CHARTERED INSTITUTE OF LEGAL EXECUTIVES

LEVEL 6 - UNIT 14 – LAW OF WILLS & SUCCESSION
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.

SECTION A

Question 1

A total intestacy occurs where a person dies without leaving a valid will. The rules and entitlement that apply to a surviving spouse are contained in the Administration of Estates Act 1925 (AEA 1925) as amended by the Inheritance & Trustees' Powers Act 2014 (ITPA 2014) and the Intestates Estate Act 1952 (IEA 1952). The ITPA 2014 was the direct result of the Law Commission's final report, Intestacy and Family Provision Claims on Death (Law Comm. No 331) in 2011. The report addressed current social trends and the complications inherent in the rules and process of intestacy, particularly those concerning the surviving spouse. Since the 2014 Act came into effect on 1st October 2014, it has fundamentally changed the position of a surviving spouse of an intestate.

A surviving spouse includes surviving partners of a registered civil partnership and same-sex marriages (CPA 2004 and M(SSC) 2013) but not surviving divorced (Re Seaford (1968)) or judicially separated spouses or civil partners of a dissolution.

After 30 September 2014, a surviving spouse's entitlement governed by the statutory order of priority in s46 (AEA 1925 as amended) is entirely dependent upon solely whether the intestate left behind surviving children; she no longer shares the estate with any surviving parents or full siblings of the intestate (s1 ITPA 2014). Thus, if the intestate does not leave any surviving children (or issue according to the per stirpes rule in s47 AEA 1925), the surviving spouse takes the entire estate.

Although a welcome simplification of the rules, excluding remoter family members purely in favour of the surviving spouse may be regarded as too generous. However, the change reflects the expectations of the majority of the

public (Nuffield Survey 2010) and apparently the position undertaken by the majority of will makers. Furthermore, remoter family members maintained by the deceased may make an application for financial provision under the Inheritance Provision for Family & Dependents Act 1975, but this can be rather costly and an added complication.

If there are surviving children (or issue), the surviving spouse takes three distinct entitlements each of which has been amended (s46 AEA 1925 and ITPA 2014) and most of which entail a reduction in the children's entitlement.

Firstly, the surviving spouse takes a statutory legacy of £250,000 plus interest. There is now a statutory mechanism for updating the statutory legacy specified by the Lord Chancellor at intervals of no more than five years and index-linked (unless the Lord Chancellor specifies otherwise) to the Consumer Price Index where it rises by more than 15% (ITPA 2014 s2 and Sch. 1). Furthermore, interest on the statutory legacy is simple, not compound (s1(2)) and is now set at the Bank of England official bank rate applicable on the date of the intestate's death. The old higher rate of 6% was out of touch with commercial interest rates and unfairly disadvantaged other beneficiaries of the intestate's estate.

Secondly, the surviving spouse receives all the intestate's personal chattels as defined in s55(1)(x) Administration of Estates Act 1925 and amended by ITPA 2014 (s3). The previous definition was an antiquated and complex list of specific and general classes of personal items (such as "articles of household or personal use or ornament"). It is now a modern definition of " all tangible movable property" which continues to exclude "money, securities for money and property the deceased used solely or mainly for business purposes" (upholding, it appears, the dominant purpose test in Re Maculloch's Estate (1981)). However, it also excludes property "held solely as an investment."

Although the new definition should simplify the classification of property as a personal chattel, problems may arise with items at the intestate's death "held solely as an investment". These items are likely to be of significant value, they are, therefore, likely to prove highly contentious, particularly when collections of valuable items are involved.

Thirdly, the surviving spouse receives half of the remainder of the estate absolutely, whilst the remaining half is distributed equally among the intestate's children (taking into account the per stirpes rule in s47 AEA 1925). Unlike previously where the surviving spouse received half the residuary estate for her life the remainder passing to the children equally (or if no surviving children to a surviving parent or siblings of the full blood). Now that there is no longer a life interest, she receives the capital, not merely the income and interest.

This change ensures that no longer are there complicated rules concerning capitalisation of the surviving spouse's life interest (s47 A (1) AEA 1925) or those governing the administration and costs of the running of a trust, especially when the life interest is in a small fund. Moreover, the change impacts the need for two personal representatives or a trust corporation whenever there is a life interest (s114 (2) Senior Courts Act 1981): it only applies now if there are minor children of the deceased.

The surviving spouse has a special right to require within 12 months of first representation by signed writing that the personal representatives appropriate the matrimonial home in satisfaction of an absolute interest (IEA, Sched 2). This

is significant where the family home is solely owned by the intestate or is owned under a beneficial tenancy in common. It has no application where the home is owned by the deceased under a beneficial joint tenancy with another, in which case it passes to the survivor under the doctrine of survivorship rule.

