LEVEL 6 - UNIT 14 – LAW OF WILLS & SUCCESSION
SUGGESTED ANSWERS – JANUARY 2018

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide candidates and tutors with guidance as to the key points candidates should have included in their answers to the January 2018 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed by the suggested answers.

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

SECTION A

Question 1 (a)

Under s20 Wills Act (WA) 1837 destruction of a will can take place 'by the burning, tearing, or otherwise destroying...with the intention of revoking…' Thus, s20 requires two fundamental elements simultaneously: an act of destruction and an intention to destroy (animus revocandi). As emphasised in the leading case of Cheese v Lovejoy (1877), "all the destroying in the world without intention will not revoke a will, nor all the intention in the world without destroying: there must be the two" per James LJ.

There must be an actual and not merely symbolic "burning, tearing or otherwise destroying'. For example, in Stephens v Taprell (1840) a testator who had struck through the body of the will, the names of the witnesses and his signature had not carried out an act of destruction. Similarly, in Cheese v Lovejoy the Court of Appeal (CA) held that a testator who had merely crossed through various parts of his will and written on the back of the will 'all these are revoked' had only at best attempted a symbolic destruction without actually carrying out an actual act of destruction. Even though this was obviously contrary to the testator's intention, the will was upheld.

However, the act of destruction does not need to destroy the whole will provided there is sufficient damage to impair the entirety of the will. In Hobbs v Knight (1838), the court held that the 'essence' of the will was destroyed when the testator cut out his signature, which was a sufficient act of destruction. Similarly, in Re *Adams* (1990) the entirety of the will had been impaired where the signature of the witnesses and the testatrix had been heavily scored out with a pen (see also *In the Goods of Morton* (1887)).

Furthermore, the testator must complete the act of destruction that he intended. In Doe D Perkes v Perkes (1820), a hostile testator, during an argument with

one of the beneficiaries named in the will, tore his will into four pieces. However, another person stopped him from doing further damage. After he had calmed down, he fitted the pieces back together and said' *it is a good job it is no worse* '. The court held that the will had not been destroyed, as the testator had not completed everything that he had intended by way of destruction.

S20 WA 1837 permits the act of destruction to be carried out by 'some other person' in the testator's 'presence and by his direction'. 'Presence' requires the testator to be both mentally and physically present when the act of destruction occurs. Physical presence requires that there is a line of sight between the testator and the act of destruction of the will, as illustrated In the Goods of Dadds (1857) (a will burnt in a separate room from the testator held not to be a valid revocation by destruction). Similarly, In the Estate of Kremer (1965) a testatrix had telephoned her solicitor and instructed him to destroy his will, which the solicitor did. The court held that revocation had not occurred, as the act of destruction was not performed in the testator's presence.

While the act of destruction is carried out the testator must also have the intention of revoking the will. Thus, if a will is destroyed by an accident or due to a mistake, there can be no intention to revoke. In Re Booth (1926) the necessary intention was missing where a will was accidentally destroyed by fire. In Giles v Warren (1872) the testator lacked intention while he tore his will into pieces because he mistakenly believed the will was invalid.

Intention requires that the testator has mental capacity. The degree of capacity is the same as is required to make a will: the testator must have a sound and disposing mind and memory. For example, in Brunt v Brunt (1873) a testator who tore his will into pieces while drunk and suffering from an attack of delirium tremens was held to lack capacity to revoke his will by destruction.

The courts will presume the testator had an intention to revoke his will in two situations; both can be rebutted by evidence to the contrary. Firstly, if a will is missing at the testator's death but was last known to be in his possession, the courts will presume that the testator destroyed the will with the intention of revoking it. In Sugden v Lord St Leonards (1876) the CA held the presumption had been rebutted even though the will could not be found on the testator's death. The evidence showed that although the will and eight codicils had been kept locked in a box that he held a key to, others had access to a spare key. Furthermore, he often asked his daughter to recite the contents to him; she was, therefore, able to provide a reasonable account of its contents, which was consistent with the codicils.

Secondly, if a will is found to be torn or mutilated at the testator's death and it was last known to be in his possession, the courts will presume that the testator destroyed it with the intention of revoking.

(b)

The conditional revocation rule means that revocation of a will only operates if a specified condition is fulfilled. The rule can be applied to any condition but in practice is often applied where a new will is invalid and the earlier will has been revoked. A presumption applies that the testator intended to revoke the earlier will only if the new will is valid (Onions v Tyler (1716)). This is also called the doctrine of dependent relative revocation.

The CA in Re Jones (1976) fundamentally stated the question is whether the testator intended to revoke his will absolutely or on condition of a specified event or contingency. If his intention was conditional and the condition or contingency has not taken place revocation does not operate, however, if his intention is absolute the will is revoked.

The courts have been prepared to find that the testator had both intentions concerning different gifts in a previous will. For example, in Re Finnemore (1992) the court construed an express revocation clause contained in a later will distributively between the two different gifts in the first will. The testator intended only to revoke one gift on condition the gift took effect in the later will whereas the other gift he intended to revoke absolutely. Therefore, the result was the first will was only partially revoked.

