

## CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JUNE 2018

### 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 June 2018 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 June 2018 examination paper was a fairly balanced assessment, which covered 80% of the learning outcomes of the unit specification. The examination paper was set at the right qualification level.

It is pertinent, at this juncture, to congratulate all those candidates who achieved a pass in their examination. Candidates who did not achieve a pass mark should be supported and encouraged to sit the examination paper next year.

#### General Observations

- Candidates appeared to have given sufficient time for preparation.
- It appeared that most of the candidates read the questions and understood what they were expected to do.
- Most candidates wrote legibly and addressed as many issues as they could in a structured way; stronger candidates were particular good at addressing relevant issues and case laws.
- Candidates should continue to be encouraged to prepare thoroughly and

give sufficient time for preparation.

- Candidates are encouraged to take suitable time to revise. Candidates should always be encouraged to attempt past papers.
- Candidates should be encouraged to complete each question before attempting the next question.

## CANDIDATE PERFORMANCE FOR EACH QUESTION

### Question 1

This tested the candidates' general knowledge and skills in the requirements for a valid Will and the grounds for challenging the validity of a Will.

Most candidates showed very clear understanding of what was required and a distinctive understanding of the requirements for drafting a valid Will and grounds to challenge a valid Will.

### Question 2

This tested the candidates' knowledge and skills in their understanding of the general structure and identification of the purpose of an oath and its contents. This question also tested the candidates' specific knowledge and skills in the requirements for a valid Will and Codicil and their understanding of the effect of alterations in Wills and Codicils.

Candidates showed a reasonable understanding of what was required with less than a third of candidates showing a distinctive understanding of the purpose of an oath and its contents and the effect of alterations in Wills and Codicils.

### Question 3

This tested the candidates' knowledge and skills in the entitlement to an estate, the nature of any entitlement and the principles relating to the taxation of lifetime gifts and the effect of death on lifetime transfers.

Most candidates showed a good level of understanding of which assets do not fall into an estate and in some cases, candidates were able to identify the amount each beneficiary is entitled to.

### Question 4

This tested the candidates' knowledge and skills in the distribution of a person's property on death and the calculation of a residuary estate and inheritance tax.

Most candidates showed a lesser level of understanding on how to calculate the value of a residuary estate and inheritance tax liability on the death of a person.

## SUGGESTED ANSWERS

JUNE 2018

### LEVEL 6 UNIT 21 PROBATE PRACTICE

#### Question 1(a)

A testator must have testamentary capacity. The test is *Banks v Goodfellow* (1870) LR 5: QB 549 as to soundness of mind, memory and understanding.

Gregory must have:

- a. understood the nature and effect of the will-making act;
- b. understood the extent of his property;
- c. must not have suffered from any mental disorder or insane delusion, which affected his judgement or perverted his affections;
- d. known and approved the contents of his Will.

Presumption of capacity should be considered if the challenger of the Will has evidence which raises a real doubt as to capacity.

The presumption of knowledge and approval applies where a person with capacity executes a Will. Presumption does not apply if someone signs for the testator or there are suspicious circumstances.

The key requirements are that Gregory must have capacity at the time of giving instructions in the preparation of his Will; the Will must be prepared in line with those instructions and, at the time of execution, that Gregory was capable of understanding and understood he was executing the Will for which he gave instructions. The burden shifts to the persons propounding the Will, who must prove capacity.

If the challenger raises real doubt as to capacity, the propounders of the Will must contend that Gregory's mental state was sufficient.

To support any challenge to Gregory's Will, the following impartial evidence needs to be presented to prove that:

- Gregory did not have testamentary capacity when giving his instructions in the preparation of his Will;
- Gregory's Will was not prepared according to his instructions;
- Gregory was not capable of understanding and he did not understand his Will was being executed according to his instructions.

