LEVEL 6 - UNIT 21 – PROBATE PRACTICE
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.

Question 1(a)

David died before Roseanne, but his Will included a survivorship clause and Roseanne did not survive the stated period. Hence, the substitute provision will take effect and Tom will hold the estate for his two children contingent on them reaching 21 David's estate is thought to be £800,000 so each child is contingently entitled to £400,000.

If one child dies before reaching 21, the other will take the entire estate on reaching 21. If both die before reaching 21, there will be an intestacy. Roseanne and David were still married at the date of their deaths, so Roseanne would be entitled to the estate but she failed to survive by 28 days so his brother Tom will take under the intestacy rules.

1(b)

Roseanne has assets of £1,180,000. The gift of the three-stone diamond ring is adeemed, as the gift was of a specific item which was no longer owned by Roseanne at the date of her death. The alteration adding a legacy of £25,000 is not correctly executed and, as it was made after execution of the Will is invalid. Therefore, Magenta takes nothing.

The £1,180,000 will be divided equally between Pearl and the charity so, ignoring inheritance tax, each will take £590,000.

1(c)

David has an estate of £800,000. There appear to be no exemptions or reliefs available. The surviving spouse exemption will not apply in the circumstances.

He has made no lifetime chargeable transfers so has a full nil rate band of £325,000. His first wife died leaving everything to him and without making any

lifetime gifts; David's PRs can, therefore, claim her unused nil rate band. Thus, the first £650,000 will be taxed at 0% and the balance of £150,000 will be taxed at 40% giving a tax liability of £60,000.

1(d)

Roseanne's estate is £1,180,000. As explained above Magenta takes nothing so the whole estate will be divided between the charity and Pearl. The charity's £590,000 is exempt.

Pearl's share will bear its own tax. Roseanne has no transferred nil rate band as her husband exhausted his. Her own nil rate band is reduced by the lifetime gift to Magenta. The gift was exempt as to the first £6,000 being the annual exemptions for 2013/14 and 2012/13. The balance of £25,000 was potentially exempt when made, but has become chargeable. Her nil rate band is therefore reduced by £25,000 to £300,000. The surviving spouse exemption will not apply in the circumstances

The first £300,000 of Pearl's share is taxed at 0% and the balance of £290,000 would normally be taxed at 40%. However, more than 10% of Roseanne's estate is passing to charity so the rate is reduced to 36%.

£290,000 x 36% = £104,400.

Question 2(a)

Vera's Will appoints Edward as executor and that appointment is effective even though the rest of the Will cannot take effect. Edward will take a grant of probate. Executors can always act alone even where there is a minority interest. There is no need to clear anyone off.

2(b)

Vera has died intestate and the disposition of her estate will be in accordance with the rules set out in the Administration of Estates Act 1925.

Her personal representatives will hold the estate on trust to pay the debts and liabilities and then pay the balance to the statutory next of kin.

Where a person dies without a surviving spouse or civil partner, their issue have the next right to inherit. Illegitimacy is ignored so illegitimate children can inherit. However, Vera's first daughter, Annabel, was adopted. Once an adoption takes place, the child is treated as the child of the adopters, not the natural parents. Hence, neither Annabel nor her children have any right to inherit any part of Vera's estate.

Issue take on the statutory trusts. This means that only issue who are living at the intestate's death can take and they must reach the age of 18 or marry or form a civil partnership earlier. No one can take whose parent is alive.

Edward fulfils those conditions and will take half of the estate.

His sister, Briony, predeceased Vera and so is entitled to nothing. However, the statutory trusts provide that where a deceased person leaves issue who survive, the issue take the share their parent would have taken provided they reach the age of 18 or marry or form a civil partnership earlier.

Briony left two children so her share will be divided equally. Geoffrey will take half of Briony's share. The other half would have gone to Colin, but he predeceased Vera. Colin's half will be held for Katherine and Zara equally and on the statutory trusts. Their interests are contingent on reaching 18 or marrying or forming a civil partnership earlier. If one dies without fulfilling the contingency, her interest will pass to the other. If both die, they are treated as if they never existed and their interests will pass to Geoffrey.