The conditional revocation rule also applies where a testator revokes his will under a mistake. For example, In the Estate of Southerden (1925) the mistake was that the testator believed his wife would inherit his entire estate on intestacy. CA held that as the condition was not fulfilled his will was not revoked.

Question 2 (a)

The traditional common law test for mental capacity is established in the leading case of Banks v Goodfellow (1870) where Cockburn CJ stated that a testator must have a *"sound and disposing mind and memory"*. There is a three-stage requirement test that must be satisfied for the testator to be mentally competent under Banks. Firstly, the testator must understand the nature of the business he is engaged in. is requires that the testator understands that he is making a will that takes effect upon his death and not some other document.

Secondly, the testator must be able to recall the extent of his property. However, case law shows that he does not need to recall every item that he owns, a general awareness of his property is sufficient (see Wood v Smith (1993) and Schrader v Schrader (2013)). The simpler the will may indicate that a lower degree of mental capacity is required (see In the Estate of Park (1954)).

Thirdly, he must be able to recall those persons who may have a moral claim upon him even if he chooses not to benefit them (Harwood v Baker (1840)). For example, in Boughton v Knight (1873) Sir James Hannan stated, "[The testator] *may disinherit the children, and leave property to strangers in order to gratify spite, or to charities to gratify pride"*. Therefore, a testator is free to make a will where he is *"moved by capricious, frivolous, mean or bad motives"* as stated in Fuller v Strum (2002). Arguably, this element of the Banks test has been somewhat limited as persons with a moral claim may now be able to make a claim for reasonable financial provision out of the deceased's estate under the Inheritance (Provision for Family and Dependants) Act 1975.

A further consideration is that the testator must not be suffering from a delusion of the mind that causes them reason not to benefit those people. So, for example, if a testator leaves his daughter out of his will due to an *"insane delusion"* which has *"poisoned his natural affections"* towards her he will be held as lacking mental capacity (Dew v Clark (1826) and Banks).

The Mental Capacity Act 2005 (MCA 2005), which came into force on 1 October 2007, sets out a general statutory test of mental capacity relating to a person's informed decisions about their health, welfare and finances**.** The MCA 2005 establishes a presumption of mental capacity for all persons in s1, unless a lack

of mental capacity is proven. This is hard to reconcile with the common law burden of proof, which shifts back and forth but ultimately is always on the propounder to prove mental capacity. S2(1) states that a person lacks capacity if at the material time he is unable to make a decision for himself because of an impairment of, or a disturbance in the functioning of, the mind or brain. S3 provides guidance concerning when a person is considered unable to make a decision for himself. The overall focus of s3 is on whether or not the person can understand all the relevant information surrounding the decision and the reasonably foreseeable consequences of making such a decision. Whereas, as illustrated in Re Walker (2014), testators are not required to understand all the information or the foreseeable consequences.

Initially, it was unclear whether the MCA 2005 statutory test had replaced the common law mental capacity test. However recent case law such as Scammell v Farmer (2008) Re Walker (2014) and Elliott v Simmonds (2016) appear to assert that the correct test is still that from the leading case in Banks v Goodfellow (1870), although Scammell concerned a testatrix's capacity before the MCA came into force. Thus, unless and until we have a definitive statement from the CA or SC, the Banks competence test appears to remain the sole test for testamentary mental capacity, at least in practice.

However, the MCA 2005 is not entirely redundant in the area of testamentary capacity. It appears to have assisted in the development of the Banks competence test to accommodate the contemporary medically recognised effects bereavement can have upon rational decision-making. In Key v Key (2010) the court recognised for the first time that the effects of bereavement on a testator could negatively impact upon his mental capacity. In Re Wilson (2013) the testatrix's will was held invalid due to her deep grief at the recent death of her brother.

In conclusion, the position in English law is clearer: the Banks v Goodfellow test is still very much being used as the sole test for testamentary mental capacity. However, although a long-established test, as it accommodates changes to mental capacity in the 21st century, it appears not to be without influence from the MCA 2005.

(b)

The general principle is that testators must have mental capacity at the time they execute their will. For example, in Ewing v Bennett (2001) the Court of Appeal upheld a will where the testatrix was in the early stages of dementia, the fact that she lacked mental capacity after execution was irrelevant.

However, an exception under the rule in Parker v Felgate (1883) applies where a testator lacks mental capacity at execution, but he is capable of understanding and does understand that he is executing a will which his solicitor has prepared according to his previous instructions given when he had mental capacity (Re Flynn 1982). Clearly, the rule is justified in deathbed situations to allow instructions that have been given by a declining testator shortly before they lose capacity and then executed within a short period before death. In Parker the testatrix was roused from a coma to execute her will for which she had previously given instructions.