If the family home is worth more than the surviving spouse's entitlements she can make up the difference by an equalisation payment (Re Phelps (1980); the date of the valuation of the house is that at the time of appropriation and not at the intestate's death (Re Collins (1975). Moreover, if the surviving spouse is the sole personal representative she must apply in writing to the court, appoint another personal representative or obtain the consent of all adult beneficiaries (Kane v Radley-Kane and Others (1998).

An additional special rule is the 28-day survivorship rule found in s46 (2A AEA 1925), which provides that a spouse must survive the intestate by 28 days to take any of the intestate's estate (other than property held with the intestate under a joint tenancy).

In conclusion, the special rules and changes to the surviving spouse's entitlement have had the required effect of increasing the surviving spouse's entitlement, and in particular is an attempt to safeguard her position in relation to being able to remain in the matrimonial home. Alternatively, it can be argued that the new rules put too much emphasis on the rights of surviving spouses and not enough emphasis on children, who stand to lose out as a result of the ITPA 2014, especially when the surviving spouse is the deceased's second or third marriage.

Question 2(a)

Where an estate has sufficient assets to discharge the testator's entire funeral, testamentary and administration expenses debts and liabilities, it is said to be solvent.

Under s34(3) AEA 1925 the testator's real and personal property, subject to any provisions in the will, is applied to discharge any unsecured debts in the statutory order laid out in Part II Sch 1 AEA 1925. The statutory order of priority may be varied by the testator but not by the courts (Petterson v Ross (2013).

The first category of property to be used in the payment of 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 includes property that the testator has unsuccessfully attempted to dispose of in his will (Re Lamb (1929) and Re Worthington (1933)). The second category of property is the residuary estate, subject to the retention of a fund sufficient to meet any pecuniary legacies (Para 2). There is a subtle distinction when a testator varies the statutory order made between lapse shares of residue that fall into the first category as 'undisposed' property and lapse shares of residue that do not.

For example, if the testator in his will directs his expenses and debts to be paid out of his residuary estate as a whole, the statutory order is varied, so, any lapsed share of the residue does not fall into the first category of undisposed property. Instead, the unsecured debts are paid from the residue as a whole borne rateably between the lapsed and valid share of the residue, as occurred in Re Harland-Peck (1941) and Re Kempthorne (1930).

However, if the testator merely directs that expenses and debts be paid without specifying which property is to be charged with the payment, the statutory order

is not varied. So, any lapsed share of the residuary estate is undisposed property and is used first to pay any unsecured debts, as occurred in Re Lamb (1929).

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).

If the testator in his will merely charges or gives any of his property for the payment of debts this does not vary the statutory order: something more is required (Re Gordon (1940)). Such property falls into the relevant third or fourth category and is used after the first two categories to pay any remaining balances of unsecured debts.

However, a testator who not only charges or gives property for the payment of debts but also couples this with an intention to 'free' other property applied in priority in the statutory order, will vary the order (Re James (1947)). For example, a testator who directs both that his debts be paid out of a bank account and makes a gift of his residuary estate is said to have excluded the statutory order (Re Meldrum's WT (1952)).

The fifth category is the pecuniary legacy fund that has been set aside in the first two categories (Para 5, but not specific pecuniary legacies). Sixth, is property that the testator has specifically devised or bequeathed rateably according to value (Para 6). Lastly, property appointed by will under a general power of appointment, rateably according to value.

It has been shown that varying the statutory order is a challenging task for any testator; he must take great care to clearly specify exactly which part of his estate he wishes to be used in the payment of his debts. Unless he does so, the outcome that he may have wished for is precarious and uncertain since the courts must rely on the process of construction to determine whether his words have by implication varied the statutory order (a similar problem lies in establishing a contrary intention to s35).

(b)

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 liable for the payment of the debt upon his death unless the deceased has shown a contrary intention.

S35 makes no difference to the secured creditor's right to be personally paid; he may still seek payment from any asset of the deceased's estate (s35(3)). The doctrine of marshalling is employed to ensure that the debt eventually falls on the charged property.

Only, if the testator has clearly expressed in his will that the secured debt is not to be paid out of the charged property is it easy to establish an intention to vary or exclude s35. For example, the testator gives the property 'free of mortgage' or 'free of charge'.

Where the testator generally directs that all his debts are to be paid from a special fund (for example, 'all my debts to be paid out of the sale of shares in Cadbury') variation of s35 applies but only in so far as the special fund can meet the payment of the secured debt (Re Fegan (1928)).

However, if the general direction is 'to pay all debts out of the residuary estate'

the testator has not varied s35. Instead, he must ensure that he also includes words that expressly or by necessary implication refer to the secured debt. An illustrative case is Re Valpy (1906) where the testator directed that all his debts except a specific mortgage were to be paid from the residue. The court held that by explicitly excluding one secured debt he had by necessary implication shown an intention that another secured (mortgage) debt was to be paid out of the residue.

