

CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

LEVEL 6 - UNIT 21 – PROBATE PRACTICE

JUNE 2019

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 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 June 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 re-sit. 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 in the question given – if no application is given marks are lost. If writing short introductions and conclusions, where necessary, ensure they contain relevant points not already repeated.
- It is possible to get a mark on the tax question by breaking down the question and applying the law.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1

This question tested candidates' knowledge on entitlement on an intestacy. 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. In 1(a) candidates were required to answer who inherited Cyril's estate and candidates were not awarded marks for who inherited Bibi's estate as this was dealt with in 1(b). Many candidates assumed that Rose could make an election but on the facts she was not resident in the property when Cyril died. Some candidates wasted time stating which applicants could make an inheritance act claim.

Question 2

This question tested candidates' knowledge on how IHT is calculated. Few candidates appreciated that the loan reduces the amount of BPR to £50,000. Stronger candidates knew that taper relief is calculated after the IHT on PETs is calculated to reduce the amount of tax payable.

There was a very broad range of marks for 2 (a). 2 (b) was answered very well.

Question 3

This question tested candidates' knowledge on protecting executors which is a key role in practice. 3(b) was answered best out of the three parts but no marks were given for reference to a presumption of death declaration as there was no evidence Jessica was dead, nor had she been missing for seven years. In (c) few candidates referred to S34 (3) AEA 1925 and some candidates only paid some of the debts before distributing the estate.

Question 4

This question asked candidates to interpret a will. On the whole it was answered well. In question 4(a) candidates needed to highlight that Rebecca was not able to enter an appearance or serve a summons for directions as whatever the outcome she had no potential interest in the estate. In (c) Bibi only loses her entitlement if she is convicted of murder rather than merely arrested or charged.

SUGGESTED ANSWERS

LEVEL 6 - UNIT 21 – PROBATE PRACTICE

JUNE 2019

Question 1(a)

The distribution of Cyril's estate will be governed by the intestacy rules contained in Part IV Administration of Estate Act 1925 (AEA 1925).

Rose is treated as the surviving spouse as the decree absolute has not been issued. It does not matter that they have been living apart or that Rose is abroad or that the decree nisi has been issued. She must survive Cyril by 28 days to inherit.

The statutory definition of "spouse" does not include cohabitantes or fiancés, so Peter is not entitled to anything under the intestacy rules.

As both a spouse and children survived Cyril, Rose as surviving spouse is entitled to the personal chattels absolutely. This term is defined by s.55(1)(x) AEA 1925 as meaning tangible movable property. The Range Rover, watch and household contents go to Rose. The van was used solely for business so does not fall within the definition of personal chattels.

Rose also receives a statutory legacy of £250,000 free tax and costs, with interest from the date of death until payment and receives one half of the remaining residuary estate ($£300,000 + £10,000 - £250,000 = £60,000$) absolutely. Rose is therefore entitled to an additional £30,000.

Cyril's issue are entitled to the other half of the residuary estate (£30,000) immediately. Yolanda and Bibi's estate each receive £15,000.

It does not matter that Bibi was illegitimate (s18 Family Law Reform Act 1987). There is no survivorship period for issue. Adam and Evie are not entitled as only Rose adopted them and Ben was a step-child and so is not entitled.

Cyril's share of 45 Purland Road Lincoln passes equally to Bibi and Yolanda as the remaining co-owners by survivorship, so that they own 50% each. There is no survivorship period for this.

Peter inherits the £5,000 in the bank account as the remaining co-holder by survivorship.

1(b)

Bibi's 50% share of 45 Purland Road Lincoln passes to Yolanda by survivorship.

As Bibi was not married nor in a civil partnership and died intestate, her estate is held for her surviving issue on the statutory trusts imposed by s.47 AEA 1925. Her entire estate is held for Daniel as he is her only issue and this is contingent on him reaching 18 or marrying or forming a civil partnership under that age. If Daniel dies without attaining a vested interest leaving issue then his issue will take the estate under the statutory trusts. If he has no issue then his mother Zoe will inherit.