2(c)

Vera's estate consists of all the assets to which she was beneficially entitled before death less her liabilities. Her assets are £693,450 and her liabilities are £5,450 giving an estate of £688,000. There are no reliefs or exemptions; the surviving spouse exemption does not apply in the circumstances. We are told that neither Vera nor her husband made any lifetime gifts which are relevant for inheritance tax purposes. Therefore, Vera has a full nil rate band of £325,000 plus a full nil rate band transferred from her dead husband (who left everything to Vera as his surviving spouse).

The first £650,000 of the estate will be taxed at 0% and the remaining £38,000 will be taxed at 40% giving an IHT liability of £15,200.

2(d)

Where land is sold within four years of death for less than its probate value, personal representatives can make a claim for loss relief. This allows the sale price to be substituted for the probate value. On these facts, this would reduce the value of the estate from £688,000 to £638,000. This is below the level of the nil rate bands available to Vera's estate, so the estate will be entitled to a refund of the inheritance tax paid.

Question 3(a)

The legacies to Naomi and Ursula will fail as they have witnessed the Will. Section 15 of the Wills Act 1837 provides that beneficiaries who witness a Will cannot benefit from it.

The attestation clause is defective, as it does not recite that the witnesses were present at the same time when the testatrix signed, nor that they afterwards signed in the presence of the testatrix. Therefore, there is no presumption that the formalities were complied with and Lillian will have to produce evidence that they were.

3(b)

As explained in (a) above, in order for the new Will to be admitted to probate, Lillian will have to prove that the Will was properly executed.

The testatrix must have had testamentary capacity which means meeting the requirements of the Banks v Goodfellow test. She must have understood the nature and effect of the will-making act, the extent of her property, and appreciated the claims she ought to consider. She must not have suffered from any mental disorder or insane delusion, which affected her judgement or perverted her affections.

There is normally a presumption of capacity but, if those opposing the Will have evidence which raises a real doubt as to capacity, the burden shifts to the person propounding the Will, who must prove capacity. Yolanda would need medical evidence as to Isabelle's mental state plus, if possible, evidence from people who interacted with her on a regular basis. Lillian will obviously contend that her mental state was good, but the witnesses may say otherwise – particularly since they do not stand to gain from the Will.

It is helpful that Isabelle was diagnosed with Alzheimer's disease although it is perfectly possible for someone in the early stages of the disease to retain sufficient capacity to fulfil the test. The disease is progressive and the original diagnosis was in 2014.

The testatrix must have known and approved the contents of the Will. There is normally a presumption of knowledge and approval where a person with capacity executes a Will. The presumption does not apply if someone signs for the testatrix or if there are suspicious circumstances; for example, if the Will substantially benefits a person who was instrumental in the preparation of the Will. This appears to be the case. Lillian has admitted helping Isabelle find a solicitor and it appears that Lillian remained in the room while Isabelle gave instructions for her Will.

It would be helpful to obtain a statement from the solicitor who took instructions for the Will. The duty of confidentiality does not prevent disclosure of information where there is a dispute about the validity of a Will and the solicitor is a material witness.

A Will is invalid if the testatrix was subjected to undue influence which overpowered her will without convincing her judgement. A testatrix can be persuaded, but not coerced. There is no presumption of undue influence, so Yolanda would have to prove it. It is often difficult for those alleging undue influence to gather enough evidence to substantiate the allegation.

Requiring Lillian to establish capacity and knowledge and approval is probably a better route.

3(c)

Personal representatives are liable to capital gains tax on any increase in value between death and sale at the rate of 28% on residential land. Disposal costs can be deducted. In the tax year of death and the two following tax years' personal representatives have the same annual exemption as an individual. Even so, there will be a significant tax liability on a sale by the PRI.

If the asset is instead appropriated to beneficiaries and sold on their behalf, the gain is treated as the beneficiary's not the estate's. Charities are exempt from capital gains tax. Yolanda will be liable to capital gains tax, but will have an annual exemption available (unless she makes other disposals in the tax year showing gains). She may have losses available which she can set against the gain.

To determine the rate of tax to be applied, Yolanda's share of the gain will be added to her income. Any portion of the gain below the level of the higher rate of income tax will be taxed at 18%. Only the balance will be taxed at 28%.