Significantly, variation can also be demonstrated from a document made outside of the will, for example, a life insurance policy taken out by the testator to cover the secured debt (Ross v Perrin-Hughes 2004)). However, as Ross clearly shows this method ought to be avoided as it can create difficulties.

Ultimately, the best way a testator can vary s35 AEA 1925 is to clearly express his intentions in the will. Otherwise, establishing a sufficient implied intention to vary could prove challenging since the court has to construe the section together with the words used by the testator.

Question 3

The formality rules in s9 Wills Act 1837 as amended by s17 of the Administration of Justice Act 1982 (AJA 1982) apply to all testators making a valid will in England and Wales, other than those who are privileged personnel on active service. The formalities recognise the importance of the act of will making and the essential need for reliable evidence of the testator's testamentary intention.

Under s9(a) a will must be 'in writing', yet there is no definition of what constitutes 'in writing'. The general approach of the court is that it need not be written on paper; provided there is a permanent visual form it can be written on any surface. For example, in Re Murray (1963) the will was written on a cigarette packet and in Hodson v Barnes (1926), it was written on a hen's eggshell. Furthermore, a will can be written in any language provided there is reliable evidence as to its meaning. For example, the Court of Appeal in Re Berger (1989) granted probate to a will written in Hebrew and in Kell v Charmer (1856) jewellery symbols were used in the testator's will.

S9(a) also requires that the will must be 'signed by the testator'. Again, this is left undefined and is clearly ambiguous. The Court has widely and flexibly interpreted the word 'signed' provided what is written is intended to represent the testator's signature. For example, initials, In the Goods of Savory (1851); a thumbprint, In the Estate of Finn (1935) and the words "your loving mother", In the Estate of Cook (1960) were all accepted as signatures. Moreover, in Re Chalcraft (1948) "E Chal" was accepted as a valid signature where the testatrix slipped into a coma since she had in the circumstances done the "best she could have done".

Another person can sign on behalf of the testator provided it is undertaken by the direction of the testator and in his presence. The phrase "by his direction" requires a positive communication from the testator to the other person as held in Barrett v Bem (2012). Concerning "presence", this essentially means the testator must be able to object to or assent to the signature made on his behalf. Not many testators are aware of the presence requirement, let alone the duality of it: mental and physical presence.

There is no clear requirement of the capacity necessary of the 'other person'. Remarkably, it appears that a minor can sign as another person as they can be a

witness to a will, and witnesses can sign on behalf of the testator (Smith v Harris (1845)). This possibility seems implausible given that minors cannot make valid wills. Of course, if a beneficiary signs as the other person suspicion will be raised (Barrett) but is this enough.

Under s9b it must "appear" that the testator intended by his signature to give effect to the will. S9b relaxed and simplified the rule regarding the position testator's signature and applies on or after 01/01/1983 (AJA 1982). Now, a testator may place his signature anywhere in the will provided he intended to give effect to the will. For example, a testatrix may write her name in the attestation clause, as held in Weatherhill v Pearce (1995).

The word "appear" may be resolved by extrinsic evidence. In Marley v Rawlings (2014) the testator and his wife made mirror wills, but each accidentally signed the other's will. The Supreme Court found that when Mr Rawlings signed his wife's will he had intended by his signature to give effect to the will (s9(b). The clerical error, resulting in the content of the will being meaningless under s21(1)(a) (or (b)) AJA 1982 could be rectified by s20 AJA 1982. As a cautionary measure, the court in Re White (1991) held that the making of the will and the signature must be one operation (Wood v Smith (1992) CA).

Under s9(c) the testator's signature must be made or acknowledged in the simultaneous presence of two or more witnesses. Mental presence merely requires the witnesses to be conscious of the act of writing by the testator: Smith v Smith (1866). Thus, if a witness, although present in the same room, is unaware that the testator is writing the requirement is not satisfied, as held in Brown v Skirrow (1902). Physical presence requires an unobstructed line of sight between the witness and the testator at the moment of execution. Remarkably, the test is not whether the witness has in fact seen the testator writing but whether he could have seen the testator writing if he had chosen to do so (In the case of Benjamin (1934), Brown v Skirrow (1902)).

A testator's acknowledgement of his previously made signature is not defined by the Act, but it may be either expressly or impliedly made usually by conduct. For example, by gesturing to the will or by directly asking someone to witness it (Weatherhill). No particular form of words is necessary (Hudson v Parker (1844). The witnesses need not even know that the document is a will. They must, however, be conscious of the words or conduct that construe the acknowledgment, and they must be able to see the signature or have the opportunity to do so. Therefore, if the signature is covered this will not amount to a valid acknowledgement (In the Goods of Gunstan (1882).

S9(d) requires that each witness either attests and signs the will or acknowledges his own signature, in the presence of the testator. Presence has the same dual meaning, but it is the testator who must be both mentally and physically present, a classic illustration is Casson v Dade (1781). s9(c) & (d) requires a specific order, which must be followed: the testator must first sign or acknowledge his signature in the simultaneous presence of at least two witnesses and then the witnesses must sign or acknowledge their respective signatures. If a witness signs the will before the testator has completed the first stage, the execution is invalid: Re Davies (1951). In Couser v Couser (1996) the wife's protestations constituted an acknowledgement of her signature.

