

**LEVEL 6 - UNIT 21 – PROBATE PRACTICE  
SUGGESTED ANSWERS – JUNE 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 June 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)**

The residue of the estate is passing to a charity and so is exempt from inheritance tax. Only the three pecuniary legacies (expressed to be given 'free of tax' to the beneficiaries) are chargeable.

As the inheritance tax is payable from residue, the legacies will have to be grossed up to the extent that they exceed the available nil rate band.

The rate will be 36% not 40% as more than 10% of the estate is passing to charity.

The deceased had a full nil rate band available as the only significant lifetime gifts he made were covered by his annual exemption of £3,000 per tax year.

Deducting the nil rate band of £325,000 from the total legacies of £725,000 leaves £400,000 of the legacies to be grossed up at 36%. The grossed up figure is £625,000 meaning that tax of £225,000 is payable.

**(b)**

An executor is deemed to acquire the assets of the estate at their probate valuation. The sale price is £20,000 higher than the probate valuation. Therefore, after deducting any disposal costs there will be a significant gain.

If the sale is made by an executor as part of the administration, there will be a Capital Gains Tax ('CGT') liability on the gain.

Personal representatives pay CGT at the higher rates so, as this is a sale of residential property, the applicable rate will be 28%.

There is an annual exemption available for the tax year of death equal to that of an individual, and the two following tax years. For tax year 2016/17 the annual exemption is £11,100 leaving a balance of £8,900 chargeable to tax.

Charities benefit from a CGT exemption in respect of gains realised on the disposal of assets, if the gains are applied for charitable purposes. However, the exemption will only apply if the relevant property is beneficially owned by the charity. Until assets have been specifically vested or the residue has been ascertained, no legatee can be certain that they will receive an interest in any specific asset. All that the legatee holds during the period of administration is a chose in action, being a right to have the estate properly administered.

Hence, the executor should execute an assent, either declaring that the property is held on trust for the charity absolutely or transferring the legal title in the property to the charity. No CGT will be payable and the annual exemption can be preserved for disposals of other assets.

**(c)**

"I am pleased to say that as the cottage is not required for the purposes of the administration, it can be appropriated to you can take it as part of your entitlement. However, the valuer has confirmed that the current value has increased to £280,000. We are legally required to make the appropriation at that value, not the value at the date of death. This means that the balancing cash payment will be only £70,000 not £100,000.

Please you let us know whether or not you wish to continue on that basis.

There will be no capital gains tax liability resulting from the appropriation of the holiday cottage to you. As a beneficiary, you are treated (for CGT purposes) as acquiring the asset from the executor at its market value at the date of death."

**(d)**

Dividends and interest are now received gross. Personal representatives have no tax free allowances. Therefore, the interest will be liable to basic rate tax of 20% and the dividends to the dividend ordinary rate of 7.5%.

When income is paid to residuary beneficiaries, they are entitled to a form R185 showing the tax paid by the estate. As a charity, the Suffolk Wildlife Trust is not liable to income tax, so it will be able to reclaim the tax.

**Question 2(a)**

"The life policy was written in trust for you and your brother. As such it is yours and you can claim it directly from the life assurance company on production of the death certificate.

The remaining assets amount to £455,000 and, as your father did not leave a Will, will pass under what are known as the intestacy rules. The personal representatives must first pay debts and funeral expenses which will reduce the funds available to £450,000. They will hold this on trust for your father's next of kin.

As your father was divorced his next of kin are his issue (i.e. children) who will take 'on the statutory trusts'.

To take an interest on the statutory trusts a person must be living at the date of death and have reached the age of 18 or married or formed a civil partnership earlier. A child who dies without fulfilling one of those conditions is treated as if they had never existed. No one can take whose parents are alive. A child who is conceived but unborn at the date of the intestate's death is 'living' for this purpose. It does not matter whether a child is born legitimate or illegitimate.

Frank had three children so his estate will be divided into three shares of £150,000. You and your brother Kwento will take one share each absolutely.

The remaining £150,000 will be held for Curt's three children.

Stuart and Quentin will each take one third of Curt's share (£50,000 each) absolutely. The remaining one third share will be held on trust for Waveney. If she dies before reaching 18 and without having married or formed a civil partnership, her share will be divided equally between Stuart and Quentin."

**(b)**

"You are entitled to take out a grant of administration to administer your father's estate, but your brother and Curt's two sons have equal rights to do so. You cannot act alone in a case where a beneficiary of the estate is a minor; there must be at least two administrators. You cannot prevent Curt's sons applying for a grant. However, because grants are issued on the basis of who applies first, if you and Kwento make the first application, the grant will issue to you. It is therefore important to consider making the application quickly in this instance."

