

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JUNE 2021
LEVEL 6 – UNIT 14 – LAW OF WILLS & SUCCESSION

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 June 2021 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

On the whole it is felt that the paper performed well with candidates attempting a variety of questions.

Candidates answered Section A stronger than last session. Stronger candidates showed good application to the scenarios in section B.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

Mental capacity is always a popular topic, and it was felt that this session the candidates considered the question rather than writing all that they knew about Banks V Goodfellow.

Question 2(a)

Candidate performance on this question was low. Few mentioned ademption examples and cases such as Re Slater (1907).

(b)

Some excellent answers here with a significant number of candidates achieving high marks.

Question 3(a)

Not a popular question. Answers seen required finer detail and reference to case law.

(b)

Greater discussion of renunciation was required for this question, as well as chain of representation.

(c)

The majority of responses lacked reference to the Trustee Act 2000.

Question 4

Candidate performance on this question was low. Some candidates were not aware of the basic rules for adopted and illegitimate children.

Section B**Question 1**

Some good responses both to the survivorship issue and the class gift.

Question 2(a) and (b)

Many responses lacked application, in particular in 2(b).

(c)

Most candidates discussed S27 TA 1925 notices.

Question 3(a)

Mixed responses with the weaker candidates just reciting the rules without analysing these in the context of the given scenario.

(b)

That said, it was pleasing that most candidates recognised the difference between a solvent and an insolvent estate.

Question 4

Like section A Q1, one of the best answered questions on the paper with some excellent commentary on Illot V Mitson and how this is similar to Tegan's case.

**SUGGESTED POINTS FOR RESPONSES
LEVEL 6 – UNIT 14 – LAW OF WILLS & SUCCESSION**

The purpose of this document 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 2021 examinations. The Suggested Points for Responses 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. Candidates and learning centre tutors should review this document in conjunction with the question papers and the Chief Examiners' reports which provide feedback on candidate's performance in the examination.

Section A

Question Number	Suggested points for responses	Max Marks
Q1	<p>An answer which consists of reasoned evaluation, offering opinion/verdict which is supported with evidence.</p> <p>Responses could include:</p> <ul style="list-style-type: none">• General rule – testator must have mental capacity at the time of execution and• If a Will appears rational on the face of it capacity will be presumed .• Discuss the <u>Parker v Felgate (1883)</u>• Exception whereby the general rule is relaxed if the Will is professionally prepared, and the testator understands that he is signing a Will for which he has previously provided instructions ;• Traditionally the test applied to determine capacity is the decision in <u>Banks v Goodfellow (1870)</u>. This test requires the testator must have understood:<ul style="list-style-type: none">• 1. Nature of document - making a Will to into effect on death	25

	<ul style="list-style-type: none"> • 2. The extent of property, though need not know exact value , • <u>Schrader v Schrader (2013)</u> • 3 The moral claims on his generosity, though he need not recognise those persons if he chooses not to do so • <u>Boughton v Knight (1873)</u> . • Credit additional discussion point • MCA 2005 is a statutory provision that deals with capacity in general • s1 MCA 2005- 2 core principles that a person has capacity unless proven otherwise and • Unwise/spiteful decisions, bad motives do not mean that a person lacks capacity • <u>Fuller v Strum (2002)</u> • s2 MCA 2005 - a person lacks capacity if unable to make a decision due to impairment/disturbance in functioning of mind/brain • But lack of capacity cannot be assumed because of age or other factors • s3 MCA 2005 - being unable to make a decision for himself if he is unable to understand the information relevant to the decision, retain that information, use or weigh that information as part of the process, communicate his decision. • Discuss MCA 2005 being unable to retain information for a short period of time does not mean lack of capacity so being forgetful/early signs of dementia do not mean that a person lacks testamentary capacity • Discuss that MCA 2005 does not supersede Banks v Goodfellow test • <u>Scammell v Farmer</u> • But can complement it - recognition that deep grief can affect capacity to make a will; <u>Key v Key (2010)</u> or <u>Re Wilson (Deceased) 2013</u> • Discuss lucid intervals- person may have a good day at the time of making the Will • <u>(Cartwright v Cartwright (1793))</u>, <u>Richards v Allan (2000)</u>, <u>Simon v Byford (2014)</u> • Discuss delusions - a Will is still valid if delusions do not influence the Will making process If delusion affects only part, e.g., codicil, the remaining parts are still valid • Reasoned conclusion. 	
Total	25 marks	