Although s9(d) does not require an attestation clause one should be included as its presence raises a robust presumption of due execution. Strong evidence is needed to rebut the presumption (Sherrington v Sherrington (2005) and

Channon v Perkins (2005)). However, if an attestation clause is not included an affidavit of due execution in accordance with r12(2)NCPR 1987 will be required.

In conclusion, it is submitted that the s9 formalities are not “easily and generally understood”. For example, most testators are unaware of the intricacies of the rules concerned with valid signatures, apparent intentions, and the particular order that must be followed when testators and witnesses sign the will.

Question 4

Under the Inheritance (Provision for Family and Dependants) Act 1975, as amended by the Inheritance and Trustees’ Powers Act 2014 (ITPA 2014), the Court has a discretionary power to vary the deceased’s will or the intestacy rules if it can be shown that reasonable financial provision has not been made for a spouse or civil partner of the deceased.

The applicant must prove that the deceased died domiciled in England and Wales (see Cyganik v Agulian (2005)) and that they have locus standi within s1(1)(a) (one of the six categories of applicants). The applicant must also apply to the Court within six months of the grant of first representation (s4). Further, since 1/10/2014 an application can be made even before a grant has been taken out (as amended by ITPA 2014, Para 6, Sched 2).

In proving locus standi a spouse or civil partner must show that he or she was validly married to or was in a civil partnership with the deceased at the date of death (Re Watkins (1953)).

The Court must consider a two-stage test. Firstly, whether the deceased’s estate makes reasonable financial provision for the applicant and if it does not, secondly, what provision ought to be made considering the orders in s2. The Court of Appeal in Ilott v Mitson (2011) confirmed that the first stage requires a “value judgment” by taking into account the guidelines in s3 and discretion may only be exercised during the second stage when it is considering what order, if any, to make. The test is objective: not based on the subjective intentions of the deceased (Re Goodwin (1968)), highlighted by s3(5) where a Court takes into account facts after the death of the deceased up to the date of hearing.

Under s3(1) there are seven guidelines common to all applicants to assist a Court in determining whether reasonable financial provision has been made for the applicant. The fact that no single guideline is weightier than any of the others can lead to difficulty in predicting the likely outcome of the Court and as there is no guidance concerning how to weigh the guidelines between competing claims this also creates difficulties.

The guidelines include the financial resources and needs of the applicants and any other beneficiary, either now or in the foreseeable future. If the deceased had any obligations and responsibilities towards the applicant or any beneficiary, these must also be considered. Furthermore, the Court of Appeal in Re Jennings (1994) stated that this includes both moral and legal obligations the deceased had immediately before his death. Usually, one spouse owes a moral obligation to the other. However, this was not the case in Re Gregory (1971) where the husband left the applicant after one year of marriage and had paid no maintenance to her or their child. Contrast, Stephanides v Cohen (2002) where the Court resolved competing claims on an estate between a spouse and the deceased’s son finding that the testator owed the son only a moral obligation and

the spouse a legal obligation to provide for her. The spouse was awarded a lump sum of £80,000 and a shop having only received a £25,000 legacy in the will.

The size and nature of the net estate of the deceased and any physical or mental disability of the applicant or beneficiary are also taken into account. Finally, any other matter, including conduct of the deceased, the applicant or beneficiary can be considered. The Civil Evidence Act 1995 enables the Court to admit any written or oral statements that contain the reasons of the deceased in leaving his estate as he did although they are not conclusive.

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 including spouses who at the deceased's death are judicially separated or a civil partner with a separation order, although the Court has discretion to apply the surviving spouse standard in limited circumstances according to s14.

Under s3(2) particular guidelines are provided for the surviving spouse standard so that the Court can take into account the applicant's age, length of marriage or civil partnership and contributions made by the applicant to the welfare of the deceased's family. Moreover, in s3(2)(c) the Court must consider the provision the applicant might have reasonably expected to receive if, at the time the deceased died, the marriage instead had been terminated by divorce (or dissolution of a civil partnership). This is known as the divorce analogy test.

s3(2)(c) has recently been amended by the ITPA 2014 so that it now confirms that the analogy test does not set an upper or lower limit to the award of financial provision. The Law Commission recommended the amendment as the law was inconsistent concerning how much emphasis the divorce analogy should be given and exactly how it should be done. For example, in Re Besterman (1984) the Court of Appeal held that the divorce analogy was a 'useful cross-check' but only one of many factors which the Court had to consider. This approach was followed in Re Bunning (1984), but the Court also highlighted that the needs of both spouses have to be taken into account in a divorce.