However, can the rule ever be justified when it is used where an intermediary conveys the instructions from the testator to the solicitor. In Battan Singh v Amirchand (1948) the Privy Council did not apply the rule where the instructions

were given to a lay intermediary to pass to the solicitor. Lord Normand pointed out the obvious risks and stated that in this situation the rule should be applied '*with the greatest caution and reserve*' as 'the *opportunities for error in transmission and of misunderstanding and of deception in such a situation are obvious…there is no ground for suspicion'.*

More recently, however, the Court of Appeal in Perrins v Holland and Others (2010) approved the use of the rule, where there was a significant period of 18 months between the giving of instructions and the signing of the will, and the lay intermediary was the beneficiary under the will. At first instance, Lewison J pointed out the justification of the rule on the grounds of testamentary freedom. Arguably, this case goes beyond any sort of justification.

In conclusion, the rule in Parker v Felgate, despite being an anomaly, is a justifiable departure only when it is confined to the most exceptional circumstances, such as those akin to deathbed executions, and when the warning in Amirchand is strictly observed.

Question 3

Devastavit applies whenever a personal representative breaches a duty of his office and causes a loss. Such a personal representative is personally liable to make up any loss caused to the deceased's creditors or beneficiaries of the estate.

It should be noted a personal representative who is also a trustee may additionally be liable for a breach of trust, which may give rise to personal liability even though no loss has been incurred.

There are three broad categories within which the particular circumstances of devastavit may fall.

Firstly, the personal representative may misappropriate the deceased's property by, for example, using the deceased's assets for his personal use as in Re Morgan (1881).

Secondly, the personal representative, even in good faith, may wrongly administer the deceased's estate and thereby commit maladministration. This can occur where the assets of the estate are applied contrary to the will or relevant statute. For example, a personal representative fails to correctly administer an insolvent estate according to the prescribed order of the Insolvency Act 1986 and the Administration of Estates Deceased Persons Order 1986 and pays an ordinary creditor before a preferred creditor (see Re Fludyer (1898).

Another example is where a personal representative has wasted the assets, for instance, because he has incurred unjustifiable expenses, or settled debts which do not need to be paid (Re Rownson (1885) or wrongly disposed of estate assets of value. In Thompson v Thompson (1821) a personal representative was liable when he surrendered the deceased's leasehold estate for no value instead of selling it at a premium (contrast Rowley v Adams (1839).

Other examples include, but are not limited to, failure to obtain a grant of representation promptly, to pay the deceased's debts or collect in assets diligently (Re Tankard (1942)) or to distribute the estate correctly, as in Re Whorwood (1887).

Finally, the personal representative omits to take reasonable care in preserving estate assets (Job v Job (1877)). So, for example, there will be no liability if reasonable care has been taken but an accidental fire has destroyed an asset or they have been taken in a robbery. Additionally, under s1 Trustee Act 2000, a statutory duty of care applies to personal representatives and requires them to act with reasonable care and skill when carrying out their duties.

There are many ways in which a personal representative who is liable for a *devastavit* may be relieved or protected from liability, some of which are examined below.

A personal representative may be protected from liability against a sui juris beneficiary or creditor who has acquiesced in the breach with full knowledge of all the facts. As an extra safeguard, the personal representative should obtain a written release from the person consenting to the breach of duty, although, it would not provide protection where the personal representative commits a fraudulent act.

Further, under s62 TA 1925, the court may order that the personal representative's loss, which he has incurred from meeting his liability towards any other non-consenting beneficiary or creditor, be indemnified by impounding the consenting beneficiary or creditor's interest.

An exclusion clause in the will may relieve or limit the liability of a personal representative, except for fraudulent acts, so far as beneficiaries are concerned, but the clause does not affect the rights of creditors.

Alternatively, under s61 TA 1925 the court has discretionary power to grant relief where the personal representative has acted honestly, reasonably, and ought fairly to be excused for the breach. However, if the personal representative is a paid professional he is less likely to be granted relief, examples include Bogg v Raper (1998) and Re Evans (1999).

The personal representative may also protect themselves from any unknown beneficiaries or creditors by taking out a s27 TA 1925 notice. This requires that an advertisement has been placed in the London Gazette, in a local newspaper where the deceased lived, and any other court-ordered advertisement. In which case, after the expiration of the stipulated time limit of two months for interested persons to come forward, the personal representative can distribute the estate without being liable for unknown claims.

However, protection is not afforded where the personal representative has knowledge of a beneficiary or creditor but is merely unable to find him. In this situation, the personal representative ought to obtain a Benjamin Order for protection, which permits distribution of the estate on the footing that the beneficiary (creditor) has predeceased the deceased, as in Re Benjamin (1902). Alternatively, an indemnity from the overpaid beneficiaries or an insurance policy could be taken out.

S27 does not protect against claims under the Inheritance (Provision for Family and Dependants) Act 1975. However, if the personal representative waits six months from the grant of representation to distribute the estate, and no claim has been made, he will be protected from liability.

Protection may also be found where the right to take action becomes statute barred by the Limitation Act 1980. For example, normally beneficiaries have

twelve years, whilst creditors have six years to bring a claim for a debt.

Furthermore, if a personal representative successfully pleads *plene administravit* or plene administravit against a creditor of the estate, the claim is settled only from future assets or from those the personal representative still holds as he has duly administered all other assets.

