LEVEL 6 - UNIT 14 – LAW OF WILLS AND SUCCESSION
SUGGESTED ANSWERS – JANUARY 2017

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide students and tutors with guidance as to the key points students should have included in their answers to the January 2017 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 students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

Students and tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' reports which provide feedback on student performance in the examination.

SECTION A

Question 1

To assist the court in deciding whether a testator has testamentary capacity to make a will, a set of principles were laid out in Banks v Goodfellow (1870). These principles became known as the rule or test in Banks v Goodfellow. First, the testator must understand the nature of his act and its effects. Second, the testator must understand the extent of his property and, third, be able to understand and appreciate the claims to which he ought to give effect. Lastly, no disorder of the testator's mind "shall poison his affections, pervert his sense of right, or his will in disposing of his property."

Although the testator must be able to recall the property he owns, there is no need to have a precise recollection, it only being necessary for the testator to have a broad understanding of the extent of his property, as illustrated in cases such as Wood v Smith (1993) and Schrader v Schrader (2013).

Although the testator should understand the moral claims upon him, the testator may still "disinherit … the children, and leave property to strangers in order to gratify spite, or to charities to gratify pride", as stated in Boughton v Knight (1873). This is now subject to statutory restraints placed upon the testator such as the Inheritance (Provision for Family and Dependants) Act 1975. Consequently, as stated in Fuller v Strum (2002), a will can still be upheld even though the testator was moved by capricious, frivolous, mean, or bad motives.

The rule in Banks v Goodfellow is significant because the court holds that there is a standard of 'morality' to which most testators ascribe, and if the expected natural affection is displaced by an 'insane delusion', the testator is held to be of unsound mind.

The court has continued to apply the rule in Banks v Goodfellow to determine whether a person has testamentary capacity to make a will. The Mental Capacity Act 2005 (MCA 2005) deals with a person's mental capacity to carry out acts, and since it came into force in 2007, there has been debate as to whether or not the statutory test contained in that Act has replaced the common law test in Banks v Goodfellow.

In Scammell v Farmer (2008), the court followed the test in Banks v Goodfellow. However, in Key v Key (2010), where an elderly testator changed his will shortly after the death of his wife of 65 years, the court was unable to find any case law dealing with the effect of bereavement on testamentary capacity. Consequently, the court said that the test in Banks v Goodfellow must now be applied to accommodate this factor. The court therefore appeared to be extending the rule in Banks v Goodfellow. A similar point arose in Re Wilson (Deceased) (2013).

More recently, in Walker v Badmin (2014) the court had to consider whether the test in Banks v Goodfellow had been superseded by the statutory test, or what their interaction should be. The court came to the view that the "correct and only test" for testamentary capacity is that in Banks v Goodfellow. In Simon v Biford (2014) the court came to the same conclusion. Consequently, notwithstanding the provisions of the MCA 2005, the rule in Banks v Goodfellow remains the only test for determining testamentary capacity.

The rule in Parker v Felgate (1883) is concerned with the testator's capacity at the time the will is executed. The rule applies where a testator lacks mental capacity at the execution of his will, but he is capable of understanding and does understand that his solicitor prepared the will according to his instructions, and given that he had mental capacity at that time. Of course, the will must contain the testator's instructions.

The rule in Parker v Felgate is useful in a situation where the testator's capacity deteriorates after giving instructions. The rule was extended in In the Estate of Wallis (1952) to apply to a will drafted by a solicitor in accordance with a client's written instructions. However, in Battan Singh v Amirchand (1948), the court warned that the rule in Parker v Felgate should be applied cautiously, especially where a testator was relying on a third party to convey his instructions to the solicitor

More recently, the rule in Parker v Felgate was considered in Perrins v Holland Others (2010). The testator had given instructions in April 2000 and only executed the will in September 2001, by which time he lacked capacity. Nonetheless, the rule was approved and the preference of the court to uphold transactions was confirmed and the will was held to be valid. Consequently, although the rule in Parker v Felgate is still relevant, it is treated with caution where a third party has been involved in giving instructions on behalf of the testator to the solicitor.