Gregory was undergoing treatment for his cancer and from the instructions, it is clear that the results of his assessment indicated that he struggled with everyday tasks and at times has suffered from only short term memory loss, not full or permanent loss. Gregory may have retained sufficient capacity to fulfil the test. These symptoms were not diagnosed by his General Practitioner (GP) and may have been because of the chemotherapy treatments he received. These assessments were not carried out to assess Gregory's testamentary capacity and therefore are likely to have little weight.

In the case of *Re: Simpson* [1977] 121 SJ 224, the law provides further guidance for testators who are elderly and seriously ill. Gregory was diagnosed with cancer and would therefore be regarded as a vulnerable person protected by the law.

The law provides that there is one golden rule that should be observed and that is however straightforward the making of a Will by an elderly or seriously ill testator ought to be witnessed by a medical practitioner who is satisfied of the capacity and understanding of the testator.

Gregory's Will was prepared professionally. The solicitors who prepared his Will would likely have been alerted to one of the serious questions on Gregory's capacity if Gregory's capacity were in question.

### **Question 1(b)**

Under the provisions of the Inheritance (Provisions for Family and Dependant's) Act 1975 those making a Will are entitled to leave what they want to whomever they want. However, under this Act claims for a reasonable share of an estate may be made by certain people even if the Will leaves them nothing or very little on the grounds that reasonable financial provision has not been made by the Will (or intestacy).

A claim may be made by those entitled to claim, if they consider that they have not been adequately provided for under the Will. The court will normally consider whether adequate provision has been made based on two standards of provision. The first is based on what might have been awarded in the event of divorce or separation and the second is based on what would constitute an adequate maintenance provision.

The Law Society recommended, in 1959, that in some instances where a will prepared by a solicitor becomes the subject of a dispute, the solicitor should make available a statement of his evidence dealing with the execution of the will and the circumstances surrounding it (*Larke v Nugus* [2000]).

An Inheritance Act claim may be made by:

- a. the spouse/civil partner of the deceased;
- b. the former spouse/civil partner of the deceased who has not remarried or entered into a further civil partnership;
- c. a person living as husband, wife or civil partner with the deceased for at least two years prior to their death;
- d. the deceased's child (which includes an adult child);
- e. treated as the deceased's 'child' (for example, but not necessarily, adopted, fostered or a step-child); or
- f. being "maintained" by the deceased.

Lee Smart is Gregory's former civil partner. They have been living together in the same household since 2015. Lee can bring a claim as former civil partner and potentially bring a claim as a person living with the deceased for at least 2 years.

It is clear Gregory wished to use this money to benefit various members of his family when they need it. However, there is no evidence in the facts that he did maintain any members of his family. Unless there is clear evidence that

Gregory did maintain any members of his family to a material extent and this can be demonstrated, no claim can be made by any members of his family.

Gregory's brothers Simon and Abraham and his parents Marlene and Jasper are self-sufficient and will also not be able to make a claim.

Gregory's children Romeo and Godwin are entitled to make a claim but they are unlikely as Gregory divided all his estate equally between them.

It is not sufficient if there was past indication of willingness to give future support. Courts will consider common guidelines applicable to all applicants:

- a. financial needs and resources of the claimant and any other claimant or beneficiary;
- b. deceased's moral obligations; size and nature of the estate; physical and mental disability of any claimant or beneficiary;
- c. any other relevant matter - any special guidelines i.e. extent, basis and time period of deceased's maintenance of claimant.

A claim may be made by those entitled to claim if they consider that they have not been adequately provided for under the Will. The court will normally consider whether adequate provision has been made based on two standards of provision. The first is based on what might have been awarded in the event of divorce or separation and the second is based on what would constitute an adequate maintenance provision.

There is a very strict time limit of six months from the grant of representation or probate within which to bring a claim for financial provision under the Inheritance (Provision for Family and Dependents) Act 1975. In exceptional circumstances, it may be possible to extend the time limit.

### **Question 2(a)**

All applications for a grant of representation must be supported by an oath. The oath serves the following purposes:

- a. it specifies the applicant's entitlement to take out the grant;
- b. the applicant swears to the collection and administration of the estate;
- c. it exhibits and identifies the Will and the codicil(s) where they exist.