Claims for rectification of a will must be made within six months. Therefore, personal representatives who have waited until after six months to distribute the estate will be protected, provided that no claim has been made during this period.

Where the deceased's estate includes leasehold property, the personal representative may be liable for any unpaid rent and breaches of covenant at the date of death, and in certain leases he may also be liable for the deceased's continuing liability under the doctrine of privity of contract. Provided the personal representative does not enter into possession of the leasehold premises, he is also liable for liabilities that arise during the administration period, but will not be personally liable. Protection concerning these liabilities after he has assigned the lease is found under s26 TA 1925. However, if he has entered into possession, he becomes personally liable and should seek indemnity protection from the beneficiaries or create an estate indemnity fund.

Finally, where an estate is subject to contingent liabilities, the personal representatives will be protected from devastavit if they have set aside an indemnity fund, obtained an indemnity from the beneficiaries or insured against the risk of the liability being enforced.

Question 4

The validity of alterations is primarily governed by the rule contained in s21 Wills Act 1837 (WA 1837). Under s21 any alteration, including an interlineation or obliteration**,** made after the will is only valid if the alteration itself has been executed or the will is re-executed according to s9 WA 1837. s21 further states that an invalid alteration will only have any effect if the original wording is not "apparent".

The overall effect of s21 is that three issues are pertinent to any case: firstly, if the alteration was made before the will was executed, s21 is inapplicable; secondly, if the alteration is duly executed it is valid and thirdly, if the alteration has made any part of the will not apparent and the testator intended to revoke it, partial revocation applies to that part. (Parry and Kerridge, The Law of Succession, 13th Edition, 2016).

An alteration made in the will before execution is valid if that is the testator's final intention. Therefore, if the alteration is in pencil, the court has taken the view that the testator was merely deliberating, so a rebuttable presumption arises that the alteration is not final and invalid, as illustrated in In the Goods of Adams (1872).

Where the alteration is unattested, a rebuttable presumption arises that the alteration was made after the will was executed**,** Cooper v Bockett (1846). Although the presumption is rebuttable, the onus probandi lies on the party propounding the alteration as part of the will. In order to rebut the presumption, both internal and external evidence may be used. Case law shows that the courts readily accept internal evidence from the will where the testator has filled blank

spaces left in his will, particularly where the same colour ink is used. For example, in Birch v Birch (1848) unattested alterations in red ink to fill in blank spaces on a black ink will were presumed to have been made after the will and therefore invalid. However, concerning the black ink alterations, the court stated that it would be difficult to explain why anyone would execute a will with all blank spaces. Therefore, the presumption was rebutted for these legacies. Various forms of external evidence are permissible; including affidavit evidence from the draftsman and witnesses is permissible (r 14 Non Contentious Probate Rules 1987).

Concerning alterations that are attested, s21 requires that alterations are executed according to s9 Wills Act 1837 and that the signatures may be made in the margin or opposite the alteration. Case law has upheld that execution of the alteration requires only the initials of the testator and the witnesses, *as in In the Goods of Blewitt (1880)*. However, if only the witnesses initial the alteration, the alterations are invalid as they do not comply with s21, as in Re White (1991).

As previously explained, s21 also provides that an invalidly executed alteration, which obliterates the original words of the will, may make that part of the will "not apparent"**.** Townley v Watson (1844) held that apparent means optically apparent on the face of the will. This has led case law to hold that the words must be legible by 'natural' means only, for example, by holding the will up to the light, Finch v Combe (1894) and by using a magnifying glass, In the Goods of Brasier (1899). By contrast, if the words can only be read by "forbidden methods" such as extrinsic evidence or by physically interfering with the will, Finch, or by using an infrared photograph of the will, as in Re Itter (1950), the original wording is not apparent in compliance with s21. The effect is that probate is granted with a blank space as the obliteration amounts to a partial revocation of the will, which the court determines is the testator's intention (In the Estate of Hamer (1943)**.**

An intention to revoke will not be found if the will was altered by accident, for example, spilling ink over part of the will. In which case, extrinsic evidence may be used to discover the original wording, including a copy of the will. Clearly, this is a welcome and necessary rule.

Furthermore, if the testator's intention to revoke is conditional, and the condition has not been fulfilled, despite any obliteration, the conditional revocation rule applies to save the original wording. The obliterated word must be ascertained so that it can be admitted to probate. This means any evidence can be used to discover what lies beneath the obliteration including "forbidden methods" such as removing strips of paper that have been pasted over the original wording**,** as in Re Itter and even the admission of extrinsic evidence. Arguably, this is a somewhat strained and artificial application of law, particularly as the intention is said to be ascertained whilst the testator is making the alteration. Does the court really know what the testator intended when he obliterated a word and substituted another. For example, consider a substitution where the testator has replaced a new beneficiary or even where the substituted amount is smaller than the obliterated amount, in such cases a plausible explanation may have been that the testator intended to revoke regardless of whether or not the substitution takes effect. However, where these factors are not present one can argue that the conditional revocation rule is truly searching to uphold the testator's wishes. Perhaps, the rule is a convenient way of saving the gift in the will without flatly contradicting the statutory rule in s21.