Question 2(a)

A donatio mortis causa (dmc) is a gift which becomes absolute only on death and it remains revocable until death. It does not have to comply with the rules contained in s9 Wills Act 1837 (WA 1837). This is because a person who is close to death may not have the opportunity or time to have a formal will prepared and executed.

There are three requirements for a dmc to be valid. First, the donor must be contemplating his impending death. This means the donor should be contemplating death in the near future for a specific reason, such as an impending operation. Importantly, the donor must have good reason to anticipate death in the near future from an identified cause. The gift will lapse automatically if the donor does not die soon enough.

In Wilkes v Allington (1931), although the donor knew that he was dying from cancer he died from pneumonia. The court decided the gift was still valid. Other examples include Re Cravens Estate (No 1) (1937), Birch v Treasury Solicitor (1951), Re Lillingston (1952) and Sen v Headley (1991)

Second, the gift is conditional on the donor's death. The requirement is that the gift must be made under circumstances, which show that the subject matter of the gift is to revert to the donor if he recovers. In cases where early death is inevitable, the law relaxes this requirement. If property is handed over during the last days of a donor's illness, it is more likely to be treated as a dmc, as in Gardner v Parker (1818).

Third, the donor must deliver "dominion" over the subject matter. Dominion can mean physical possession of the subject matter or some means of accessing the subject matter, such as a key to a box, or documents evidencing entitlement to possession of the subject matter. Examples include Woodard v Woodard (1995), and Vallee v Birchwood (2013).

In King v Chiltern Dog Rescue and Redwings Horse Sanctuary (2015), the court considered the doctrine of dmc and stated that it is open to abuse and so strict proof of compliance with the three requirements is essential. The court emphasised that a dmc has distinct risks and can easily lead to fraudulent claims. It enables a donor to transfer property upon his death without complying with any of the rules in s9 WA 1837, thereby paving the way for all of the abuses which the statute was intended to prevent.

In giving his Judgment, Jackson LJ expressed mystification over why the common law has adopted the doctrine of dmc at all. Although it served a useful purpose previously, it serves little useful purpose today, except possibly as a means of validating deathbed gifts. Although a will may have been prepared with the assistance of a solicitor and in the absence of the beneficiaries, there are no such safeguards during a deathbed conversation. The words in a will are plain to see, but there may be scope for disagreement about what the donor said to those visiting him in his final hours of life. Consequently, the court stressed that dmcs must be kept within their limitations.

The court stated that Vallee v Birchwood was wrongly decided due to the length of time the between the donor making the gift of his house to his daughter, namely four months, until his death. It said that the donor had ample opportunity to take advice and make a will, and although the donor was elderly and appeared to be in poor health, he was not anticipating death from any known cause. Consequently, the court is promoting its preference for wills executed in accordance with the statutory rules rather than upholding dmc's which bypass the safeguards provided by those rules.

Question 2(b)

A document is not admissible to probate if it does not comply with the formal requirements of s9 WA 1837. However, a testator may include the terms of another unattested document as part of the will which has been duly executed. The doctrine of incorporation by reference permits the admission of such documents provided that three requirements are met. These requirements are strictly applied if incorporation of the unexecuted document is to be allowed.

First, the document must already be in existence when the will is executed. If the document comes into existence after the will is executed, but before the execution of a codicil confirming the will, this requirement is satisfied because the will is treated as having been re-executed at the date of execution of the codicil.

Second, the document must be referred to as being already in existence when the will is executed. If the document comes into existence between the execution of the will and a codicil, this requirement is only satisfied if the will refers to the document as being in existence, as in In the Goods of Smart (1902). In University College of North Wales v Taylor (1908) a testator made a gift by will which was conditional on compliance with "any memorandum found in my papers". As this could refer to a document not in existence at the date of the will, the document had not been validly incorporated. A similar decision was reached in Re Bateman's Will Trust (1970) where the will referred to "such persons as shall be stated".

Third, the document must be described in the will in sufficient detail to enable it to be identified. If the identification is vague, then it will not be incorporated, an example being In the Goods of Garnett (1894).

Incorporation can avoid filling a will with long lists and enable a testator to include items in a separate document. Although this may be more convenient, the terms of the incorporated document, like the will itself, will be open to public scrutiny. Consequently, incorporation by reference does not enable the contents of that document to be kept secret. As there are strict requirements for incorporation of a document, it seems that the formalities in s9 WA 1837 are not necessarily undermined.