Furthermore, in White v White (2000) the House of Lords in ancillary proceedings preferred the starting point as one of equal division, at least in 'big money' cases. This led to some cases such as Re Adams (2001) to consider equal division as the yardstick of calculation and award a spouse of 54 years half the deceased's estate. In P v G (2004) a 'big money' case the Court stated that the divorce analogy was the minimum that the widow should receive and awarded her a capital sum of £2 million and ordered the pension trustees to purchase an annuity for her. However, in Cunliffe v Fielden (2005) the Court of Appeal held that White had not created a presumption of entitlement to an equal division of assets between spouses under 1975 Act; White could be departed from where there was good reason. Other particular matters in s3(2) including the longevity of the marriage and the contribution made to the family wealth had to be considered. Lastly, in Lilleyman v Lilleyman (2012) a 'big money/short marriage' case the Court held that a wider range of considerations based on all the facts of the case needed to be taken into account other than focusing solely on the divorce analogy: it is not the determining factor. The Court makes a "value judgment" taking into account all of the guidelines.

In conclusion, the spouse or civil partner occupies a privileged position in regard to making a claim for reasonable financial provision under the 1975 Act and is much more likely to be awarded generously than other categories of applicant.

The divorce analogy as amended now confirms what recent case law seems to have held that although there is no floor to the limit a spouse or civil partner may receive there is no ceiling either.

SECTION B

Question 1

Clause (i)

The issue here is that both direct and circumstantial extrinsic evidence reveals a latent ambiguity concerning the words used by Alice in the gift of 'my vintage car' to Colin. Under s21 Administration of Justice Act 1982 **(**AJA 1982**),** the court can admit extrinsic evidence where any part of the will is meaningless**;** the words used in the will show a patent ambiguity; or extrinsic evidence, but not the testator's intention, shows a latent ambiguity in light of the surrounding circumstances.

Therefore, under s21(c) extrinsic evidence that there are two vintage cars can be admitted to show that there is a latent ambiguity. To resolve the ambiguity, direct evidence that Alice had told Brian that she wanted Colin to receive the Porsche 911 can now be used (Re Jackson (1933), Pinnel v Anison (2005), Marley v Rawlings (2014)). Thus, Colin will be able to take the Porsche 911.

Clause (ii)

There are two issues concerning the gift to Deborah.

The first is whether Alice's alterations are valid, especially considering that only she has initialled them. Since the substituted amount of '£20,000' is written in pencil it is merely deliberative and as such is invalid (In the Goods of Bellamy (1886)). This leaves consideration of the effect of the alteration by way of interlineation through the original amount of £6,000, as this was made in ink. If the alteration were made before the will was executed, it would be valid**.** However, when applying for probate, unattested alterations, such as the one made by Alice (only she has attested the alteration), require affidavit evidence as to their presence at the time the will was executed (r14 Non-Contentious Probate Rules 1987 (NCPR 1987)**.** Since neither of Alice's witnesses recalls seeing the alteration at the time of execution a presumption arises that it was made thereafter (Cooper v Bockett (1846)).

Under s21 Wills Act 1837 (WA 1837) alterations made after the will are only valid if the alteration itself has been executed or the will is re-executed according to s9 WA 1837. Execution of the alteration requires only the initials of the testator and the witnesses in the margin of the will opposite the alteration (In the Goods of Blewitt (1880)). As only Alice has signed the alteration and there is no evidence of re-execution of the will the alteration is invalid.

S21 further states that an invalid alteration will only have any effect if the original wording is not "apparent". "Apparent" means that the original words must be able to be read only by natural methods without interfering with the will, such as using a magnifying glass or holding the will up to the light, see Re Itter (1950). As the original £10,000 is obviously "apparent" the striking through will not have any effect. Therefore, the gift of £10,000 to Deborah remains valid.

The second issue concerns the uncertainty that has been caused by Alice using the word "daughter" when in fact Deborah is not her daughter**.** The general principle of construction is that words are first given their natural, ordinary, grammatical meaning at the date of the will (Perrin v Morgan (1943))***.***

However, if the ordinary, grammatical meaning does not make sense, then a secondary meaning may be construed. Often revealed when taking into account the surrounding circumstances, which includes evidence of the language the testator used, at the time the testator made his will under the armchair rule (Boyes v Cook (1880)). For example, in Re Smalley (1929) the court held that the expression *"*wife*"* could be given a secondary meaning referring instead to a common law spouse based on the surrounding circumstances. Similarly, in Thorn v Dickens (1906) the words "all to mother" were given a secondary meaning as referring to the testator's wife (see also Re Fish (1893) and Charter *v* Charter (1874)).

Applying the armchair rule, since the surrounding circumstance would reveal that Alice regarded Deborah as her daughter and often referred to her as such, the word "daughter" can be given a secondary meaning; thus Deborah can take £10,000.