A logical approach taken by the courts, which is likely to reflect the testator's intentions is that where a codicil has republished the will containing a post-execution unattested alteration and the codicil makes reference to the alteration, the alteration will be valid, as in In the Goods of Heath (1892). The same result follows if other evidence shows that the alteration was made before the codicil was published.

In conclusion, given that the chief witness is absent, the rules in s21 Wills Act 1837 serve a useful purpose of protecting against and minimising the possible risk of fraud by ensuring as far as possible that only alterations made with the testator's knowledge and approval are admitted to probate. Case law has maintained a challenging dual role; rigorously applying the statutory rules while ensuring as far as possible that primacy is given to the wishes of the testator.

SECTION B

Question 1 (a)

Nicholas's will made 2007, following his divorce from Patricia, is automatically revoked by his later civil partnership to Maximus in accordance with the provisions contained in s18(B) Wills Act 1837. Consequently, Nicholas has died wholly intestate and his estate will be dealt with under the provisions of the Administration of Estates Act 1925 (AEA 1925) as amended and the Intestates' Estate Act 1952 (IEA 1952).

The family home owned as beneficial joint tenants will pass automatically to Maximus by the right of survivorship and will not form part of the estate to be distributed under the intestacy rules.

Nicholas's estate is held by his personal representatives on "statutory trust" with a power to sell under s33 AEA 1925. The first duty of the personal representatives is pay all the funeral, testamentary and administration expenses and debts from Nicholas's cash and any proceeds of sale of other assets.

His estate will then be distributed in accordance with the order of entitlement contained in s46 AEA 1925 as amended by the Inheritance & Trustees' Powers Act 2014 (ITPA 2014). Priority is given to any surviving spouse, which includes a civil partner (Civil Partnership Act 2004) and is entirely dependent upon whether the intestate left behind surviving children; the spouse no longer shares the estate with any surviving parents or full siblings of the intestate. The deceased's children take on statutory trusts defined in s47 AEA 1925, which includes not only the surviving children of the intestate, who will share equally if more than one, but also the issue of a child who has predeceased the intestate. If there is more than one issue of the deceased child they take in equal shares per stirpes their deceased parents share by stepping into the deceased parent's shoes. Shares due to children or their issue are contingent upon them attaining 18 years of age, or marrying or forming a civil partnership earlier.

As explained above, Maximus is primarily entitled to Nicholas's estate as the surviving spouse (CPA 2004). He is subject to the rule that in order to inherit he must survive Nicholas by 28 days. If he does, he is entitled to a statutory legacy of £250,000 plus interest set at the Bank of England official bank rate applicable from the date of death until payment, all the personal chattels and half of the residue absolutely (s46 AEA 1925).

Personal possessions are defined in s55 (i)(x) AEA 1925 (as amended by ITPA 2014) and include all tangible movable property, but excludes money, property the deceased used solely or mainly for business purposes and property held at the intestate's death solely as an investment. The question is whether the diamond is classed as a personal possession or whether it is excluded as a business item or an item solely as an investment. Although in Re Crispin (1974) a valuable collection of clocks and watches was classed as a personal chattel as the items were by their nature articles of personal use, if Re McCulloch (1981) is followed the test for business use is whether the dominant purpose was for business as opposed to personal use. As Nicholas purchased it when he was on a business trip in Africa and had arranged for its sale through his commercial contacts it is unlikely that it would be included as a personal possession, regardless of the fact that it was kept in his personal safe and so it forms part of his residuary estate.

The remaining half of Nicholas's residuary estate passes to his three children on the statutory trusts. Consequently, Alexandra, Francesca and Dillon are entitled to an equal one-third share in the half remainder. However, as Alexandra has predeceased Nicholas her children, Evie and Theo will take her one-third share per stirpes. As Evie is 19 years of age, she takes a vested interest and is entitled to a one-sixth share now. As Theo is 9 years of age, he takes a contingent interest subject to him attaining 18 or legally marrying or forming a civil partnership earlier.

Francesca is entitled to a third share now, as she is an adult; her son, Calum is not entitled to take, as she is living.

Dillon, aged 12, takes a contingent interest, which vests on attaining 18 or if he marries or forms a civil partnership earlier. The fact that he is adopted is irrelevant because he is treated as a child of Nicholas under s67 Adoption and Children Act 2002. He will be entitled to a one third share.

Edna, Nicholas's sister, is not entitled as she comes within a lower class of those entitled and is excluded by the surviving spouse and children. Simon Alex's husband is not entitled as he is not a blood relative.

(b)

As Nicholas 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. The order, which follows the statutory order of entitlement found in s46, provides that the surviving spouse or civil partner is entitled to take out the grant in the first instance. The children (or their children if the child has predeceased the deceased) are next in line followed by parents, brothers and sisters of the whole blood (and their children if they have predeceased) and brothers and sisters of the half blood and their children if they have predeceased. Last to be found in the order is more distant relatives.

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. Thus, Maximus, as the surviving spouse should take out the grant. However, as there are minor beneficiaries two administrators will be required to take out the grant due (s114 (2) SCA 1981). Maximus should take out the grant either with Francesca, or with Simon on behalf of Theo (for his use and benefit).