Question 3

Specific legacies

A specific legacy is a gift of an existing item from the assets of the testator. It is a gift of a specific thing, such as, for example, "my wedding ring". The gifted item must have belonged to the testator and be a specified part of the estate, or be distinguishable from the remainder of the estate. A specific legacy is identified by the possessive prefix "my" although this is not conclusive.

Examples of cases include Bothamley v Sherson (1875) where there was a gift of "all my shares or stock in the Midland Railway Company." Other examples include Re Willcocks (1921), Re Gage (1934), and Re Rose (1949).

It is the construction of the will which determines the type of legacy, and the court leans against construing legacies as specific, and if there is a doubt, prefers to construe them as general. The purpose of this is to try to allow the gift to take effect rather than for it to fail.

A specific gift fails by ademption if the subject matter of the gift no longer forms part of the testator's property at the date of death. In Re Clifford (1912), a will included a legacy of "twenty-three of the shares belonging to me" in X Co Limited. The company had changed its name prior to the testator's death and had subdivided each share into four £20 shares. So, the testator held 104 £80 shares in XA Co. The court decided it was a change in form and not a change in substance. Consequently, the beneficiary took the shares which represented those originally given by the testator, namely 92 £20 shares. Other examples of cases concerning the ademption of specific legacies include Re Slater (1907), Re Dorman (1994), and Soukun v Hardoyal and Others (1999).

Abatement of specific legacies occurs where the estate is insufficient to pay all the liabilities. The order of payment between the beneficiaries is regulated by s34 and Part II Sch 1 Administration of Estates Act 1925. If there are insufficient assets to pay the liabilities, the legacies in each class are reduced proportionately, and general legacies abate before specific legacies.

A specific legacy which takes effect immediately on death carries all income and profits from the date of death, as in Re West (1909). If the specific legacy is contingent or specific, s175 Law of Property Act 1925 provides that it will carry the intermediate income unless the will provides otherwise.

General legacies

A general legacy is a gift of no particular thing, but something which is to be provided from the estate. The subject matter may or may not form part of the testator's property at the time of death. If the latter, the personal representatives must purchase the equivalent asset or offer the beneficiary the equivalent in money. An example would be "I give 1000 ordinary shares in ABC plc to my daughter."

It follows that a general legacy cannot fail by ademption. Using the example of the gift referred to previously, it is immaterial whether the testator has at the time of death, shares in ABC plc. It is the subject matter of the general legacy that must be provided by the personal representatives out of the testator's general estate. As previously stated, general legacies abate before specific legacies.

Interest on general legacies runs from the time they are payable, normally at 0.3% per annum from one year after the testator's death, unless the will states otherwise. Interest on a general legacy will run from the date of death in four cases. The first is where a testator gives a legacy to a creditor in satisfaction of a debt. The second, is where a vested legacy is charged only on real property although this will not apply where the legacy is payable from the proceeds of sale of real property where a trust for sale is imposed. Third, where a legacy is given to an infant child of the testator, the purpose being to provide maintenance for the child, although this rule does not apply where the testator made specific provision for the child's maintenance in the will. Fourth, where a legacy shows an intention to provide for the maintenance of an infant beneficiary.

Demonstrative Legacies

A demonstrative legacy is a hybrid because it is in the nature of a general legacy which is directed to be satisfied out of a specified fund, as stated in Ashburner v Maguire (1786). An example would be "£1,000 out of my National Building Society account."

If the specified fund is sufficient, then the legacy is treated as specific, whereas if it is insufficient, it is treated as a general legacy. Consequently, it cannot fail by ademption and a demonstrative legacy abates rateably with general legacies. Consequently, the legatee of a demonstrative legacy is in the best of positions.

Interest on demonstrative legacies runs from the time at which it is payable, normally at the end of the executor's year, unless the will states otherwise.

Pecuniary legacies are gifts of money and are usually general, although they can be specific or demonstrative.