Question Number	Suggested points for responses	Max Marks
Q2(a)	<p>An answer which consists of reasoned evaluation, offering opinion/verdict which is supported with evidence.</p> <p>Responses could include:</p> <ul style="list-style-type: none"> • A specific gift of a particular item may be given under a Will • But if the subject matter of the gift is no longer owned by the deceased as at the date of death because the subject matter has been sold or destroyed or given away during testator's lifetime this will fail by ademption and the beneficiary will receive nothing. • Discuss that if it is unclear whether testator died first or an item was destroyed first, then the property is held to have perished before the testator • <u>Durrant v Friend (1852)</u> • Discuss ademption and gifts of shares which will only adeem if the stock changes in character • Re Slater (1907), Re Clifford (1912) and Re Lemming (1912) ; • Discuss other types of specific gifts e.g., bank accounts, Re Dorman (1994); life assurance policies <u>Soukun v Hardroyal and Others (1999)</u> • Discuss ademption and contracts or sale - gift adeems even if the contract is not completed until after the testator's death and • Beneficiary only entitled to enjoy property until contract completed unless the contract for sale predates the will, the beneficiary will be entitled to the sale proceeds • Re Calow (1928) or Re Sweeting (Deceased) (1988) • Discuss ademption and an option to purchase. • Where the beneficiary predeceases the testator, the gift will lapse • Although the gift may be saved by a substitutional gift in a Will • If a gift is subject to a contingency e.g., an age contingency and the beneficiary dies before satisfying contingency, then the gift also lapses. • Where gift is made to beneficiaries as tenants in common and the testator outlives a beneficiary that share will lapse, • <u>Page v Page (1728)</u> • The doctrine of lapse does not apply where there is a class gift. • s33 Wills Act 1837 is an exception to the doctrine of lapse where a bequest is made to children or remoter issue who predecease the testator. S33 allows issue of the beneficiary living at the testator's death to take their parents share 	18

	<ul style="list-style-type: none"> • This is subject to contrary intention in the Will • Rainbird v Smith . 	
Q2(b)	<p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant law provisions (3) • Discussion around the above with analysis (3) • A reasoned conclusion <p>Responses could include:</p> <ul style="list-style-type: none"> • Courts apply the presumption that an alteration was made after execution and is therefore not valid • Unless it is attested by both testator's and witnesses' signatures or initials S21 Wills Act 1837 • Reference to In the Goods of Blewitt (1880) · The presumption does not apply if the alteration was filling in a blank space on the original document • As in Cooper v Bockett (1846) • An obliteration occurs where the original wording is not visible and cannot be read by natural means • Re Itter (1950) • Scientific non-natural means are not permissible to determine the original wording • One exception to this is conditional revocation whereby testator only intended to obliterate the original wording based on the presumption that the new wording would apply • If replacement wording is not visible non-natural means or scientific means may be used to decipher the original wording <p>Another exception is unintentional obliteration whereby the words are obliterated by accident such as a drink spilled on the words in the will</p>	7
Total		25 marks

Question Number	Suggested points for responses	Max Marks
Q3(a)	<p>An answer which consists of reasoned evaluation, offering opinion/verdict which is supported with evidence.</p> <p>Responses could include:</p> <ul style="list-style-type: none"> • An executor takes their authority from the Will, but a Grant of Probate is required to confirm their authority . • The appointment is a personal one and cannot be assigned. • The appointment does involve responsibilities which some may not wish to take on due to lack of time/knowledge . • Examples: • If a person acts in the estate without a grant, they are deemed to have accepted the role of executor . • An executor who acts in this way without authority is an executor de son tort . • Examples of what constitutes intermeddling such as collecting assets or paying debts . • Trivial acts or acts of kindness do not constitute intermeddling • Acts such as settling funeral account or caring for deceased's pets • Re Biggs (1966), Re Stevens (1897) <u>Pollard v Jackson (1994)</u> or <u>Holder v Holder (1968)</u> • Executor de son tort is liable to the extent of the assets they have received • but as a defence can plead they have acted as a PR would have done 	11
Q3(b)	<p>Responses could include:</p> <ul style="list-style-type: none"> • In this case an Executor may renounce probate, but renunciation is not final until it is filed in the Principal or District Probate Registry. • Renunciation does not preclude person from applying for a grant of administration in another capacity such as a creditor unless the court determines otherwise • An executor can change their mind re renunciation, but consent of court is required to retract renunciation, reference to R37 NCPR 1987 & • Court will only consent if to do so would benefit the estate • Credit for either of Re Gill (1873) or Re Stiles (1898) • An executor cannot accept one appointment but then renounce others (2) • Under the chain of representation (explain) • Although can renounce as executor of both estates, and then applying as an administrator in the second estate • Re Toscani (1912) 	9