Question 2

To make a claim against Valerie's estate under the Inheritance (Provision for Family and Dependants) Act 1975 (1975 Act), as amended by the Inheritance and Trustees' Powers Act 2014 (ITPA 2014), all applicants must prove that Valerie died domiciled in England and Wales (see Cyganik v Agulian (2005)) and that they have locus standi to make the application by falling within one of the six categories in s1(1) (a).

The applicants can apply to the court before Helen obtains a grant of probate, but it must be made within 6 months of the grant (s4 as amded. by para 6, Sched 2 ITPA 2014).

The next step involves a two-stage test. The first stage requires all applicants prove to the court that reasonable financial provision has not been made from Valerie's estate. The second stage, which requires the court to quantify the order for financial provision, only applies if the first stage has been. The Supreme Court in Ilott v Mitson (2017) confirmed that the first stage test requires a value judgment determined by the consideration of the section 3 guidelines whereas the court exercises discretion only at the second stage. The test is objective: not based on the subjective intentions of the deceased (Re Goodwin (1968)), which means that the outcome may override Valerie's subjective views.

There are two standards of reasonable financial provision. The surviving spouse standard in s1(2)(a) is not restricted to maintenance. The maintenance standard in s1(2)(b) applies to all other applicants.

The section 3(1) common guidelines, which assist the court when deciding whether reasonable financial provision has been made, 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.

Section 3(2) includes particular guidelines, which are additional matters the court takes into account that are particular to each category of applicant.

Bob

Bob is within category s1(1)(a) as Valerie's surviving spouse: the facts clearly state that they had not divorced. He must produce his marriage certificate to prove that his marriage to Valerie was valid, and, if so, Bob has locus standi to bring a claim (Re Watkins (1953)). If Bob is successful he is entitled to the surviving spouse standard under s1(ii)(a), regardless of whether the provision is required for his maintenance.

The court will consider both the common and particular guidelines. The particular guidelines includes the court considering Bob's age (60), the 35 years longevity of marriage and the contributions Bob made to the welfare of the their family, including the contribution he made in looking after the home and caring for the family. Furthermore, what provision Bob might reasonably have expected to receive on a divorce, although this is not to be regarded as setting an upper or lower limit on the provision (s3(2) as amded by ITPA 2014). As Valerie's estate, net worth £2.5 million, is 'a big money case' the starting point may be one of equal division, as held in White v White (2001). However, considering the other competing claims from Valerie's children, this may be departed from, see Cunliffe v Fielden (2005). As Bob is unemployed and homeless it seems that his chances

of success are extremely high, the court consider an appropriate award to be a significant lump sum or periodical payments and even the transfer of the family home into his name: s2

Rory

Rory is within category s1(1)(c) as he is Valerie's biological child. There is no age restriction (Re Callaghan (1984)) and although there is no need to show "special circumstances", it will improve the chances of a successful application as stated in Re Hancock (Deceased) (1998) and Espinosa v Bourke (1999).

Although at the time of Valerie's death there was no special circumstance, Rory's accident that occurred after Valerie's death will be taken into account under s3(5) where the court takes account of relevant facts that occurred up to the date of the hearing.

Rory's disability will be taken into account under s3 (1)(f) of the common guidelines, as in Re Debenham (1986). The court will also take into account the fact that his accident leaves him unlikely to be employed for the rest of his life and the impact this will have on his earning ability now and in the future under s3 (1)(a). Furthermore, under Section 3(1)(g) and under the s1 Civil Evidence Act 1995, Valerie's treatment and oral statement as to why she made no provision for Robert will be considered by the court, although it will not be conclusive.

Due to Rory's special circumstances, his chances of success are high and the court is likely to award a lump sum or an annuity for Rory's continued maintenance, which will include financial provision for any home modifications and special equipment that is needed to assist in his quality of life, as the courts have held that maintenance does not mean merely subsistence (Re Coventry (1979)).

Georgina

Georgina is also within s1(1)(c) as she is Valerie's child and it does not matter that she is illegitimate: s25(1). Although her claim appears less deserving than Rory and Bob's, the court is likely to take the view that Valerie had a moral obligation towards her even though she has not been contributing towards her maintenance during recent years (see Re Jennings (1994) and s3(1)(d)) The court will also have regard to Georgina's limited resources and needs under s3(1)(a), including her low income, state benefits, housing accommodation and her parental responsibility for her 6 year old son Lucas.

Helen should be advised that Gail could claim successfully but that her claim will be weighed against the other more meritorious claims of Bob and Rory and that of the charity (see Ilot). As a result, it is likely that only a relatively small lump sum may be awarded, and if a home is to be provided under the Act then following the Supreme Court decision in Ilot (2017) as the claim is for maintenance, this should be provided by a life interest rather than a capital lump sum.