Question 4

Section 24 Wills Act 1837 (WA 1837) sets out the rules for construing how gifts in a will should be applied. The date from which a will speaks is a question of construction. Section 24 states that a will is to be read and takes effect as if it had been executed immediately before the death of the testator when considering any gifts of real or personal property referred to in the will. However, when identifying or describing the beneficiary, normally the will speaks from the date when it was made. It is important to note that these rules are subject to a contrary intention contained in the will.

In the absence of a contrary intention, property acquired after the date of the will passes under a devise or bequest in the will. An example is in Re Kempthorne (1930), where "all my freehold land" passed the freehold land that the testator owned at death and not just that at the time the will was made. The same principle applied in Re Evans (1909) and Re Bancroft (1928).

As a gift of residue clearly means residue at the time of death, it might seem that s24 WA 1837 has no application to general or residuary legacies. However, it can apply to general legacies in situations where, for example, there is a legacy of a specific number of shares in a named company and that company has subsequently been reorganised and has issued new shares to replace the previously issued share. The effect of s24 WA 1837 is, prima facie, to give the same number of new shares to the legatee because they are described as at the date of death. Section 24 WA 1837 also applies to specific shares, so that if a testator gives all his shares in a company to a legatee then that legatee is entitled to receive all the shares that the testator owned in that company at the time of his death.

Section 24 WA 1837 specifically states that the contrary intention must appear in the will itself. There may be difficulty in determining when a contrary intention appears due to a reference, for example, to the present time, or a detailed description of the gift. Consequently, the court has had to interpret the language used by the testator indicating the present time, where, for example, the word "now", has been used as this can amount to a contrary intention because it suggests the date of the will. Examples include Wagstaffe v Wagstaffe (1869), Re Edwards (1890) and Re Willis (1911).

The courts have also had to interpret the language used by the testator when giving a detailed description of the property being gifted. If the gift has been described with such particularity as to show that the testator intended to designate an object in existence at the date when the will was made, this would amount to a contrary intention, and so s24 WA 1837 does not apply. In Re Sikes (1927) the testator bequeathed "my piano" to a friend. By the time of her death she had sold her original piano and acquired another piano. The court decided

that the replacement piano was not included in the gift because there was a contrary intention shown through the use of the word "my". Another example is Re Gibson (1866). These cases appear to say that no specific legacy, other than a specific generic legacy will survive ademption due to s24 WA 1837. Consequently, a gift of, for example, "my car", will be adeemed where the testator has replaced the car by the time of his death.

A problem arises where a testator acquires a different interest in the property gifted at a later date. In Re Fleming's Will Trusts (1974), the testator made a gift of "my leasehold house…", of which the testator was the lessee at the date of his will, but he later acquired the freehold reversion. The court decided that the gift passed the testator's entire interest in the property at his death. Simply stating the interest in the land the testator held at the date of the will does not amount to a contrary intention and, consequently the beneficiaries took the freehold reversion.

Section 24 WA 1837 does not affect the construction of a will with regard to the object of a gift, so the will speaks from its date as to the object of a gift subject to any contrary intention. For example, a beneficiary referred to as "my sister's husband" is taken as the person answering the description at the date of the will. Examples include Re Whorwood (1887) and Re Daniels (1918). It should be noted that this rule does not apply to a class gift.

Section 34 WA 1837 provides for the republication of a will by re-execution or by a codicil to the will. If a codicil is to republish the will then it must contain some reference to the will. The confirmed will is treated as operating from the date of the codicil so far as the subject matter of the gift is concerned, subject to any contrary intention. Similarly, republication means the will speaks from the date of the codicil as to the beneficiaries of the gift, again subject to any contrary intention.

In Re Reeves (1928), a testator made a will giving "all my interest in my present lease" to his daughter. At the date of his will the testator held a lease due to expire in 1924. The testator subsequently took out a new lease for a term of 12 years, and by a codicil made in 1926 confirmed his will. The court decided that the daughter was entitled to the new lease because the testator had confirmed his will. In Re Hardyman (1925) a gift was made by will to the wife of X. The testatrix confirmed the will by codicil after she knew that X's wife had died. The court decided that the subsequent wife of X was entitled to take the gift.