### **Question 2(b)**

The relevant information required to complete the Oath for Executors is as follows:

#### **The extracting solicitor**

The complete details of the extracting solicitor i.e. the solicitors acting for the PRs must be provided. The extracting solicitors are:

Extracting Solicitor: Private Client  
Address Department of Kempstons  
The Manor House, Bedford,

MK42 7AB

DX: (BD345987)

### **Details of the Registry**

The complete details of the Registry to which the application is being made must be provided and from the materials given the application would be made to the Principal Registry.

### **The name of the deceased**

The name of the deceased must be provided. The name of the deceased is Freddy Baker. The name should be inserted after the phrase IN the Estate of. The true and proper name of the deceased should be given and should be the name on the deceased's birth certificate (or marriage certificate or deed poll).

### **Address of the deceased and domicile**

The address and domicile of the deceased must be provided. This will be the last usual residential address of the deceased. If the last usual address is different to the address in the deceased's Will, the address in the Will should be used. The deceased's address in the Will is 3 Albert Street Hull HU5 2JB, United Kingdom, domiciled in England and Wales.

### **Dates of birth and death and age at death**

The date of birth, death and age of the deceased at death must be provided. The deceased's date of birth, death and age are as follows:

Date of birth 10th day of January 1952.

Date of Death 5th day of May 2018.

Aged 66 years.

### **Settled land**

The Oath must contain a statement as to whether there was land settled before the death of the deceased and continuing to be settled after the death. From the facts there is no land vested in the said deceased, which was settled previously to his death and not by his Will with one Codicil.

### **Personal representative details and duties**

The details of the personal representatives applying for the grant must be provided. The true names of the executors should be given. If the name in the Will is different to the true name, this should be dealt with in the Oath.

The duties of the personal representatives should also be set out including preparing estate accounts and returning a grant where required by the Courts.

Charles Baker and Dean Baker are the executors named in the said Will.

### **Value of the estate**

The gross and net value of the estates should be recorded.

### **Swearing the OATH**

The Oath must be sworn (or affirmed) by each deponent where (executor

applying) before an independent commissioner for oaths.

### **Question 2(c)**

s.21 Wills Act 1837 applies to alterations to a Will (Codicil). The alterations made to the Will by the Codicil must be made in accordance with the formalities for preparing a Will.

s.15 WA if a person who is a beneficiary under a Will witnesses that Will (Codicil) then, the signature is perfectly valid and the Will is properly executed. However, that beneficiary loses their benefit under the Will.

Dean Baker is a witness to Freddie's Codicil. Dean loses the benefit of the property known as 3 Albert Street Hull. The property known as 3 Albert Street Hull passes to Charles Baker under Clause 2 of the Will.

The provisions of a Will are normally contained in one properly executed document. A document can be incorporated into a Will if it is validly incorporated into a Will.

To be validly incorporated into a Will the following conditions must be met:

1. The document must be clearly identified in the Will;
2. The document must already exist at the date of the Will;
3. The document must be referred to in the Will as already in existence at the time of execution.

The alteration in the first codicil, which gives £5000 to each of the people to be named in a list, will fail because it is not validly incorporated.

There are no rules, which govern who may or may not act as witnesses. However, a witness must be capable of attesting the testator's signature at the time that it is made. The witness must be physically and mentally present when the testator signs the Will and must be able to see that the Will is being signed.

Sean is registered blind and was in the fact, drunk. He would therefore not be eligible to act as a witness to Freddy's Will. The codicil is therefore not valid as it only has one witness.

### **Question 2(d)**

The pecuniary legacies of £1000 to Kesh and Allan take effect under Clause 3 of the Will. The gift to Zalan fails (lapsed) as he predeceased Freddy.

The property known as 3 Albert Street Hull passes to Charles Baker under Clause 2 of the Will.

Codicil not valid so legacies not effective. Had the Codicil been valid, the pecuniary legacies of £5000 under Clause 2 of the Codicil to each of the people to be name in a list will fail as list was not validly incorporated and will fall into the residuary estate.

