

## CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JANUARY 2022

LEVEL 6 – UNIT 21 – PROBATE PRACTICE

### Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses 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 2022 examinations. The suggested points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

Candidates and learning centre tutors should review the suggested points for responses 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 question paper provided a thorough test of the candidates' knowledge of the law, and it was clear what was being asked in the questions.

Where questions were awarded more marks, they required more detailed answers, and this was rarely achieved.

There were few answers which applied the facts to the question, and this resulted in answers being too short and this particularly applied to questions 1a and 3a.

Question 4 (b) was obviously more testing for the candidates and there was a variety of standards here.

### General comments

1. Where more marks are allocated more detailed answers are required.
2. Not enough planning is made before candidates start writing with consideration being given to what the question is about and what is it asking for.
3. Candidates should read all the questions first before answering them to avoid unnecessary repetition.

4. On the whole candidates showed a knowledge of the law but sometimes it was the application which was lacking.
5. Sometimes candidates would use very short sentences which gave the impression that they were short of time.

Some candidates interpreted questions where the question asked - please advise, as if they were asked to write a letter which was not the case.

#### CANDIDATE PERFORMANCE FOR EACH QUESTION

##### **Question 1(a )**

In general the answers given were too brief and did not cover the main part of the question which was who to appoint as executors of the will and why? Most candidates dealt with the will signing aspect satisfactorily

##### **(b)**

No real comments here as most candidates got the main points although some omitted dealing with the Mental Capacity Act.

##### **Question 2(a) and (b)**

This was answered well in general, but some candidates repeated the same things in both answers and this would have been resolved by reading a and b first before writing their answers

##### **Question 3(a)**

As stated above this was not answered very well with most candidates not going far enough with their answers by applying the law to the facts and drawing conclusions. Very often candidates said they were relying on the courts' decision.

**(b)** This was answered satisfactorily.

##### **Question 4(a)**

Most candidates got the main points about money laundering but failed to deal with other aspects of due diligence such as the client engagement letter setting out inter alia the scope of your retainer.

##### **4(b)**

As stated above this was a more testing question and, overall, there was insufficient detail given in the answers

**(c)** On the whole candidates achieved the main points here .

**SUGGESTED POINTS FOR RESPONSE**

**LEVEL 6 – UNIT 21 – PROBATE PRACTICE**

Question Number	Suggested Points for Responses	Max Marks
<b>1(a)</b>	<p>Hilda Brown can change the executor by putting in place a new will or doing a codicil to her existing will, the codicil will have the same requirements in terms of intention and capacity to make a will approval of it and the same formalities for execution as for a will.</p> <p>Number and choice of executors – Any number can be named in a will but 4 is the maximum who can act, I would suggest 2 is adequate and it covers the situation where one of the executors dies before her or she can appoint one executor and another person as substitute and her choice will be influenced by various factors for example their availability, ability and willingness to act and the possibility of any conflict arising explain the advantage of appointing someone neutral like a professional especially where there might be a family conflict candidates should point out there is nothing to stop Mrs Brown appointing someone who will be a beneficiary but include the fact that the appointee may require professional advice because of the assets involved here and it is likely to be a taxable estate conclusions to the answer as to who you recommend here as executor/s and why and include the fact the executor has to be over 18 and suggest that his niece might be a good option even though she is a beneficiary</p>	<b>15</b>
<b>1(b)</b>	<p>The meeting with Mrs Brown has raised issues in your mind about her capacity to make a will. Outline how these observations will have an impact on Mrs Brown decision making</p> <p>Explain what she needs to show that she does have sufficient capacity and explain what it states in the case of <u>Banks v Goodfellow</u> and then deal the statutory guidance given in the Mental Capacity Act and say the test in the case above is the still the leading guidance</p> <p>You may decide the best course of action is to then ask her doctor to carry out an assessment of her before you proceed but you will need to ensure your client agrees for you to do this</p> <p>Point out to the doctor in your instructions that the following matters from case law should help in setting out the criteria for assessing whether she can make these changes:</p> <p>She needs to understand the nature of the act of will making and the effects of making the changes to her will in the manner above</p> <p>She must understand the extent not necessarily the approximate value of the property she is disposing of in her will, and she needs to understand the nature and extent of any moral claims upon her</p>	<b>10</b>

	<p>. <u>Statutory guidance on assessment of capacity</u> is given in the MCA code of practice and enclose a copy of the relevant pages of the code of conduct and summarise the guidance which requires us to work out whether there is an impairment or disturbance or functioning of the mind or brain such that this is sufficient to cause her to be unable to make relevant decisions concerning making changes to her will</p> <p>Invite him or her to attend your client to assess whether a) there is such an impairment of her mind affecting her decision to make the changes to her will and b) whether she is incapable of making these changes</p>	
<b>Question 1 Total:</b>		<b>25 marks</b>