**(c)**

"No inheritance tax is payable on your father's estate. The life policy is regarded as belonging to you and your brother and so does not attract inheritance tax. Debts are deducted, so your father's net estate is £450,000, which is potentially chargeable to tax.

However, the shares he acquired in your brother's company, now worth £150,000, are eligible for 100% business property relief and so can be ignored, leaving £300,000 potentially chargeable to tax.

Your father made no significant lifetime gifts and so had a full nil rate band of £325,000 available on his death. Therefore, the whole of the rest of your father's estate falls within his nil rate band and no inheritance tax will in fact be chargeable."

**(d)**

"In order to protect the personal representatives from unknown liabilities and claims against the estate, it is advisable to place advertisements for claimants complying with requirements of Trustee Act 1925, s 27.

The advertisements must be placed in the London Gazette, and, where land is included in the estate, in a newspaper circulating in the district in which the land is situated and the personal representatives must also issue such notices as a court would direct in an action for administration. They should make such searches as an intending purchaser would be advised to make.

The advertisement must ask any claimants to send in details of their claim within a stated period, which must be not less than two months.

The personal representatives must then pay all claims of which they are aware, whether as a result of the advertisement or otherwise and are then protected against all unknown claims. However, a claimant can obtain payment from the recipients of the assets of the estate. The personal representatives are only protected in their representative capacity.

If personal representatives are really concerned, it is possible to take out insurance to cover possible liability and/or to ask the beneficiaries for an indemnity but it does not seem likely that this is necessary in this instance."

### **Question 3(a)**

#### **"Entitlement under the Will**

Luana has no entitlement under the Will. An alteration made after the date of execution is ineffective unless it is executed in the same way as a Will (Wills Act 1837, s21). David signed the alteration but it is not witnessed. Therefore, the alteration has no effect and the Will takes effect as originally drawn.

#### **Inheritance Act claim**

Luana had been receiving a monthly allowance from David and, therefore may potentially fall within the category of 'a person maintained by the deceased immediately before death'. If so, she is eligible to make a claim under the Inheritance (Provision for Family and Dependants) Act 1975 on the basis that David did not make reasonable provision for her maintenance.

A person is treated as 'maintained by the deceased' if the deceased person 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.

Luana's wages obviously fall under the definition of 'full valuable consideration'. However, the additional gifts do not. Although the amounts Luana received were relatively small, they are probably enough to meet this requirement.

She must make an application within 6 months of the date of the grant (or obtain leave to apply out of time).

The court will consider the matters set out in s3 of the 1975 Act when deciding whether to make an order and, if so, how much. It would consider her financial resources and needs and also your own financial resources and needs of Victor.

The court will consider any other relevant matter and is likely to be influenced by the fact that David attempted to make a will in Luana's favour. Her chances of receiving a reasonably substantial amount would be good, although probably not as much as 25% of the estate. The court is only able to order reasonable financial provision for *maintenance*. This was defined in Re Dennis (1981) as "payments which, directly or indirectly, enable the applicant in the future to discharge the cost of his daily living at whatever standard of living is appropriate to him".

#### **Negligence claim against solicitors**

A person drafting a Will owes a duty of care to an intended beneficiary (White v Jones (1995)). Luana may have an action in negligence against the solicitors for not preparing the Will sufficiently quickly.

In X (A Child) v Woollcombe Yonge (A Firm) (2001), the court considered that a will drafter owes a duty to prepare a new will promptly, but that the appropriate time frame in which to do so would depend on the circumstances of each case. The court there accepted that 7 days was a reasonable period for a terminally ill lady whose death was not expected to be imminent.

In David's case, there do not seem to be any factors which would have alerted the firm to a particular need to prepare the Will unusually quickly, so their delay may not be regarded as sufficient to justify a negligence claim. It would need to be queried whether a time frame was agreed for the preparation of David's Will and whether the firm kept to it. If they did not, Luana would have a good chance of success but if they did, she is unlikely to succeed. Although this claim is probably less likely to succeed than the 1975 Act claim, if successful she may recover her full loss, i.e. 25% of the estate."

## **(b)**

"A gift of cash will have no CGT implications as cash is not a chargeable asset.

However, from an inheritance tax point of view, the gift is a potentially exempt transfer. There will be no tax to pay if you survive for seven years. If you die within seven years, the transfer becomes chargeable. If it is the first transfer you make, the first £325,000 will fall within your nil rate band. The balance will be potentially taxable at 40%, although once you survive for three years, tapering relief will reduce the rate actually charged.