The fact that he was conceived by IVF is irrelevant.

Bibi's estate passing under the intestacy rules consists of the £15,000 inheritance from her father's estate and household contents of £1,500.

(c)

Rose cannot make an election to take the family home because she was not resident at 41 Purland Road when Cyril died. The house will need to be sold for Rose to receive the statutory legacy. If Rose can raise £20,000 for Yolanda and Bibi's estate (being the difference between the £300,000 value of the house and the £280,000 value of Rose's total entitlement under the intestacy), then this sale can be avoided and will save estate agent costs and delays administering the estate. Rose as administrator could use s.41 AEA 1925 to appropriate the major share in the property to herself in settlement of her entitlement, with equality money being paid to the estate to satisfy the other entitlements. Both Yolanda and Daniel's guardian must consent to this.

Question 2(a)

The transfer of value arises on your father's death and relates to everything in the Inheritance Tax (IHT) estate to which he was beneficially entitled before death.

Property passing under the Will to you:

Cash

Shares in Timekeepers Ltd

Vase

Jewellery

Work out value transferred:

	£	£
Cash	160,000	
Shares in Timekeepers Ltd	250,000	
Vase	3,000	
Jewellery	10,000	
Boat	200,000	
		<u>623,000</u>
Less debts		
Funeral	6,000	
Other debts	3,000	
		<u>9,000</u>

Value transferred (before reliefs) **614,000**

There is no spouse or charitable exemption (on death) available. The trading shares qualify for business property relief at 100 per cent.

The mortgage loan is not deductible as it was incurred to acquire shares that qualify for IHT Business Property Relief (BPR).

$£250,000 - £200,000 = £50,000$

$100 \text{ per cent} \times £50,000 = £50,000 \text{ BPR.}$

This reduces the value transferred to £564,000 and this is the amount that is chargeable to IHT.

The gift of 8 Bluebell View was a gift with reservation of benefit because your father carried on living in the property and paid all outgoings. Therefore, for IHT purposes the house is still treated as part of his estate.

Assets of some kind are "closely inherited" by you as his lineal descendant but no RNRB is available because life interest takes estate over £2million threshold.

The gift of the vase to you was a potentially exempt transfer which has become chargeable. The loss to your father's estate was £7,000 (not £3,000) as his estate was worth £7,000 less after gifting one vase of the pair. Taking off your father's annual allowance of £3,000 for 2012-2013 and £3,000 for 2011-2012 means that the net gift of £1000 is subtracted from your father's nil rate band.

The £10,000 gift to Save the Children is exempt under the charity exemption.

The £400,000 gift to you was a potentially exempt transfer which has become chargeable. Taper relief is available as over 3 years have passed since the date of the gift and there is tax to pay.

Taking off the remaining nil rate band of £324,000 and your father's annual allowance of £3,000 for 2014-2015 and £3,000 for 2013-2014 leaves a net figure of £70,000 taxed at 40 per cent resulting in IHT of £28,000 on this gift.

Taper relief is available to reduce the amount of IHT payable. As the transfer was made between four-five years before death 60% of the IHT is payable = £16,800.

The Will Trust was set before 22 March 2006 and as Herbert was entitled to income he had an interest in possession and there is charge to IHT on his death.

Chargeable estate

From Will	£564,000
Settled Property	£1,000,000
Bluebell View	<u>£1,200,000</u>
	£2,764,000

No nil rate band is available as this has already been used up by failed lifetime gifts.

$£2,764,000 \times 40\% = £1,105,600 \text{ IHT in total}$

Apportioning the IHT bill – the estate rate

Estate rate is $\frac{\pounds 1,105,600}{\pounds 2,764,000}$ (total tax bill)
£2,764,000 (total chargeable estate)

Trustees will pay $\pounds 1,000,000 \times \frac{\pounds 1,105,600}{\pounds 2,764,000} = \pounds 400,000.00$

Simon will pay $\pounds 1,764,000 \times \frac{\pounds 1,105,600}{\pounds 2,764,000} = \pounds 705,600.00$

Total tax payable = £1,105,600

2(b)

When we complete the statement of truth for the executor, we need to ensure that he applies in the name of Herbert Fox, but the name Herbie Fox needs to follow as an alias.