SECTION B

Question 1 (a)

The will of Lawrence was known to be in his possession, but as it cannot now be found despite a thorough search, the presumption arises that he has destroyed it with the intention of revoking it, as in Welch v Philips (1836). The presumption is stronger because of the care Lawrence took to ensure the security of his papers. There is no evidence to rebut the presumption as there was in Sugden v Lord St Leonards (1876), where a number of persons had access to the key kept by the testator to the box containing his will and personal documents.

As Lawrence has died intestate, his assets become subject to a statutory trust under s33 Administration of Estates Act 1925 (AEA 1925). His personal representatives hold and distribute the estate on the "statutory trusts" referred

to in the order of entitlement under s46 AEA 1925 as amended by Inheritance and Trustees' Powers Act 2014. Priority is given to any surviving spouse or civil partner followed by any issue, parents, brothers and sisters of the whole blood, brothers and sisters of the half blood, followed by remoter relatives.

Section 47 AEA 1925 defines the meaning of the "statutory trusts" as including the class of relative to whom it applies, together with the issue of the relative in question if that relative has predeceased the intestate. If the deceased person had more than one child who was entitled on intestacy, the deceased person's share of the estate is divided per stirpes (in equal shares). A child who is unborn at the date of death, but is later born alive, is known as a child *en ventre sa mere.* Consequently, if the relative in question has predeceased the intestate, then the children of that relative step into the deceased parent's shoes and inherit the parent's share of the estate.

It is important to note that shares due to children (or their issue), are contingent on them attaining the age of 18 years or marrying or forming a civil partnership earlier. Consequently, if a child survives the intestate but dies before attaining 18 years, his share will devolve as if he no longer existed. However, an exception is provided by s3 Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011 (EDP (FRLS) A 2011). Under s3, if the beneficiary in question dies after the intestate without having attained a vested interest but leaves issue, then the beneficiary is, nonetheless, treated as if he had predeceased. Consequently, his issue can take his share under the statutory trusts in the same way that they would have done if the beneficiary predeceased the intestate.

Applying the above principles to Lawrence's relatives, he had no surviving spouse, child, or parents. Although his brother Ralph and sister Yvonne predeceased him, they have surviving children and they will take their deceased parent's share of the estate. As Sharon is a sister of the half blood, she is in a lower class of relative and does not benefit from her brother's estate. Verity, Joe, Phoebe and Fiona are not entitled to share in Lawrence's estate, as they are not his blood relations.

The children of Ralph, Gareth, and Kevin, are entitled to share in the estate, but as Gareth predeceased Lawrence, Celine and the child *en ventre sa mere* will take Gareth's share per stirpes. This is subject to the contingency that they both attain 18 or marry or form a civil partnership earlier. They will each receive a one eighth share. Kevin will be entitled on attaining 18 or if he marries or forms a civil partnership earlier. It does not matter that he is adopted because he is treated as a child of Ralph under s67 Adoption and Children Act 2002. He will be entitled to a one quarter share.

As Yvonne predeceased Lawrence, her children Ben and Ethan take her share per stirpes. As Ben is 22 years of age, he takes a vested interest and is entitled to a one quarter share now. It does not matter that he is illegitimate because he is entitled to his share under s14 Family Law Reform Act 1969 and s18 Family Law Reform Act 1987.

Ethan has survived Lawrence, but subsequently died having failed to attain a vested interest because he did not attain 18 years of age or marry or form a civil partnership earlier. However, s3 EDP (FRLS) A 2011 applies and he is treated as having predeceased Lawrence, with the result that Natasha will take her one quarter share on attaining 18 years of age or marrying or forming a civil partnership earlier.

Question 1(b)

As Lawrence died intestate, the order of entitlement to a grant of letters of administration to his estate is governed by r22 Non-Contentious Probate Rules 1987. This provides that it is the surviving spouse or civil partner who is entitled to take out the grant in the first instance, followed by any children (or their children if the child has predeceased the deceased), parents, brothers and sisters of the whole blood (and their children if they have predeceased). They are followed by brothers and sisters of the half blood and their children if they have predeceased, followed by more distant relatives.

Two administrators will be required to take out the grant due to the various minority interests which arise due to the beneficiary's ages. The court prefers an adult to take out a grant of representation in preference to a minor. It also prefers a living person as opposed to the personal representatives of a deceased person.