Fortunately, it is possible to structure the transfer to Luana as a post-death variation of your uncle's estate. Provided we comply with the requirements of s 142 of the Inheritance Act 1984, the transfer will be treated as made by your uncle and not by you. It will, therefore, have no tax implications for you.

The requirements are:

- (1) the transfer is made within two years of death,
- (2) it is in writing,
- (3) there is no consideration (other than the making of another variation, and
- (4) a written election is included stating that the disposition is to be treated as made by the deceased."

## **(c)**

"If the flat is transferred to Luana, we must consider the CGT position. A gift by you will be a disposal for CGT purposes. As a legatee you are treated as acquiring the flat from your uncle at its market value at the date of death; you will be treated as disposing of it at market value at the date of the gift. Hence you will realise a gain of £20,000. You will have an annual exemption (£11,100 for 2016/17), but it appears that you have other gains against which this could be set.

Fortunately, it is possible to vary your uncle's estate for capital gains tax under s 62(6) of the Taxation of Chargeable Gains Act 1992 in the same way that you can vary for inheritance tax purposes. We would need to include an election for capital gains tax within the variation and the transfer will then be treated as made by your uncle and not you.

## Question 4(a)

Henry's wife predeceased him. His gift to her, therefore, fails and clauses 4 and 5 of his Will apply.

The pecuniary legacies to the charities and the great-nephew Pierre-Luc will be paid.

The legacy to Yvonne lapses because she predeceased the testator. Although she has a child, there is no express substitutional gift for children of a deceased beneficiary and the statutory substitution contained in Wills Act 1837, s33 applied only to lineal descendants of the testator.

The gift of the MG sports car to Pierre-Luc is adeemed as it is no longer part of the estate. The insurance proceeds do not pass to him.

The gift to Pierre-Luc of the shareholding in Hamblings Ltd is adeemed by the takeover unless the change can be regarded as one of form not substance (Re Clifford (1912)). This is unlikely, as the new shares are in an entirely different organisation (Re Slater (1907)) and there was an additional cash payment.

## (b)

Henry's gross assets amount to £1,255,000. The debts and funeral costs are deducted for inheritance tax purposes leaving a net estate of £1,250,000 chargeable to tax.

There is a charity exemption available on the £20,000 charitable gifts. However, this is not a sufficiently large proportion of the estate to attract the reduced rate of inheritance tax on the rest of the estate. Henry has his own full nil rate band plus an additional nil rate band transferred from his wife, so £650,000 will be taxed at 0%.

Tax at 40% will therefore be paid on £580,000 which amounts to £232,000.

Tax on non-instalment option property has to be paid before application for the grant. The IHT account will have to be delivered within 12 months of the end of the month of death, but the personal representative will want to deliver the account within 6 months to prevent inheritance tax becoming payable.

Inheritance tax on instalment option property can be paid in 10 equal annual instalments, the first being due 6 months after the end of the month of death.

In this estate the only asset attracting the instalment option is the house which was valued at £800,000. Therefore, the tax on £1,230,000 less £800,000, which is £430,000, has to be paid before the grant.

$$£430,000/£1,230,000 \times £232,000 = £81,106$$

The balance will be payable in instalments.

In order for Ursula to obtain a grant of probate to Henry's estate we will need to send the following to the Probate Registry:

- A copy of the Will marked by Ursula together with 2 A4 photocopies.

- The oath for executors sworn or affirmed by Ursula in front of an independent solicitor.
- The receipted IHT 421.
- The probate fee plus an additional amount to cover the number of sealed copies required.

**(c)**

The instalment option is available for the payment of inheritance tax on land. However, the full amount of tax becomes payable when the land is sold.

When the personal representatives sell land within four years of death for less than its value at the date of death, they can make a claim to substitute the sale price for the death value. This will reduce the inheritance tax value of the estate by £100,000 and lead to a reduction in the inheritance tax payable on the estate.

Where a claim is made, the new value becomes the personal representatives' acquisition value for CGT purposes. Hence they are not treated as realising a loss on the sale (apart from a small loss resulting from the deduction of any disposal costs).

The personal representatives can choose whether or not to claim inheritance tax loss relief. If they choose not to make such a claim, they will then have a loss of £100,000 (plus any disposal costs) for CGT purposes which they can set against any gains they make during the administration. However, as the applicable rate of tax is higher for inheritance tax than for CGT, it will usually be preferable to claim inheritance tax loss relief.