Jenny Hope died in December 2004. Freddy's personal possessions under Clause 4 of the Will fall into the residuary estate. Freddy's residuary estate comprises:

	<b>£</b>
Natwest Bank current account	25,000
HSBC Bank currents account	3,200
HSBC Bank deposit account	11,800
Personal possession	14,100
Pecuniary legacies	5000
	<hr/>
	59,000
Less the pecuniary legacies of £1000 to Kesh and Allan	(2,000)
	<hr/>
	<b>£57,100</b>

**Question 3(a)**

Stephanie is the surviving spouse of Tom. Tom and Stephanie had three children Bill, Megan and Hanna. Stephanie gets all personal items, £250k and half the balance of Tom’s estate. Bill, Megan and Hanna receive the other half the balance. Bill’s share goes to Charlotte as he is deceased. The following assets do not fall into the distribution of Tom’s estate:

1. The cottage in the Peak District. You would need to ask for the property file in order to establish the nature of the beneficial interest. If the property shows that the property was held on a beneficial joint tenancy basis it will pass by survivorship to Stephanie as the surviving joint tenant;
2. The Legal & General policy. You will need to ask to see the life policy in order to determine the nature of the trust;
3. In the absence of any evidence to the contrary you can assume that the contents of the cottage and the house are held on a beneficial joint tenancy basis and pass by survivorship to Stephanie;
4. In the absence of any evidence to the contrary you can assume that the HSBC bank savings account is held on a beneficial joint tenancy basis and pass by survivorship to Stephanie;
5. You would need to ask for the details of the discretionary trust Tom made.

The net estate in Tom’s estate totals £660,300, calculated as follows:

	<b>£</b>	<b>£</b>
House in York	300,000	
Less: the mortgage	(100,000)	200,000
An Audi convertible	6,000	
Personal possession	<u>1,300</u>	
		7,300
Current account with HSBC Bank		2,000
Quoted stocks and shares		450,000
Unpaid salary		<u>2,500</u>
		661,800
Less: Funeral expenses		(1,500)
		<hr/>
		<b>£660,300</b>

The estate falls to be distributed as follows:

Stephanie as surviving spouse is to receive:

	<b>£</b>
1. Personal items of possession	7,300
2. Statutory legacy of	250,000 ( <i>free of tax with interest from date of death</i> )
3. ½ the balance	£201,500

The children to receive the other half of the balance in the value of £201,500.

The division is as follows:

1. Megan is an adopted child. She is treated as a legitimate child of Tom and Stephanie her adoptive parent. Megan takes 1/3 of the share;
2. Anna is under 17 but she is married and therefore takes a vested interest in a 1/3 share;
3. The remaining 1/3 share is held for Charlotte contingent on her reaching the age of 18 or earlier marriage. If she dies under 18 and unmarried then her share is divided equally between Megan and Hanna.

### **Question 3(b)**

A lifetime chargeable transfer (LCT) is a transfer from an individual, during their lifetime, to any trust, which does not fall into any category outlined below:

1. Transfers to trustees of a trust which is established for a disabled beneficiary;
2. Transfers made on or after 22nd of March 2006 to trustees of a bereaved minor's trust on the ending of an 'immediate post death interest';
3. Transfers to the trustees of an interest in possession settlement because the estate of the beneficiary with the life interest includes the property in which that interest subsists, i.e. the settled property;
4. Transfers to the trustees of an accumulation and maintenance trust.

LCT are gifts which are given to a trust and will attract an instant IHT charge if the amount gifted to the trust is over the settlor's available NRB.

The effect of death on inheritance on LCT are as follows:

1. Death estate becomes chargeable to inheritance tax;
2. Tax on LCT made within 7 years of death must be re-assessed
3.
  - a. Tax if above the nil rate band paid at the time the LCT was made at lifetime rate (half the death rate);
  - b. Tax now become payable at death rate;
  - c. Tax must be recalculated at new rate;
  - d. Cumulative total at tie LCT made may have changed due to potentially exempt transfer (PET) becoming chargeable;
  - e. Taper relief may be available;
  - f. Credit must be given for tax already paid.