Clause (iii)

The same rules as to the alteration being valid in clause (ii) apply to this alteration. However, the issue with this alteration is that unlike that in clause (ii) the original wording has been obliterated and is not "apparent" (s21 WA 1837): it cannot be discovered by the use of natural means without interfering with the will. Thus, Elisha would take nothing, as probate will be granted with a blank space: the obliteration amounts to a partial revocation of the will as that appears to be Alice's intention (In the Estate of Hamer (1943)***.***

However, the doctrine of conditional revocation can save the gift. The effect is that if the original legacy is revoked conditionally on the new legacy taking effect, any means can be used to discover what lies beneath the obliteration including "forbidden methods" such as infra-red photography or removing strips of paper and even the admission of extrinsic evidence (Re Itter). Therefore, if any of these methods reveal the original amount the gift to Elisha will be valid, and probate is granted with the original amount.

Clause (iv)

The gift of 'Sea View' is a specific gift of a particular existing part of Alice's estate (Bothamley v Sherson (1875)). Specific gifts are subject to failure under the doctrine of ademption if the subject matter of the gift is not in the testator's estate at his death. Furthermore, under the rule in Lawes v Bennett (1785) if a testator specifically devises land and afterwards grants to another an option to purchase that land the exercise of the option even after the testator's death converts the land into money from the date the option was granted, so that the specific devise is adeemed. Therefore, 'Sea View' is adeemed when Gabriel exercised his option two weeks ago. However, Florence is not entitled to the sale proceeds, which fall into the residuary estate (Weeding v Weeding (1860)) instead she receives the rents and profits from the date of Alice's death until the exercise of the option (Re Marley (1915).

Clause (v)

As Alice's husband has predeceased Alice and there is no substitutionary beneficiary in the will, the gift of the residuary estate fails under the doctrine of lapse. The effect is that it falls to be dealt with upon a partial intestacy, governed by the Administration of Estates Act 1925 (AEA 1925) as amended by Inheritance and Trustees' Powers Act 2014. The personal representatives will hold the residuary estate on trust with power to sell, and will first pay any funeral, testamentary and administration expenses, debts and liabilities (s33(1) & (2) AEA 1925) subject to the provisions contained in the will (s49 AEA 1925). Under s46 and s47 (AEA 1925) as there is no surviving spouse the residuary estate is held on trust for her only son, Colin.

Question 2(a)

A valid will requires the testator to have mental capacity to make a will and knowledge and approval of the contents of the will. If either is missing the will is invalid.

The Mental Capacity Act 2005 (MCA) introduced uncertainty regarding the correct test for testamentary mental capacity, specifically s1, 2 & 3. However, recent case law (Scammell v Farmer (2008), Re Walker (2014) and Simon v Byford (2014) and also Elliott v Simmonds (2016)) appears to assert that the correct test is still that from the leading case in Banks v Goodfellow (1870).

The 'Banks' test has three fundamental requirements. Firstly, that the testator understands that he is making a will that takes effect upon his death and not some other document. This requirement clearly seems to be met as evidenced by Harold's last statement made to his witnesses, "Mohammed has been really helpful with making my will, so I have left him something, not much, but something".

Secondly, that he has a general recollection of his property, but he need not recall every item (Waters v Waters (1848)) or the exact value of his home (Schrader v Schrader (2013)). Again, there is nothing to suggest that this requirement has not been met. Harold has simply left all his estate to Mohammed; indeed, this fact may indicate that a lower degree of mental capacity is required (see In the Estate of Park (1954)).

Thirdly, Harold must be able to recall persons who may have a moral claim against his estate. Although such a testator is free to leave his property to whomever he chooses (Boughton v Knight (1873)) even if moved by mean or capricious motives (Fuller v Strum 2002)). This requirement appears to be in issue since Harold from 2014 'often forgot who they (his daughters) were and on separate occasions referred to them as strangers'. India should be advised that the time for assessing Harold's mental capacity is generally at the date of execution and that a testator with dementia at that date may still have mental capacity. 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, from 2014 Harold's dementia had worsened, and it is highly likely that at the time Harold executed his will, two weeks before his death in 2017, he was in the later stages of dementia. Affidavit evidence will be required from Harold's doctor and the staff at the nursing home. Further support that Harold had not recalled his daughters may be found from the fact that he had omitted to leave

them anything yet his earlier professional will left his residuary estate equally between them.

Therefore, although mental capacity is issue specific and an imprecise line as held by the Court of Appeal in Hoff v Atherton (2005) sufficient evidence shows that it is likely that Harold lacked mental capacity when he executed his homemade will in 2017. In which case, the propounder of the will, presumably Mohammed, must prove that Harold had mental capacity (Barry v Butlin (1838)), if not the will is invalid.

The requirement of knowledge and approval of the contents of the will (a derivative from animus testandi) is that the testator knew and approved every part of his will at the time he executed it. Specifically, Harold must have understood and approved of the single gift in his will to Mohammed (Guardhouse v Blackburn (1866)).