Ian

Ian is not within category s1(1)(ba) as he only lived with Valerie for a twelve period and not the required two years as husband and wife immediately before Valerie's death. Neither would he qualify as having locus standi under category

s1(1)(e) as although Valerie had maintained Ian by making a substantial contribution towards his reasonable needs in the provision of rent free accommodation with a monthly financial amount, this had ceased two months before her death. The court has held that where the provision of maintenance has come to an end before the deceased's death for reasons **other** than the deceased's death, the deceased will not be regarded as having maintained the applicant: see Jelley v Iliffe (1981) and Kourkey v Lusher (1982)**.** Furthermore, applying Re Beaumont (1980) it is clear that the *"settled state of affairs" of the provision of maintenance had ended. Therefore, based on the given facts, including Ian's fortuitous significant lottery win, Helen can be confident that Ian has no chance of success.*

Question 3

A validly executed will does not need to contain an attestation clause: s9 (d). Nevertheless, its presence raises a strong presumption that the will was duly executed (Sherrington v Sherrington 2005). Furthermore, although the burden of proof is always on the propounder of the will (Barry v Butlin (1883), where a testator has mental capacity and the will is duly executed a rebuttable presumption arises that the testator had knowledge and approval. (Guardhouse v Blackburn(1866).

However, as there is no attestation clause and Eloise is blind neither presumption arises. The court will require affidavit evidence from the witnesses to establish both knowledge and approval and due execution in accordance with s9 WA 1837 (r12 and r13 Non-Contentious Probate Rules 1987). The evidence should show that the will was read over to Eloise, it was duly executed and that Eloise understood and agreed the contents before she signed.

S9 (a) requires that a will is 'signed by the testator'. Case law has interpreted 'signed' flexibly so that the testator can write his name or make a mark, which he intends to represent as his signature (In the Goods of Savory (1851) In the Estate of Finn (1935)). Especially relevant to Eloise's signature is the case of Re Cook (1960) where the words 'your loving mother ' sufficed as a signature. Consequently, by analogy, Eloise's words "your loving mother, friend and servant" appear sufficient to comply with signing in s9.

Clause (2)

The gift to Winifred is a demonstrative legacy; often described as a hybrid gift, because it is in its nature a general legacy but payment is directed to be satisfied from a specific fund, Ashburner v Macguire (1786).

As Eloise's National Bank account at her death only has a balance of £2000, £2,000 is payable as a specific legacy from that account and the remaining £3,000 is paid as a general legacy from the residuary estate.

Clause (3)

The first issue is that the words in the will "007" appear to be meaningless, but extrinsic evidence can reveal what Eloise meant by those words.

s21 AJA 1982 allows the admission of extrinsic evidence in three circumstances. Firstly, where any part of the will is meaningless (s21(a)), secondly, where the words used in the will show a patent ambiguity (s21(b) or thirdly, where extrinsic evidence, but not the testator's intention, shows a latent ambiguity (21(b)).

A relevant case is Kell v Charmer (1856) where extrinsic evidence was admitted to explain what the testator meant when he bequeathed amounts of legacies in a code, which had been used in his jewellery trade. Consequently, it seems highly likely that as other staff members know the meaning of the code that Eloise has used, extrinsic evidence will be admitted under s21(a) to prevent the gift from failing.

The second issue concerns the construction of wills regarding objects.

Section 24 WA 1837 effectively states that wills are construed as speaking from death concerning property that is owned by the deceased at his death, unless a contrary intention appears in the will. However, s24 WA 1837 does not apply to the objects of a gift. Instead, a will is construed as speaking from its date concerning the object of the gift unless a contrary intention appears in the will. Consequently, as Zelda only married her present husband, Umberto, last year, he does not fit the description at the time Eloise made her will in 2010 and, so, cannot take the gift. However, her first husband, Xander, whom she was married to at the date of the will, is entitled under the will in clause 3, as illustrated in Re Whorwood (1887).

Clause (4)

Under s15 WA 1837 where a beneficiary or their spouse attests the will they remain valid witnesses but lose their gift. As a consequence, Nathan, who has witnessed the will, is prevented from taking the gift of £10,000, but he remains a valid witness.

Clause (5)

In order for a document to be admissible to probate as a will, it must comply with the formalities in s9 WA 1837, essentially it must be in writing signed by the testator and witnessed. However, where a document, such as Eloise's paper, is unattested it may be admissible as part of the will under the doctrine of incorporation by reference, if three requirements are met.

The document must be clearly identifiable by the reference in the will. The words used to identify the document must not be vague (In the Goods of Garnett (1894). The document must have been in existence at the date of the will**.** The will must refer to the document as already being in existence: there must be no ambiguity**.** In University College of North Wales v Taylor (1908) the testator's reference to "any memorandum…**"** indicated that the document could come into existence after the will. Similarly, in Re Bateman's Will Trusts (1970) "…shall be stated by me" suggested the same. Both documents could not be validly incorporated.

The first two requirements appear to be met as the reference to "Cornwall Cottage Testamentary Gift" is not vague and matches the title on the paper found, which provides the names of beneficiaries, and it is signed and dated one year before the will is executed: 2010.

However, Eloise refers to "any" piece of paper as in University College of North Wales and has used the word "may", both of which suggest that the paper was not written before Eloise executed her will: hence, the doctrine is inapplicable. Consequently, the gift fails for lack of beneficiaries and the cottage falls into the residuary estate.