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

The validity of the Will:

- There is no date clause. A Will will not be invalid without a date;
- Date inclusion will enable the Probate Registry to ascertain the last Will of the testator;
- 
- A Will is not invalid just because it contains no attestation clause;
- A correctly drafted attestation clause raises a presumption that the Will has been properly executed;
- Proof of due execution would be required before the Will is admitted to Probate. This is usually done through an Affidavit of due execution sworn by Bark Donny and Gehu Summer;
- Christian is divorced from Kamila but is appointed as an executor to her Will. If the testator is divorced then the decree absolute of divorce operates as a limited revocation of the Will;
- Any appointment of the former spouse as executor will be omitted and any gift in the Will to the former spouse will lapse;

Martin Black will be able to be executor alone.

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

The following asset did not fall into the estate:

1. The life policy with Prudential in trust for Kamila's children is distributed as follows:

a. Lisa	£35,000
b. Derek	£35,000

Assuming the Will was validly executed, the assets in the estate are distributed as follows:

1. Grand piano passes to Derek (Clause 2(a)) The CDs will only be included in this legacy if Kamila or someone else with her knowledge and approval made the alteration before the Will was executed. There is a rebuttable presumption that the alteration was made after execution;
2. Clause 2(b) - the list was not in existence at the time the Will was executed and therefore this legacy fails;
3. Rolex passes to Lisa under Clause 2(c);
4. Personal chattels not specifically bequeathed (Clause 2(d)) and as a result of Christian's divorce, he is deemed to have predeceased Kamila and therefore this legacy fails through lapse;
5. Pecuniary legacy of £60,000 to Christian's under Clause 3(1) fails as a result of Christian's divorce;

6. Pecuniary legacy of £2,000 to the grandson Jack (under Clause 3(b)).

Clause 4 provides for the residuary estate to be divided equally between Lisa and Derek.

The gift to Lisa will not fail under Section 15 Wills Act 1837 (Martin Black, is an executor and not a witness to Kamila's Will).

The following legacies, including those which have failed, will fall into the residuary estate below:

	£
House in Manchester	200,000
Natwest Bank current account	5,000
Natwest Bank deposit account	12,000
Quoted stock and shares	245,500
CD	100
Music tapes	200
Other personal chattels	<u>1,000</u>
	463,800
Less pecuniary legacy of £2,000 to grandson	<u>(2,000)</u>
	<b><u>461,800</u></b>

Residuary gift to Lisa and Derek will take effect and vest immediately. Life policy proceeds will pass outside of the estate.

#### **Question 4(c)**

The net value of Kamila's estate for tax purposes is made up as follows:

	£
House in Manchester	200,000
Natwest Bank current account	5,000
Natwest Bank deposit account	12,000
Quoted stock and shares	245,500
Rolex	1,500
CD	100
Grand Piano	2500
Music tapes	200
Other personal chattels	<u>1,000</u>
	<b><u>467,800</u></b>

Kamila and Christian are divorced so there will be no spouse exemption.

A life policy with Prudential was written in trust for Kamila's children in equal shares for £70,000. Insurance policies written in trust are not included in the Kamila's estate for IHT purposes. This is because once the policy has been written in trust for the benefit of another, the insured divests him/herself of any benefit of the policy. The benefit of the policy belongs to the beneficiary under the trust.

Kamila made no lifetime gifts. The current nil band rate is £325,000. So the first £325,000 will be taxed at 0%.

If anyone dies on or after 6 April 2017 and their estate is above the basic inheritance tax threshold, the estate may be entitled to an additional threshold before any IHT become due. The extra amount for 2018 to 2019 is up to £125,000.

The taxable amount is:  $(£467,800 - £125,000) - £325,000 = £17,800$

There would be tax to pay at 40% on  $£17,800 = £7,120$