We need to explain that Herbert is his true name, but he held bank accounts in the name of Herbie Fox.

To apply for the Grant of Probate the following needs to be sent to the Probate Registry:

The Will, the statement of truth signed by Simon, two A4 photocopies of the Will, the receipted IHT421 and a cheque for £2500 plus a fee for any additional sealed copies required.

Question 3(a)

Executors who have distributed an estate remain personally liable to any unpaid creditor even if they are unaware of the claim at the time of distribution (Knatchbull v Fearnhead (1837)). Section 27 Trustee Act 1925 allows you to protect yourself against such liabilities.

You can give notice of your intention to distribute the estate, requiring any person interested as a beneficiary or creditor to send particulars to you within a stated time which must not be less than 2 months from the date of the notice.

The notice needs to be placed in the London Gazette and also in a local newspaper circulating in Bedford as this is where your uncle owned land. It is also appropriate to place notice in Florida given his many years of living there and running a business there.

You need to do a bankruptcy search against the names of both your uncle and your sister and a search at HM Land Registry for any other charges against the property.

Once the time limit for the notice has expired then you can distribute the estate having regard only claims to which you then have notice and you will not be personally liable to any claimant that subsequently appears if you have no knowledge or notice of them. However, you are not protected as a beneficiary of the estate.

There is a possibility of legal action in America, but at this stage it is only a contingent liability. You could ask the beneficiaries to indemnify you, apply to court for directions or purchase insurance cover against unpaid liabilities. It is likely to prove difficult to obtain insurance cover for the potential American debt as you are already on notice about it.

3(b)

The s.27 notice will not protect you from claims by Jessica as you are aware that she has an entitlement, even though at the moment you cannot find her.

You could pay the money into court, but the money could end up remaining unclaimed.

You could pay out the money to yourself and Salma and obtain an indemnity from Salma that she will return the funds if subsequently necessary. Given Salma's previous difficulties, however, this is a high risk option.

An application can be made to court for a Benjamin order which will give you leave to distribute based on the presumption that Jessica predeceased your uncle. Full enquiries and adverts will need to be placed in Brazil. If Jessica is still alive then you are protected in your role as executor, but Jessica could still seek remedies against you and Salma as beneficiaries. It is possible to obtain insurance cover against the risk of Jessica appearing. It is normally necessary to undertake the same advertisements and enquiries as for the Benjamin order, but this option is usually quicker and cheaper than a court application. Alternatively, a genealogist could be engaged to try and find out what has happened to Jessica, who might work solely on a commission basis.

S27 notices will not protect you against Inheritance Act claims by your uncle's wife or children. If you wait six months after the date of the grant before distributing, then you cannot be held personally liable if leave is subsequently given by the court for an application that proves successful.

(c)

Your uncle's estate is solvent as there are sufficient funds to cover the funeral, testamentary and administrative expenses and pay all the debts.

The mortgage is a secured debt and the value of the property is sufficient to cover the debt. The mortgage will be paid first. There are insufficient assets to pay all the legacies and therefore the unsecured debts are paid from your uncle's property following the order set out in s34(3) AEA 1925.

Total debts and expenses are £188,000.

Property forming residue is the first category applicable and uses up the residuary estate. The next category is the pecuniary legacy fund, £12,000 of the gift to Jessica is used to pay debts and expenses and the balance of £18,000 is left for her.

As there are sufficient assets in the pecuniary legacy fund to cover the value of the watch your nephew Ali Khan will receive the watch outright.

In your role as executor you are entitled to a discharge from beneficiaries who are absolutely entitled to property. This is normally in the form of a receipt

signed by the beneficiary, but a minor cannot give a good receipt, unless the Will specifies otherwise. However, under Children Act 1989, ss3 and s5 a parent with parental responsibility is entitled to receive property including legacies and so can give a good receipt. Neither of Ali's parents may be prepared to give good receipt or Fatima may not trust Salma given her potential financial difficulties. Fatima may decide to keep the watch until Ali is 18 and then hand the watch over. She could also use S42 AEA 1925 to appoint trustees to receive and hold the watch until Ali is 18.