Question 4(a)

Because the life policy was written in trust, it is not part of Frank's estate and will not attract inheritance tax. Writing the policy in trust was a transfer of value but it was done immediately the policy was taken out when it had no value. The payment of the premiums will be exempt under the 'normal expenditure' out of income exemption.

To obtain payment, Oliver and Quentin need only prove that their father has died by showing the insurance company a death certificate. They do not need to produce a grant of representation.

4(b)

Xhania could make a claim under the Inheritance (Provision for Family and Dependants) Act 1975:

- under s1(1)(1A), as a person who during the whole of the period of two years ending immediately before the date when the deceased died, was living in the same household as the deceased, and as the husband or wife of the deceased; and

- under s1(1)(e) as a person who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased.

A person is to be treated as being maintained by the deceased only if the deceased was making a substantial contribution in money or money's worth towards the reasonable needs of that person, other than a contribution made for full valuable consideration pursuant to an arrangement of a commercial nature.

It appears clear that Xhania is eligible to make a claim in both categories. Being eligible to make a claim does not, however, mean she will be successful. She must show that reasonable financial provision was not made for her maintenance and must bring the application within 6 months of the date of the grant of representation (or get the leave of the court to make a late application).

There are common guidelines which the court takes into account in relation to all applicants: the financial needs and resources of the applicant, any other applicant and any beneficiary; any obligations and responsibilities that the deceased had to the applicant; the size and nature of the estate; any physical or mental disability of any applicant or beneficiary; and any other relevant matter.

There are additional guidelines, which are specific to each category.

In the case of a cohabitee, the court will have regard to:

(a) the age of the applicant and the length of the period during which the applicant lived as the wife of the deceased and in the same household as the deceased;

(b) the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family

In the case of persons maintained by the deceased, the court will have regard to:

(a) the length of time for which and basis on which the deceased maintained the applicant, and to the extent of the contribution made by way of maintenance;

(b) whether and, if so, to what extent the deceased assumed responsibility for the maintenance of the applicant.

In Xhania's favour is the fact that her financial resources are poor, whereas those of Frank's sons seem much more secure. Also the deceased does appear to have assumed responsibility for Xhania's maintenance over an extended period.

4(c)

You can yourselves make a straightforward lifetime gift to Xhania of the cottage, but this would be a potentially exempt transfer for inheritance purposes and a disposal for capital gains tax purposes, and could adversely affect your own tax position.

It is preferable to elect to have the gift treated for inheritance tax (IHT) and/or capital gains tax (CGT) purposes as if it was made in the Will by your father. This is called a post-death variation and, to be effective, must comply with the requirements of s142 of the Inheritance Tax Act 1984 and s62(6) of the Taxation of Chargeable Gains Act 1992. You can make an election for one or both taxes.

A straightforward lifetime gift will have the following implications.

IHT

You will each make a potentially exempt transfer of £100,000. Should you die within seven years of making the gift, you will be treated as making a chargeable transfer for inheritance tax purposes.

CGT

You will be treated as acquiring the cottage at its probate value and disposing of it at its value at the date of the gift. You will be entitled to deduct any costs of disposal. Ignoring disposal costs, you will be treated as realising a gain of £20,000 each. Provided you have made no other disposals this tax year, you will have an annual exemption, but CGT will be payable on the balance.

A post-death variation will have the following implications.

IHT

Your father will be treated as having left the cottage directly to Xhania. This will have no effect on the IHT payable on your father's estate, as one chargeable beneficiary is simply substituted for another. The advantage is that you drop out of the picture and are not treated as making a potentially exempt transfer.

CGT

Your father will be treated as leaving the cottage directly to Xhania. You drop out of the picture and will not be treated as making a disposal. Xhania will be treated as acquiring the cottage at its value at the date of death (£160,000).

The variation must be in writing, made within 2 years of the death and not be made for money or money's worth. If the disposition is to be treated as the

deceased's, the variation must include a statement that s142 and/or s62(6) are to apply. There is no need to send the post-death variation to HMRC, as it does not increase the IHT payable.