Clause (6)

Yolanda, a residuary beneficiary has predeceased her mother, and under the doctrine of lapse the general rule is that the gift fails. However, section 33(1) WA 1837 provides an exception where the testator's predeceased child leaves behind issue living at the testator's death. The gift takes effect as if it were made to the issue unless a contrary intention appears from the will.

A relevant case with virtually identical wording to that Eloise has used, which showed a contrary intention is Rainbird v Smith (2012). The testator left the residue to his children on trust *"…as shall survive me, and if more than one in equal shares absolutely."* The court held that the testator intended the residue to pass only to his surviving daughters, and not to issue of a predeceased daughter as *"if more than one in equal shares",* showed the testator intended each daughter's share would increase if any of the daughters predeceased him. Consequently, the residuary estate will pass solely to Zelda.

Question 4

Oliver's estate is solvent because there are sufficient assets to discharge the testator's entire funeral, testamentary and administration expenses debts and liabilities. However, Oliver's will does not provide full directions from which part of his estate they are to be paid, Quinn should, firstly, be advised to consider the debts secured on the two properties owned by Oliver. Secondly, she should then consider the incidence of the unsecured debts.

In a solvent estate, the rules that regulate the payment of secured debts are contained in section 35(1) AEA 1925. S35 states that property charged with debt during the testator's lifetime is primarily liable for the payment of the debt upon his death unless the deceased has shown a contrary intention either in the will, deed or from some other document (Ross v Perrin-Hughes 2004. It is important to appreciate that s35 makes no difference to the secured creditor's right to be paid; if the mortgages are not paid the mortgage company may seek payment from any asset out of the deceased's estate or force a sale of the property (s35(3).

As Oliver has clearly expressed in his will that Quinn is to take his Country house "free of charge" he has shown a contrary intention to the application of s35 and consequently, Quinn is not liable for the payment of the mortgage, which instead is paid out of Oliver's estate.

However, concerning the gift of his luxury yacht as Oliver has not in the will, or otherwise, shown a contrary intention to vary s35 Venus is responsible for paying the mortgage. Venus is not personally liable to the mortgage company for the debt, but if she fails to pay the mortgage, again, the mortgage company is likely to force a sale of the yacht.

The debts and liabilities of Oliver's estate now amount to £100,000 from the mortgage incurred on Brightlands, the country house, plus the £50,000 from other unsecured debts, which leaves a total of £150,000 to be paid for debts and liabilities. However, Oliver has left two pecuniary legacies in clause 3 and 4, amounting to £70,000. Therefore, a total of £220,000 is required in order to satisfy Oliver's debts and legacies. The assets amount to a total of £200,000 (which excludes the value of the two properties devised to Quinn and Venus), which means the estate has a shortfall of £20,000.

To determine the payment of unsecured debts (including the mortgage on Brightlands) Quinn must follow s34(3) AEA 1925 and the statutory order of priority laid out in Part II Sch 1 AEA 1925. Although the statutory order can be varied by the testator (but not by the courts), Oliver's will does not make any such variation. The statutory order is needed to regulate the burden of the debts and liabilities between the beneficiaries. However, creditors are not bound by the rules, and they can obtain payment out of any assets of the estate.

The first category of property to be used to pay the testator's unsecured debts is property undisposed of by the will, subject to the retention of a fund sufficient to meet any pecuniary legacies (Para 1). This usually relates to a lapsed share of residue, however, as Oliver has left his residuary estate to Finlay there is no property falling into this category.

The second category of property to be used is the residuary estate, subject to the retention of a fund sufficient to meet any pecuniary legacies (Para 2). As there are no other remaining gifts in the will, besides those previously discussed the residuary estate consists of the total £200,000 of Oliver's assets. It is clear to see that the residuary estate is insufficient to pay the unsecured debts and liabilities of the estate, amounting to £150,000 together with the legacies referred to in clauses 3 and 4 of Oliver's will amounting to £70,000, which total £220,000. Therefore, there is nothing in the residuary estate for Finlay to receive. When £70,000 is set aside for the pecuniary legacies, £130,000 remaining in the residuary estate is used to pay off the debts and liabilities, leaving a total of £20,000 debts and liabilities still to be paid.

The next two respective categories are property specifically given by the deceased only for the payments of debts and expenses (Para 3), and property the deceased has charged with the payment of debts and expenses (Para 4). Oliver's estate does not consist of any such property. Therefore Quinn must look to the next category from which to pay the remaining £20,000.

The fifth category is the pecuniary legacy fund of £70,000 that has been set aside (Para 5). This will be used to pay the remaining £20,000 debts and liabilities, which will leave a pecuniary legacy fund of £50.000. Consequently, there is only £50,000 available to discharge the legacies, which means the legacies must abate rateably. The result is that Lindsey will receive £ 40,000 and Sunita and Jonah will each receive £5,000.

As a final note, the other categories, which include, for example, property that the testator has specifically devised or bequeathed (Para 6), are clearly not required.