As Ben is the only beneficiary of full age, he should take out the grant. As two administrators are required, he should take out the grant either with Verity or Phoebe on behalf of Kevin and Celine (for their use and benefit), or possibly Joe on behalf of Natasha.

Question 2

Tony's estate is solvent because there are sufficient assets to pay all the debts and liabilities. However, Tony's will does not include full directions from which part of his estate they are to be paid. Daniel should, firstly, be advised to consider the debts secured on the two properties owned by Tony. Secondly, he should then consider the incidence of the unsecured debts.

Section 35 Administration of Estates Act 1925 (AEA 1925) states that when a person dies owning property that is subject to a secured loan or debt, it is the recipient of that property under the will who assumes responsibility for repaying the loan or debt. Consequently, Daniel should be advised that it is his responsibility to pay the mortgage on the house in Bedford gifted to him by his father. It should be explained to him that although he is not personally liable to pay the mortgage debt, the lender could force a sale of the house if he did not repay the mortgage.

It is important to appreciate that s35 AEA 1925 is subject to a contrary intention shown by the testator. In his will, Tony gifts the flat in Llandudno to his daughter Lucy "free of mortgage". This is an example of a contrary intention and means that she does not have to be responsible for the payment of the mortgage on the flat. The responsibility for payment falls upon Tony's estate as the mortgage is treated in the same way as the other unsecured debts. Again, if the mortgage is not paid, the lender can force a sale of the flat.

Because the mortgage of £40,000 on the flat in Llandudno is to be paid out of Tony's estate, the debts and liabilities of the estate will amount to £90,000. The legacies under clauses 3 and 4 amount to £60,000, so £150,000 is needed to pay the debts and legacies in full. The available assets only amount to £100,000, so there is a shortfall of £50,000.

As Tony's will does not include any provision for the payment of unsecured debts, the order of payment is determined by s34 (3) AEA 1925 as set out in Part II Sch 1 AEA 1925. This is known as the statutory order. Where a will does

not specify from where debts and liabilities are to be paid, rules are needed to regulate the burden of the debts and liabilities. These "rules as to incidence" regulate the burden of those debts and liabilities between the beneficiaries. Creditors are not bound by the rules and they can obtain payment out of any assets of the estate.

Part 1 of the statutory order relates to a lapsed share of residue, of which there is none in Tony's estate. Part 2 includes the residuary estate, subject to the retention of a fund sufficient to pay the pecuniary legacies of £60,000. It will be appreciated that the residuary estate is not sufficient to pay the unsecured debts and liabilities of the estate together with the legacies referred to in clauses 3 and 4 of Tony's will. Indeed, there will be no residuary estate to be paid to Ellie due to the shortfall in the estate.

Part 3 of the statutory order relates to property given by the will for the payment of debts and part 4 includes property charged with the purpose of payment of debts. Neither are provided for in Tony's will. Part 5 relates to the fund retained to pay the pecuniary legacies. Part 6 applies to property specifically devised and includes the house in Bedford and the flat in Llandudno.

Daniel should be advised that the unsecured debts amount to £90,000 including the mortgage of £40,000 on the flat in Llandudno. The residue of the estate is £100,000, but as £60,000 has been retained as a legacy fund, there is only £40,000 available to pay the unsecured debts. The shortfall is £50,000, so applying the statutory order, the legacy fund is reduced from £60,000 to £10,000 once the debts and liabilities have been paid in full.

Consequently, there is only £10,000 available to discharge the legacies. Due to the insufficiency, they will therefore abate rateably. This will result in Zach receiving £6,000 and Sunita and Yasmin each receiving £2,000.

Question 3 (a)

Section 21 Wills Act 1837 (WA 1837) provides that no obliteration, interlineation or other alteration in a will shall be valid or have any effect, except so far as the words before such alteration shall not be apparent, unless such alteration shall be executed in the same way as required for the execution of a will.

In clause 3, the alteration is not initialled by the witnesses to the will, however, the original amount is apparent. Consequently, even though the alteration appears to have been signed by Isabella, it is ineffective and Esther will only receive £10,000.

In clause 4, the line deleting that clause is neither initialled by Isabella or the witnesses, but again the original wording is apparent. Consequently, it is ineffective and Henry receives the gift of £2,000.