If the will is duly executed and the testator has capacity a presumption of knowledge and approval arises but not where there are suspicious circumstances in which case the burden of proof lies on the propounder of the will (Butlin), presumably Mohammed.

Under the suspicious circumstances doctrine, whenever a beneficiary writes or prepares a will this "is a circumstance that excites the suspicion of the court" as held in Butlin and by the House of Lords in Wintle v Nye (1959). In Wintle, the testatrix was held not to have knowledge and approval of the will where the solicitor prepared the will and subsequent codicil and increasingly benefited. The witnesses' evidence that Harold said "Mohammed has been really helpful with making my will, so I have left him something, not much, but something" suggests that Mohammed was involved in the making of Harold's will. It also suggests that Harold, perhaps, was unaware of the significant gift of all his estate left to Mohammed in his will. Furthermore, the fact that the gift is so large will also increase the suspicion of the court (Wintle). The extent of Mohammed's involvement requires examination, for example, who printed the will, as it clearly was not in Harold's handwriting.

Therefore, it is highly likely that Mohammed will also have the burden of proving that Harold knew and approved his will. If Mohammed fails the homemade will is invalid despite the revocation clause.

(b)

Generally, testators must have mental capacity at the time they execute their will. In December 1997 when Harold executed his will he was confused and unable to recollect any of the gifts he had previously given instructions for or remember certain names and addresses of family members (for a similar case see Wood v Smith (1992)).

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. Applying Key and Wilson, it appears that Harold's will is invalid due to lack of mental capacity at the time he executed his will as he was suffering from bereavement following the tragic death of his sister, Lindsey, which clearly affected his mental capacity.

However, under the rule in Parker v Felgate (1883) an exception applies if a testator lacking mental capacity at execution is capable of understanding and does understand that he is executing a will which his solicitor has prepared according to his previously given instructions (Re Flynn (1982)). The will must contain the testator's instructions, and the testator must have had mental capacity when passing on his instructions, both of which appear to be present: there is nothing to suggest otherwise.

Therefore, although the rule is applied with caution (Battan Singh v Amirchand (1948)) if Harold understood that he was executing his will for which he had previously given instructions to his solicitor, the rule in Parker will save the will from being declared invalid.

Furthermore, although eleven months have passed since Harold gave instructions, this will not of itself prevent the rule from being applied. In Perrins v Holland and Others (2010) the Court of Appeal approved the rule 18 months between the giving of instructions and the signing of the will.

Question 3(a)

Nigel's Will

The fact that Wills are revocable is a fundamental principle in law; all testators can revoke or call back their will at any time before their death. There are three methods of revocation contained in s20 Wills Act 1837 (WA 1837); however, only one of these is pertinent to the facts governing Nigel's attempted revocation: revocation by destruction.

Under s20 destruction of a will can take place 'by the burning, tearing, or otherwise destroying...'. Furthermore, s20 requires two fundamental elements: an act of destruction and an intention to destroy (animus revocandi), also see the leading case of Cheese v Lovejoy (1877).

Based on the facts, Nigel has the necessary intention: there is nothing to suggest he lacks mental capacity to revoke (Brunt v Brunt (1873)), and his intention is unambiguous (Re Booth 1926, Re Southerden (1925)). There is also an act of destruction carried out by the solicitor; hence, the particular issue is whether the act of destruction is effective at law.

S20 allows another person to destroy the will by the testator's 'direction' and in his 'presence'. 'Presence' requires the testator to be both mentally and physically present when the act of destruction occurs. Physical presence, which is directly in issue, 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). In the Estate of Kremer (1965) a testatrix had telephoned his solicitor and instructed him to destroy his will, which the solicitor did. The court held that revocation had not occurred.

Thus, following Dadds and Kremer, Nigel's attempt at revocation is ineffective, and at his death his will is valid. Presumably, the solicitor has retained a copy of Nigel's will, in any case, he or the witnesses could give affidavit evidence as to its contents and to the fact that it was duly executed. Olivia's estate inherits all of Nigel's estate according to Nigel's instructions in his will.

(b)

Olivia's first homemade will

Olivia's first will in March 2010 was executed before her subsequent marriage to Phillip. The general rule under s18 (1) WA 137 (as amended by AJA 1982,) is that a will is revoked by the testator's subsequent marriage (includes civil partnership (CPA 2004) and same-sex marriages M(SSC)A 2013). This type of revocation occurs automatically, regardless of whether or not the testator knew or wished this to happen.

However, contained in s18 (3) and (4) there is an exception to the general rule applicable if two fundamental requirements are shown from the words in the will. Firstly, that at the time the will was made the testator was expecting to marry a particular person, not merely a general intention to marry (see Sallis v Jones (1936), Court and Others v Despallieres (2009)). The expectation of marriage can be express or implied from words such as 'my fiancée' as evidenced in In the Estate of Langston (1953) and Re Coleman (1975). Secondly, the testator intended the will (s18 (3) WA 1837) or a disposition (s18 4 (a) WA 1837) in the will not to be revoked by the subsequent marriage.