Question 4(a)

Dov could wait for the Caveat to expire in 6 months in the hope that Rebecca (the caveator) will fail to extend her Caveat and he will then be able to apply for a Grant.

To remove the Caveat Dov must enter a warning to the Caveat by applying in post to the Leeds District Registry. The form of the warning is prescribed by Form 4 Sch 1 Non-Contentious Probate Rules (NCPR) 1987 and must state Dov's interest in entering it and require Rebecca as the caveator to state her interest. The warning must state the date of the Will. The warning will require Rebecca to enter an appearance within 14 days of the service of the warning or issue a summons for the Registrar's directions within 14 days.

Two things can happen after the warning has been served. Rebecca may do nothing and once the time limit for entering an appearance has expired Dov can file an affidavit showing that the warning was served and no appearance or summons has been served. The Caveat is then warned off and is no longer effective.

Alternatively, Rebecca may withdraw the Caveat, but cannot do so once an appearance has been entered. Rebecca will need to give notice to Dov if she withdraws the Caveat.

In practice, Rebecca will not be able to enter an appearance nor issue and serve a summons for directions because she has no potential interest in the estate e.g. under an earlier Will, or on intestacy, if the Will is found to be invalid.

(b)

S20 Will Act 1837 states that a Will is revoked if it has been burned, torn or otherwise destroyed by the testator. Here, there has been no act of destruction – merely crossing through the Will is not enough (Cheese v Lovejoy 1877). Therefore, Ezra has not revoked the Will.

An affidavit of due execution will be needed as there is no attestation clause in the Will - the presumption that the will was duly executed does not therefore apply. Under r.12 NCPR 1987 one of the witnesses will need to give an affidavit fully describing the circumstances of execution.

In addition, Dov will need to provide an affidavit of plight and condition in order to deal with attempted revocation, in which he will need to confirm that the Will is in the same condition as when found in the cabinet.

The staple holes give rise to the possibility that some other testamentary document was attached to the Will. Dov will need to state in the same affidavit

that the staple holes were present when he found the Will and that he has searched and found no other testamentary document other than the household contents list.

The household list must be identified by affidavit, but this might be incorporated into the statement of truth used to apply for probate.

4(c)

William holds the £100,000 on trust for Rebecca as she is over 30 years old. S15 Wills Act 1837 does not apply if a witness is also a beneficiary but the witness is holding on trust (Re Young 1951).

It does not matter that Kathleen witnessed the Will as she was not married to Dov at the time of witnessing the Will (s.15 Wills Act 1837).

Rebecca will receive all the household contents listed on the separate document under the doctrine of incorporation. The Will identifies the document and states that the list is already in existence and the list disposes of Ezra's assets.

Ezra has made a class gift to grandchildren. The class is closed because Suzanne is over 21 and so is entitled to call for immediate distribution. This means that only grandchildren living at the date of Ezra's death can inherit under the Will. Living, for this purpose, includes *en ventre sa mere* and so Pinny's twins will be included in the class. As Pinny has not formally adopted Jennifer at the date of Ezra's death she is not included in the class.

S33 Will Act 1837 applies as there is no contrary intention in the Will. As this was a class gift to remoter issue and Andrew predeceased, Louise will join the class and inherit Andrew's share of the estate. The residuary estate will be shared between 12 people in equal shares. It does not matter that Andrew and Louise were both illegitimate. The gift to Andrew was made in a Will made on or after 4 April 1988 and so the reference to "my grandchildren" is deemed to include both legitimate and illegitimate grandchildren and s.33 ignores illegitimacy.

If Bibi is convicted of Ezra's murder, then public policy means that she cannot take any benefit under his Will under the forfeiture rules. S2 Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011 preserves the right of Yonni to receive his mother's share under s.33 Will Act 1837 because Bibi will be treated as dying immediately before Ezra.