Q3(c)	<p>Responses could include:</p> <ul style="list-style-type: none"> • Executors are entitled to reimbursement for all reasonable expenses that they incur . • But they cannot charge for performing their duties unless the will includes a charging clause . • Professionally drafted wills will contain a charging clause • S28 (2) TA 2000 permits trustees to charge for work that could have been done by a lay trustee • Before TA 2000, charging clause was treated as a gift to the trustee but this restriction has now been removed • S31 TA 2000 S29 TA 2000 provides that in the absence of a charging clause a professional trustee may claim reasonable payment if the other trustees consent in writing • Courts have inherent jurisdiction to award payment to a trustee who has done work over and above what was contemplated • Even where the trustee charging clause is inadequate • Re Duke of Norfolk Settlement Trust (1982) 	5
Total		25 marks

Question Number	Suggested points for responses	Max Marks
Q4	<p>An answer which consists of reasoned evaluation, offering opinion/verdict which is supported with evidence.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • Any gifts to adopted children in a Will are now governed by the Adoption and Children Act 2002 (ACA 2002) • Applies to adoption orders made by UK courts or courts in the Isle of Man or Channel Islands and certain overseas adoptions • Under S67 adopted child is treated as child of his adoptive rather than his biological parents • S4 Inheritance and Trustees' Powers Act 2014 has repealed s67 and now provides that the child may inherit from natural parents if they died leaving a contingent interest . • This applies both under will and the intestacy rules • ACA 2002 contains rules of construction where a gift to an adopted child depends on a date of birth • The gift is to be construed as if adopted child had been born at the date of adoption • Any children adopted after the testator's death will not inherit • Class closing rules apply in the same way for both natural and biological children 	25

	<ul style="list-style-type: none"> • A contingent gift to an adopted child at age 21 is construed by reference to the age of that child rather than the date of adoption • Although the Will can show contrary intention to ACA 2002 , • Hardy v Hardy and Another (2013) • Before 1970, the common law rule was that prima facie an illegitimate child could not inherit. • Following consultation re children born outside marriage the position was changed to reflect changes in society. • Legitimated children who are children born outside marriage but whose parents subsequently marry ; any gifts are to be construed as if the child was born on the date of the parent’s marriage • Legitimacy Act 1976 • Illegitimate children are entitled in same way as legitimate children and can Inherit under a will and under intestacy • Family Law Reform Act 1987 (FLRA 1987) provides that the parents are treated as if they were married in order that the child may inherit under the intestacy rules, s46 AEA 1925 • Similarly, a child en ventre sa mere at the date of death of the deceased may inherit in the same way as a child alive at the date of the intestate’s death. • In order to protect themselves against the risk of the existence of illegitimate children of whom they not be aware personal representatives should place legal notices under s27 Trustee Act 1925. • Reasoned conclusion 	
	Total	25 marks

Section B

Question Number	Suggested points for responses	Max Marks
Q1	<p>An answer which consists of reasoned analysis, offering opinion/verdict which is supported with evidence.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • The commorientes rule applies where two or more persons who leave property to each other, die together but the order of their deaths is uncertain . • It applies whether the persons who have died die testate or intestate . • s184 Law of Property Act 1925 • States that in these circumstances the younger shall be presumed to survive the older • The slightest degree of uncertainty is all that is required to invoke this presumption and • The burden of proof is the balance of probabilities • <u>Hickman v Peacey (1945)</u> or <u>Lamb v Lord Advocate (1976)</u>. • However, application of the presumption can be avoided by including a survivorship clause in the will. • Oliver and Sophia have died simultaneously in a common accident • And Sophia’s will include a survivorship clause which stipulates survivorship by 28 days • Did he die before her? Depends on their ages – unknown. • If Oliver older, then will have pre-deceased • Victor will inherit under Sophia’s will • If younger, Oliver will have survived but not by 28 days, so Clause 4 does not apply. • A partial intestacy will occur in Sophia’s estate • s46 AEA 1925 order of entitlement applies - spouse, children • Victor will inherit from Sophia on intestacy as her son. • Credit analysis of Oliver’s will – if Oliver younger than Sophia then Royal Society for Soldiers Sailors and grandchildren will inherit and grandchildren if i.e. Oliver's will stands in full. • Credit if Oliver older than Sophia. (i.e. she survives him) a partial intestacy will occur as Clauses 4 and 5 will not apply and Victor, not the charity, will inherit the residue. <ul style="list-style-type: none"> • Gift to the grandchildren will not be affected by issue of who died first . • A class gift is a gift to a group of beneficiaries whose number may change by the time of distribution 	25