Question Number	Suggested Points for Responses	Max Marks
<b>2(a)</b>	<p><u>Lifetime planning</u></p> <p>Mrs Brown could consider making gifts during her lifetime before her death to a friend or relative this is called a potentially exempt transfer see <b>S3A(1) Inheritance Act 1984</b>. This is a transfer which is not a chargeable transfer for inheritance tax. Only outright gifts will be PETS because all transfers made into trusts are chargeable transfers and provided, she survives 7 years from the date of the gift the transfer will be fully exempt from tax. If, however, she dies before 7 years has elapsed the gift becomes chargeable and is a failed PET.</p> <p>If Mrs Brown gave her house away there are particular problems here where she continued to continue living there as this is a gift with a reservation of benefit see <b>s 102 Finance Act 1986</b> but if she stops enjoying her house at any time say if she goes into care the relief will start to run from then.</p> <p><b>Other reliefs are</b> – The annual exemption <b>s19 Inheritance Tax Act 1984</b>, this is worth £3000 a year and if not used in full one year the unused part can be carried forward to next tax year.</p> <p>The small gifts exemption see <b>S20</b></p> <p>Normal expenditure from income see <b>s 21</b></p> <p>Gifts in consideration of marriage /civil partnership <b>s22</b></p>	<b>10</b>
<b>2(b)</b>	<p><u>Allowances on her death</u> - transferable Nil rate sum available of £325,000 from her late husband to the extent it is unused, candidates to be given credit for saying this is not automatic right as it must be claimed for</p> <p>She can also claim her own nil rate band of 325,000 but the residence nil rate band for her and her late husband is not available here because she has no children</p> <p><b>Legacy to Dogs home</b> charity exemption applies which reduces the taxable estate by £1000 and her personal representatives may consider varying her will to reduce the tax and the rate of tax from 40 to 36% by</p>	<b>10</b>

	<p>giving more to charity in the Will but point out that this will need consent of residuary beneficiary</p> <p><b>Her shares</b> – if these were invested in business assets she may qualify for business property relief</p>	
<b>Question 2 Total:</b>		<b>20 marks</b>

Question Number	Suggested Points for Responses	Max Marks
<b>3(a)</b>	<p><u>Points should include:</u></p> <p>There is still a subsisting marriage despite commencement of divorce proceedings and <u>is entitled as of right</u> to make this claim <b><u>section 1(1) Inheritance PFDA 1975 Act (2)</u></b></p> <p><u>Should reasonable financial provision be made to her?</u></p> <p>Explain the standard for Naomi to make a successful claim section 1(2) a, She is entitled to such financial provision as would be reasonable in all the circumstances for a spouse to receive whether required for their maintenance</p> <p>what would be reasonable for a spouse or civil partner to receive? - compare with awards made on a divorce and what would be the starting point for compensation.</p> <p><u>Deal with the common guidelines of the court set out in S 3(1) of the act,</u> the financial needs, and resources of the applicant, any other applicant and any beneficiary, the size and nature of the estate, the deceased’s moral obligations, the physical or mental disability of the applicant or beneficiary and any other relevant matter for example the conduct of the applicant, lifetime provision by the deceased etc</p> <p>Apply the criteria to the facts and draw conclusions as what they are likely to decide based on the assets and liabilities given in case scenario. On the facts she has been left nothing in the will, but David has promised her a right of occupation in the matrimonial home and clearly this is insufficient she needs security and so the transfer of the house to her outright would be a consideration and /or to receive some or all the rental income</p> <p>Credit should be given to the fact that his wife does not have to prove she was maintained by her husband</p> <p><u>So far as Ronald is concerned</u> his entitlement under the Will is very limited as he will only obtain his stamp collection and if this has little value then Ronald can make a claim as he is a dependent.</p> <p>Ronald is his son and is therefore a claimant under section 1 (PFD) Act 1975</p> <p><u>Stage 1 -Should reasonable financial provision be made?</u></p> <p>First question is the applicant’s existing provision reasonable or not?</p>	<b>15</b>

