you are elderly and in poor health. Yolanda's children and grandchildren seem in a better financial position. It is also a reasonably large estate and your home is at risk of being sold. Also, Yolanda does appear to have assumed responsibility for your maintenance over an extended period. Her pension supported you both."

Question 2(a)

"Your mother must have had testamentary capacity to make a valid will which means meeting the requirements of the test in Banks v Goodfellow (1870). She must have understood the nature and effect of the will-making act, the extent of her property, and appreciated the claims she ought to consider. She must not have suffered from any mental disorder or insane delusion, which affected her judgement or perverted her affections.

It is not clear if your mother knows that she is making a Will rather than making a lifetime gift. She does not have an appreciation of the general extent of her wealth as she greatly underestimates the size of her estate. She does know that she has three children. I see from the attendance note that your mother has been diagnosed with something, but I do not know, at this stage, if this affected her capacity. She may also have been suffering a delusion about Ali and Sara's behaviour.

In Key v Key (2010) it was determined that bereavement may impair testamentary capacity and your mother was widowed a few days before giving instructions for the Will and was still very distressed in the meeting.

There is normally a presumption of capacity but, if those opposing the Will have evidence which raises a real doubt as to capacity, the burden shifts to the person propounding the Will, who must prove capacity (Pearce v Beverley (2013)). You will need medical evidence as to your mother's mental state plus, if possible, evidence from people who interacted with her on a regular basis.

To be valid your mother must have known and approved the contents of the Will. There is normally a presumption of knowledge and approval where a person with capacity executes a Will. The presumption does not apply if there

are suspicious circumstances; for example, if the Will substantially benefits a person who was instrumental in the preparation of the Will.

Following Hawes v Burgess (2013) the court will insist on positive proof of knowledge and approval because you made the arrangements to see the will writer, sat in on the meeting and also gave instructions. The court will also consider whether you translated your mother's instructions accurately.

A Will is invalid if the testatrix was subjected to undue influence which overpowered her will without convincing her judgement. A testatrix can be persuaded, but not coerced. It is often difficult for those alleging undue influence to gather enough evidence to substantiate the allegation."

2(b)

"You should sign a deed of variation. This is a direction to redirect the 40% of your mother's estate and make the gifts to Callam and the University. If you do not sign a deed of variation, then these gifts will be treated as potential exempt transfers by you and there will be no inheritance tax ("IHT") to pay if you survive for seven years after the gift.

You need to ensure that the deed meets the requirements of s.142 Inheritance Tax Act 1984. It must therefore be in writing, not be made for money or money's worth (so no consideration), contain a statement that s.142(1) is intended to apply and be signed within 2 years of the death.

The transfers will then be treated as made by your mother and not by you. It will, therefore, have no tax implications for you.

This variation is also a disposal for capital gains tax ("CGT") purposes. We do not yet know if the estate has gone up or down in value, but you have no annual allowance of your own to use because of the sale of your own shares. If the assets have gone up in value, then you should add an additional line to the variation that s.62(6) Taxation of Chargeable Gains Act 1992 is to apply. The beneficiaries will then be deemed to acquire the assets at their value as at the date of death and there is no disposal for CGT by you. If the assets that are given to your siblings have gone down in value since the date of death, then do not include the additional line so that you can set this loss against your own personal gain.

There will be an IHT refund because of the charity exemption for the university's gift (s.25 IHTA 1984)."

Question 3(a)

Property passing under the Will to you:

Cash

Fox Cafe Shares

Buy-to-let Property

Jewellery

The life insurance is not included because your father was not beneficially entitled to it immediately before his death.

Work out value transferred:

	£	£
Cash	504,000	
Shares in Fox Cafe	800,000	
Buy-to-let Property	525,000	
Jewellery	10,000	<u>1,839,000</u>
Less debts		
Funeral	6,000	
Other debts	3,000	<u>9,000</u>
Value transferred		<u>1,830,000</u>

No spouse or charitable exemption available as your father was not married at the time of his death and left no money to charity.

The Fox Café shares qualify for BPR at 100 per cent.

100 per cent x £800,000 = £800,000 relief. This reduces the value transferred to £1,030,000 and this is the amount that is chargeable for IHT purposes.

Your father has his residence nil-rate band ("RNRB") available of £125,000 because his estate is worth less than £2 million at the date of death and the downsizing provisions apply and assets of some kind are "closely inherited" by you as his lineal descendant.

The estate will also have the benefit of one carried forward RNRB £125,000 from either your mother's estate or June's. It does not matter that they did not own property. RNRBs are not automatically applied and must be claimed.