	<ul style="list-style-type: none"> • <u>Pearks v Moseley (1880)</u> • Those members of the class who survive the testator and meet any contingency that may be stated will inherit. • Class closing rules are used to interpret the will and deal with a number of situations. • Gift to grandchildren is a class gift • As the size of each child's share will be determined by the total number of children who are alive at the date of Sophia and Oliver's death and who meet the contingency that is "attain the age of 21." • Here the gift is an immediate contingent legacy to the grandchildren • Class closes at the dates of the respective deaths of Oliver and Sophia since there are beneficiaries who have satisfied the contingency • <u>Andrews v Partington (1791)</u>. • Legacies will be paid from each estate. • If Peter, the youngest grandchild fails to attain the contingency, his share will fail and will fall back into the residue of the respective estates 	
	Total	25 marks
Question Number	Suggested points for responses	Max Marks
Q2(a)	<p>An answer which consists of reasoned analysis, offering opinion/verdict which is supported with evidence.</p> <ul style="list-style-type: none"> • S25 AEA 1925 imposes the duty to collect and get in the real and personal estate of the deceased and administer it according to law. So, an Executor's • duties are: • To collect and preserve the assets of the estate • Settle the debts and liabilities incurred by testator during his lifetime • Distribute the estate to those legally entitled • An executor should be aware that not all property devolves under the will e.g., joint tenancy, life interest, donatio mortis causa, life policies, foreign policy • Collect and preserve the assets Nicholas will have to ensure that all the properties owned by Rafael are insured and maintained pending sale . • He is also be able to continue managing these properties pending sale • Re Crowther (1895) . 	9

	<ul style="list-style-type: none"> • When the properties are sold, he must obtain the best possible sale price for the estate • Payment of funeral expenses, testamentary and administration expenses –Nicholas must pay 	
Q2(b)	<ul style="list-style-type: none"> • But is only responsible for liabilities arising from obligations entered by the deceased • Homer’s Devises Case (1852) • Debts must be paid promptly Re Tankard (1942) • Debts that carry interest must be paid first • If unenforceable debts are paid the Executor is liable. • Limitation period for actions in contract or tort is six years; twelve years in relation to land and covenants • Nicholas is liable in a personal capacity for the bills attributable to “The View with effect from the date of Rafael’s death • Since the gift is a specific legacy • Bothamley v Sherson (1875) • Payment of Inheritance Tax - Nicholas is responsible for payment of Inheritance Tax to HMRC. • Can be held personally liable for any inheritance tax due • IRC v Stannard 1984 • S1 TA 2000 imposes a duty to exercise such care and skill as is reasonable in the circumstances. 	10
Q2(c)	<ul style="list-style-type: none"> • PRs should consider S27 TA 1925 notices to protect themselves against claims against the estate • This means advertising in the London Gazette and in the newspaper local to where the deceased lived • Time limit of at least two months’ notice for claims must be specified S27 • notices provide protection against claims by unknown creditors, and beneficiaries . • Will be important here given that there are 10 investment properties • PRs are not obliged to distribute the estate until the normal executor’s year has expired 	6
Total		25 marks

Question Number	Suggested points for responses	Max Marks
Q3(a)	<p>An answer which consists of reasoned analysis, offering opinion/verdict which is supported with evidence.</p> <p>Responses could include:</p> <ul style="list-style-type: none"> • Definition of solvent estate and • Identify Gary's estate is solvent . • Secured debts take priority over unsecured debts. • Where a property is bequeathed and is subject to a mortgages the beneficiary is responsible for the payment of the debt unless there is a contrary intention • S35 Administration of Estates Act 1925 the gift of the flat under the Will is "free of mortgage" which is a contrary intention , • But as there are insufficient other funds in the estate to meet the debt Louise will take the property subject to the mortgage, lender can enforce the secured debt of £23,700 against the property • Re Birmingham, <u>Savage v Tannard</u> (1959) Re Fegan (1928) • Payment of the funeral expenses of £4,000 should be considered next, and then the unsecured debts • Where the will does not state how unsecured debts are to be paid, the assets must be used in the order in S34 Administration of Estates Act 1925. • The remaining assets will be required to pay the funeral expenses • Leaving no funds to cover the unsecured debts of £34,500 • Gift to Louise will have to also bear the burden of the unsecured debts • Edward will receive nothing as there is no fund to pay the pecuniary legacies • Harry will receive nothing as there is no residue 	11
Q3(b)	<p>Responses could include:</p> <ul style="list-style-type: none"> • Definition of insolvent estate • Insolvency Act 1986 (IA 1986) and • Administration of Insolvent Estates of Deceased Persons Order 1986 (AIEDPO 1986). • Bankruptcy order of priority cannot be varied by Will • s25 AEA 1925 • Breach of duty to pay a debt of a lower class before that in a higher class and • PR's would in this instance be personally liable • Funeral expenses take priority so the other assets of £4,000 will be used to discharge the funeral invoice for the same amount . 	14