	<p>Under the terms of the will, he only receives a stamp collection. In <i>Ilott v Mitson</i> (2017) the Supreme Court confirmed it is the trial Judge's task to decide the issue by making a value judgment as to whether the applicant's provision is reasonable in all the circumstances taking account of all the facts and the section 3 guidelines set out below.</p> <p><u>Stage 2</u> – if the answer is yes to the first question, then the court considers the second question – should such provision now be made and if so, what? It is only at this stage that the trial judge exercises discretion in deciding what if any relief to award and the standard of provision depends on the applicant</p> <p>Consider the criteria the court use to assess his claim – Explain the meaning of reasonable maintenance apply to the facts Ronald is only 14 and at school and so he is a dependent concluding comments as to his chances of success and relevant case law here for example <u>Ilott v Mitson</u> Apply the criteria above stages 1 and 2 and draw your conclusions</p>	
<b>3(b)</b>	<p>If Cilla predeceases him then there will be a partial intestacy and this means that his wife Naomi provided she survives David by 28 days she will receive the statutory legacy of £270,000 any personal chattels and one half of the residuary estate absolutely and Ronald will receive half of what is left after applying this rule and the legacy contained in the will, credit should be given to mentioning that that Naomi can decide /elect to take David's interest in the matrimonial home in or towards their entitlement and the fact that Naomi's statutory legacy of 270,000 is given to her free of tax and costs of the transfer and includes interest from date of death until payment</p> <p>Ronald or Naomi could consider making an inheritance act claim if they are not satisfied with the above</p>	<b>10</b>
<b>Question 3 Total:</b>		<b>25 marks</b>

Question Number	Suggested Points for Responses	Max Marks
<b>4(a)</b>	<p>Duty to report suspicious activity explain what money laundering is not only being the proceeds of criminal activity but also can be about people trying to launder profits from minor crimes such as benefit fraud</p> <p>Explain the main provisions of the <u>Proceeds Of Crime Act 2002</u> especially the disclosure regime for professionals and who to make the initial disclosure to and the procedure leading to the decision made as to</p>	<b>10</b>

	<p>whether you can take this case on, credit should be given to candidates for mentioning that administration of estates is regulated work and so PCA applies</p> <p>Then deal with the anti -money laundering regime set out in the <u>Terrorist Financing and Transfer Of Funds Regulations 2017</u> - explain the need to verify and identify your client which will be done by obtaining from Rohit photographic identity in the form of a passport or driving licence and evidence of his address in the form of a recent utility bill or a bank statement</p> <p>Candidates should deal with the issue here in the facts about the fact he is paying cash for your bill, you need to satisfy yourself that this money has not been laundered</p> <p>Other points to consider are the need to see whether there is a conflict of interest, and that the client will receive a client engagement letter setting out who will be responsible for the file in your office a description of the retainer, the estimated costs, and the complaints procedure in your office</p>	
<p><b>4(b)</b></p>	<p>If his sister cannot be traced, your client needs to consider protecting his position as personal representative by instructing a genealogist and agreeing a fee with them typically taken from the beneficiary's share if they are found</p> <p>He should also consider obtaining a <u>Benjamin order</u> from the court asking permission of the court to make a distribution based on the assumption set out in the order the assumption being that she had predeceased her Father the practical advantage here being there is no need to wait 7 years, but he should bear in mind the costs of doing this would be an expense of the estate and this would reduce his inheritance. Client will need to show the court that he has made full enquiries for example inserting S27 adverts (see procedure in 3 (C) below and the advert in the local newspaper should be local to Sunil's home and where his sister was last heard of</p> <p>He should also consider making a <u>payment into court</u> until she is found or declared dead</p> <p>Another option would be to obtain a declaration of death relying on <u>The Presumption of Death Act 2013</u></p> <p>He could consider an indemnity from the residuary beneficiaries, but this would be impractical as he is one of them also no point here in obtaining indemnity insurance as this would not protect him</p>	<p><b>10</b></p>
<p><b>4(c)</b></p>	<p>Client will need to raise sufficient cash to pay off any outstanding debts by liquidating assets</p>	<p><b>10</b></p>

	<p>Rohit is obliged to deal with all debts which attract interest first to minimise liability and to comply with his duty of care obligations to the estate</p> <p>It is good practice to obtain receipts from the creditors who are owed money and obtain their written confirmation that there is nothing further which is owed to them</p> <p>Client should deal with the debts in the following order of preference, firstly secured debts first (for example a mortgage) secondly preferred debts (for example funeral costs and legal costs!) and then unsecured debts like a credit card</p> <p>Explain whether any of the debts die with the deceased Advise client to insert a notice in <b><u>the London Gazette</u></b> and a local newspaper as soon as possible to see if there are any unknown creditors and should wait 2 months after the expiry of these notices before making any distributions from the estate</p>	
<b>Question 4 Total:</b>		<b>30 marks</b>