There is also the transferable nil-rate band ("NRB") from either your mother or June as neither of them used their nil-rate band. It does not matter that your mother did not have an estate or that June had a small estate – however your claim is limited to 100 per cent of a single NRB even though the total unused of the two NRBs is higher.

Calculate tax taking into account the appropriate rate

The £250 gifts to each grandchild are exempt under small gift exemption

The £6,000 gifts to the church are exempt under the charity exemption

The historic £3,000 gifts to the godson are exempt under the annual exemption – the last gift was never actually made as he did not cash the cheque.

The £250 gift to David is not exempt under small gift exemption as he received a further gift.

The £2 million gift to your son David was a "potentially exempt transfer" which has become chargeable because your father did not survive 7 years from the date of the gift. No taper relief is available as he died within 3 years of making the gift.

Taking off the remainder of the £3,000 annual allowance for 2018-2019 (£2,750) and your father's NRB of £325,000 and the transferable NRB of £650,000 leaves £1,347,250 taxed at 40 per cent resulting in IHT of £538,900 on this gift, which is payable by David as the recipient of the gift.

The RNRBs are only available to offset against the death estate. The NRBs have been used up by the gift to David.

As to the estate on death, £1,030,000 – £250,000 leaves £780,000 to be taxed at 40 per cent, resulting in £312,000 IHT, which is payable by you in your capacity as executor.”

3(b)

“The IHT is due six months after the end of the month in which the death occurred (i.e. by 31 May 2019). If not paid by then, interest will start to be payable.

If you can afford to, you could loan the money to the estate.

Also, there is enough cash in the bank to pay all of the IHT. You could use the formal direct payment scheme using form IHT423 or ask the bank if they are prepared to release a cheque made payable to HMRC.

You could also use the proceeds of the life insurance to pay some of the tax.”

(c)

“There is no IHT loss relief on the sale of the shares because they are not qualifying investments (i.e. not quoted shares or unit trusts or British government stock).

Gideon as personal representative can claim CGT loss relief on the shares to set against the chargeable gain made on the house.

There is therefore no CGT or IHT to pay on these sales.”

Question 4(a)

“Looking at each gift in turn the position is as follows:

1. The Will appears validly executed and therefore you are the executor and able to administer the Will.
2. The £10,000 gift to Petra still takes effect although they are divorced as they were divorced before the Will was signed and so s.18 Wills Act 1837 (“WA 1837”) does not apply.
3. The £5,000 gift to Lord Bell fails because s.24 WA 1837 applies only to property and not to people. As there is no contrary intention the Will speaks from the date of execution and is construed as a gift to the Lord Bell who was alive at the date of the signing of the Will. As he did not survive Isla, this £5,000 falls into residue.
4. The gift of the life insurance to Petra adeems because the policy is already held in trust due to the lifetime transfer and therefore is not something that Isla can leave in her Will. You and Henry are still the trustees holding it for Ruth.
5. Unfortunately, the amendment of the gift to Ruth is not valid as s.21 WA 1837 applies – two witnesses are also needed to amend the Will and unfortunately no witnesses signed the alteration. As the original wording is apparent – that is decipherable by “natural means” – the original amount of £10,000 is admitted to probate.
6. Ana receives whatever jewellery Isla owned at the date of her death – she does not inherit the painting. This is because of s.24 WA 1837 which provides that unless there is a contrary intention the will speaks and takes effect as if it had been executed immediately before her death.

7. The residuary gift to Michael lapses because he did not survive Isla. There is no substitutional provision in the Will to cover the position if Michael did predecease her and s.33 WA1837 does not apply to the twins, as Michael was not your aunt's child or remoter issue. This means that the lapsed residuary gift passes under the intestacy rules.
8. There is a partial intestacy. Isla was not survived by a spouse, civil partner, issue or parents. As her only sibling Zoe predeceased her Zoe's issue inherit on the statutory trust. As your mother's only child, you inherit all the residuary estate. Section 15 WA 1837 does not apply even though you and Henry witnessed the will, as you are inheriting under the intestacy laws."

4(b)

"As executor you are not entitled to remuneration for your services under the general law, although you can be reimbursed for expenses incurred in carrying your duties.

To receive remuneration there must be either an express clause (which there is not in this case) or remuneration can be authorised by the beneficiaries (if of full age and capacity) or under s.29 Trustee Act 2000 (where the personal representative is a trust corporation or acting as a professional trustee but not as sole trustee). The only way of obtaining remuneration is therefore if all the beneficiaries consent - we know that they are full age but they also need to have capacity."