	<ul style="list-style-type: none"> • Secured debts are paid first - mortgagee will receive £23,700 in full • Other unsecured debts totalling £60,840 will rank equally but there is a shortfall of £4,540 as total liabilities exceed assets • So unsecured debts will not be paid in full and will abate proportionately according to value • PRs must not show any preferences to creditors within the same category • Although if PRs pay a debt in good faith without reason to believe that the estates were insolvent, then they would not be liable to other creditors in the same class • s10 (2) AEA 1971 • This protection to the PRs is not relevant here as there was reason to expect that there may be other debts in the estate • Harry as PR should therefore, from his brother's death have administered the estate as if it were insolvent 	
Total	25 marks	

Question Number	Suggested points for responses	Max Marks
Q4	<p>An answer which consists of reasoned analysis, offering opinion/verdict which is supported with evidence.</p> <p>Responses should include: In order to succeed in a claim under I(PFD)A 1975 the applicant must show that:</p> <ol style="list-style-type: none"> 1 Deceased died domiciled in England and Wales. 2 Locus standi within one of categories of S1 I(PFD)A. 3 There was a failure to make reasonable provision. <ul style="list-style-type: none"> • Normal time limit of lodging a claim within six months from the date of issue of the Grant of Probate • Court must decide whether the will failed to make reasonable provision, and if so, what is reasonable provision • The standard of provision to be considered here is the maintenance standard i.e., such financial provision would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance • Applied subject to various principles (examples) • And common guidelines (examples) • Freya was domiciled in England and Wales as at the date of her death as shown by her owning a house in England • Tegan falls within one of the six categories of persons able to bring a claim under the Inheritance Provision for Family & Dependants Act 1975, as a child of the deceased, s1 (c) I(PFD) A 1975 • Tegan is an able-bodied adult and Freya did not owe her a special moral obligation • Re Coventry (1979) • Re Abraham (Deceased) 1996, Re Jennings (1994), Re Hancock (Deceased) (1988), <u>Espinosa v Bourke</u> (1999) Re Nahajec (Deceased)(2017) • More recently courts take a wider view of what constitutes a moral obligation towards a child • <u>Ilott V Mitson</u> (2015) • Ilott has emphasised that a child does not have an automatic entitlement but must prove his or her case • It was not Tegan's fault that she had no contact with her mother • Freya's reasons for not providing for her daughter are not relevant but the impact of this on her daughter in the level of award is • Court would consider the effect of any award on Tegan's future entitlement to state benefits • An increased sum could be awarded from the estate to enable Tegan and Winton to buy the flat they are renting 	25

	<p>which would improve their lifestyle/make them less reliant on state benefits</p> <ul style="list-style-type: none"> • Size of the estate would justify this • Xavier could claim as a person maintained by the deceased under s1 (e) I (PFD) A 1975 • as Freya was making a substantial contribution to Xavier’s reasonable needs immediately before her death by paying for his accommodation fees whilst he is studying <p>Considerations include financial needs and resources of</p> <ul style="list-style-type: none"> • Xavier who is a student, obligations and responsibilities of Freya who has undertaken to support Xavier and the size of the estate. • Kendell might claim as a person being partially maintained under s1 (e) I (PFD) A 1975 • Discussion of whether Kendell may claim as a cohabitee (1ba) • Considerations would include his financial resources and needs he has his own flat and a good pension but has physical needs owing to his arthritis • The long-standing nature of their relationship would be considered as it could be said to show Ethel accepted some moral obligation to provide for him in his failing health • <u>Stephanides v Cohen (2002)</u> • The residuary legatees are charities who depend heavily on legacies and are prejudiced by any award to a claimant and are likely to fight their case, 	
	Total	25 marks