In clause 5, the original amount of the gift has been obliterated and is not apparent within the meaning of s21 WA 1837. This means that if the wording cannot be read by 'natural means', such as holding the paper up to the light or by using a magnifying glass, as stated in Re Itter (1950), the gift fails and falls into residue.

However, Isabella not only obliterated the original amount but also inserted a new legacy. The presumption, therefore, is that she only made the alteration on the basis that the new legacy was valid. This is known as the doctrine of

conditional revocation. The effect of this is that it enables the 'forbidden methods', such as infra-red photography, to be used to discover the original wording. This doctrine was applied in Re Itter where strips of paper were removed to ascertain the original wording. Consequently, although the replacement wording is not valid, if the original wording can be identified by the forbidden methods, this would enable the original gift to be paid to Samuel. However, if the original wording cannot be discovered, then the gift fails and falls into the residuary estate.

Question 3(b)

The Personal Representatives have a duty to distribute the estate correctly, including taking all reasonable steps to find Felipe. Although it does appear that Amanda and Owen have taken those steps, if they have not already done so, they could advertise and search in accordance with s27 Trustee Act 1925 (TA 1925). This means placing advertisements in the London Gazette and in newspapers circulating nearest to where Felipe was last known to be living. Amanda and Owen should be advised that such advertisements will not protect them because they know of Felipe's existence. Consequently, they should also be advised to consider applying to the court for a Benjamin Order for their protection.

In Re Benjamin (1902), the testator left a residuary gift to someone who had disappeared nine months before the testator died. Despite advertisements having been made, the beneficiary's whereabouts remained unknown and the court permitted distribution of the estate on the basis that the beneficiary had predeceased the testator. If Amanda and Owen are authorised to distribute the share portfolio as part of the residuary estate they are protected as personal representatives, but could be pursued by Felipe, if he appears, as beneficiaries.

Alternatively, Amanda and Owen could take out an insurance policy indemnifying them against liability if they were to be sued by Felipe. This could be just as effective as a Benjamin Order and incur less costs.

Another alternative would be for them to seek an indemnity from the residuary beneficiaries who may be being overpaid. As they are two of the three residuary beneficiaries, the risk is substantially reduced and they only take the risk of enforcement against Nathan. This would be the most cost effective method.

Amanda and Owen could also seek a declaration from the High Court that Felipe is deemed to have died. The court has the power to make that decision under the Presumption of Death Act 2013, if the missing person is not known to have been alive for a period of at least seven years. Although this would be an alternative to seeking a Benjamin Order or indemnity insurance, it would incur considerable cost.

Question 3(c)

Section 33(1) WA 1837 provides an exception to the doctrine of lapse where property is left in a will by a testator to his children or remoter issue. Specifically, it states that where a will makes a bequest to a child or remoter descendant of the testator and the intended beneficiary dies before the testator, leaving issue, living at the testator's death, then unless a contrary intention appears in the will, the bequest takes effect as a bequest to the issue living at the testator's death. However, this is subject to a contrary intention shown by the will.

The words used in a will may cause doubt as to whether s33 WA 1837 has been excluded, and examples include Ling v Ling (2002) and Rainbird v Smith (2012). In the latter case the will left the residue "upon trust for such of them, my daughters R, J and S, as shall survive me, and if more than one in equal shares absolutely." The court decided that the wording of the will showed the testator's clear intention to leave the residue only to those daughters who survived her, rather than the share passing to the predeceased daughter's own children. Also, the words, "and if more than one in equal shares" showed specifically that each daughter would get what was intended to increase should any of the other daughters predecease the testator. Consequently, s33 WA 1837 did not apply.

The wording in Isabella's will is very similar. Consequently, Isabella's residuary estate will therefore pass equally to Amanda, Owen and Nathan.

Question 4

To make a claim against Olivia's estate under the Inheritance (Provision for Family and Dependants) Act 1975, as amended by the Inheritance and Trustees' Powers Act 2014, the applicant must prove that Olivia died domiciled in England and Wales, that he or she has locus standi to make the application by falling within one of the categories in s1(1), and satisfy the court that Olivia's will fails to make reasonable financial provision for them. Under s4 an application can be made before a grant of probate has been issued, and must be made within 6 months of the grant of probate.

The court must consider whether the will of Olivia makes reasonable financial provision for each applicant and, if so, what would amount to reasonable financial provision for that applicant. The test of reasonableness is an objective one and is not subjective. The court must reach an objective conclusion as to what comprises reasonable financial provision for maintenance, and this will override the subjective views of the testator. The applicant must satisfy both stages to succeed, an example being Ilott v Mitson (2015). In this case it was stated that the first question is a value judgment which is determined by taking into account the s3 guidelines.

The court applies two standards of provision, the surviving spouse standard, and that which applies in all other cases, namely the maintenance standard. A spouse is treated as if a divorce was taking place. The maintenance standard is what would be reasonable in all the circumstances for the applicant to receive by way of maintenance – s1(2)(b).

Section 3(1) provides common guidelines which help the court to decide whether reasonable financial provision has been made. These include the financial resources and needs of the parties, obligations of the deceased, size and nature of the estate, physical or mental disability of the applicant, and any other relevant matter. Particular guidelines are also given in the case of spouses, persons living in the same household as husband or wife, and children of the deceased.

Section 3(1)(g) includes the conduct of the applicant or any other person, including the deceased. Conduct can be negative or positive. Olivia's letter and oral statement as to why she made little provision for her children will be considered by the court. In Wright v Waters (2014) the applicant's conduct had caused her mother great distress as she had explained in a statement placed with her will. The applicant had committed financial misconduct with her mother's money, and this was deemed to be a very relevant consideration.

However, in Ilott v Mitson the deceased and her applicant daughter had been estranged for 26 years and her mother had deliberately excluded her daughter from her will. The court decided that it was difficult to quantify the responsibility for the estrangement and it decided that the estrangement did not diminish the amount the daughter should receive from her mother's estate. Here, the deceased left her estate to two charities with which she had no lifetime connection and the charities were not reliant or dependant upon the estate. Consequently, any decision reached by the court is fact specific, and it would seem unlikely that the estrangement between Olivia and her children will deprive them of sharing in her estate, notwithstanding the contents of Olivia's letter.

In Espinosa v Bourke (1999) the court stated that in each case the criteria in s3(1) must be applied and the obligations and responsibilities of the deceased under s3(1)(d) were both moral and legal. Consequently, an adult child capable of work would have to prove a weighty factor to show failure to make reasonable financial provision.

Applying the above principles to the potential applicants, Jessica is within category s1(1)(c) as she is Olivia's child. There is no age limit and there is no need to show "special circumstances", as stated in Re Hancock (Deceased) (1998) and Espinosa v Bourke. Given that she is unemployed and taking into consideration the value of her mother's estate, she may succeed with a claim for maintenance.

Martin is also within category s1(1)(c) as he is Olivia's child. He is in a worse situation than his sister Jessica, and he is likely to succeed due to his physical disability, as in Re Debenham (1986). Under s3(5) the court will take account of relevant facts that occurred up to the date of the hearing.

Ivor may be within category s1(1)(ba) if he can satisfy the 2 year period of cohabitation as one "household" immediately before the deceased's death. The complicating factor is the time he has been separated from Olivia while serving his prison sentence. In Gully v Dix (2004) the deceased had not been living in the same household as the claimant before his death and the claimant had not therefore been maintained by the deceased immediately before his death. The court decided that but for the deceased's alcohol problem, the couple would have lived together until his death. There had been a settled state of affairs between the parties during the period of cohabitation, and the applicant succeeded. The same principle would appear to apply to Ivor. A not dissimilar situation arose in Kaur v Singh Dhaliwal (2014) and in Swetenham v Walkley (2014). Generally, separations brought about by external circumstances are irrelevant. Although Ivor is likely to satisfy the criteria of s1(1)(ba), if he does not, he may be within category s1(1)(e) if he was being maintained by Olivia. In those circumstances, he is likely to receive some maintenance, albeit perhaps of a capitalised nature.

Holly may be within category s1(1)(d) if she was treated as a child of the family and, if not, she is within s1(1)(e) as she was being partly maintained by Olivia immediately before Olivia's death. Consequently, she is likely to obtain an order of maintenance, although this will take into consideration the maintenance being supplied by her natural mother.