Olivia's first will contains a gift to 'my fiancé Phillip'. Applying Langston and Coleman the words evidence Olivia's implied expectation of marriage to a particular person Phillip, therefore, the first requirement is met. Regarding Olivia's intention, if this is the only reference made in her will relating to her expectation of marriage to Phillip it is evidence of her intention merely not to revoke the specific gift to Phillip: s18(4), in which case s18(3) does not apply (see Coleman). Furthermore, a presumption also arises that any other gifts take effect unless there is evidence in the will showing that the testator intended these further gifts to be revoked by marriage. Therefore, applying s18(4)(a) & (b), and since there is no evidence to the contrary, Olivia's three gifts in her will take effect as an exception to the general rule of revocation contained in s18(1).

Olivia's second homemade will

Olivia's second homemade will made after her marriage raises the issue of revocation by another duly executed will (or codicil) contained in s20 WA 1837 Under this method, the whole will or any part of it may be revoked unless a contrary intention can be shown (In the Estate of Wayland [1951] and Gladstone v Tempest (1840)). As Olivia's second will appears duly executed and contains an express revocation clause, which she knew and approved of (Re Phelan (1972) and Collins v Elstone (1893) provided it is clear and unambiguous showing the intention to revoke (Cutto v Gilbert 1854), the first will is expressly revoked***.***

However, Quinta the residuary beneficiary has witnessed the second will. Under s15 WA 1837 where a beneficiary (or their spouse) witnesses the will they remain a competent witness but the gift to them is void. Given that there is no third witness so that Quinta could be a superfluous witness (s1 WA 1968), Quinta's gift will only be saved if the conditional revocation rule applies to the revocation clause.

The conditional revocation rule generally means that revocation of the previous will is conditional on the second will taking effect (Onions v Tyler (1716)). Since the CA decision in Re Jones (1976) the fundamental question to be asked is whether the testator intended to revoke his will absolutely or on condition of a

specified event, for example, that the gift in the second will to Quinta takes effect.

However, if this is applied, so that Olivia's first will is not revoked a further problem arises: the gift of £1000 will go to the Help the Children and not to Dogs for Life as Olivia clearly intended in her second will. Fortunately, the courts have been prepared in some cases, see Re Finnemore (1992), to construe the express revocation clause distributively in order to hold that the testator intended a mixture of both absolute revocation and conditional revocation as regards different gifts contained in the previous will. Thereby, the former will is only partially revoked.

Following Finnemore, the court may construe that Olivia revoked her gift of the residuary estate to Quinta in her first will only on condition that the gift of it took effect in her second will, which it did not, but that the gift of £1,000 to Help the Children was revoked absolutely. Thus, Quinta and Dogs for Life could both take their benefits although under different wills. This would certainly be a just result especially as Olivia has shown a clear and consistent intention to benefit her sister, whereas the contrary can be said concerning Help The Children. Of course, there is no similar problem with Phillip's gift: Phillip will take the house under the second will made after their marriage.

Question 4

Sunita wishes to accept the office of executorship.

Sunita has been expressly appointed as executor of her mother's will; as such she derives her authority to act from under the will. A grant of probate confirms her authority to act. However, to formally accept the office she must take out probate and prove the validity of her mother's will.

Tia's request for £10,000

Since Reesha's will was made in 2015, under s32 Trustee Act 1925 (as amended by s9 Inheritance Trustees' Powers Act 2014) personal representatives and trustees, have power to advance the whole capital of the beneficiary's vested or presumptive share, subject to the consent of any person with a prior interest. Consequently, her father, William, who has a prior life interest in the residue, must consent to any such proposed advancement.

Sunita must consider whether Tia's request for £10,000 is an 'advancement or benefit' (s32). This phrase has been widely construed in Pilkington v IRC (1962) to mean anything that improves the material situation of the beneficiary (including settling property on new trusts). Arguably, Tia has a good case given that she is recently unemployed, has obtained a first-class degree in a relevant subject area and presumably has an excellent knowledge and understanding regarding healthy food. Furthermore, £10,000 is probably not a large amount given that Reesha has left a 'significantly large estate'.

If Sunita decides to make an advancement and reasonably believes Tia is trustworthy, she can pay the money directly to Tia as Tia is over 18 (Re Pauling's Settlement Trusts (1963)). When Tia becomes entitled upon William's death, she must bring the value of her advancement into account against her share.

Xander the missing beneficiary

Sunita's duties as executor are to collect in and value all of Reesha's assets and debts, pay any debts (including any inheritance tax) and distribute the estate according to the correct order of entitlement (s25 Administration of Estates Act 1925 (AEA 1925)). This must be undertaken by all Personal representatives with due diligence.

Therefore, Sunita must ascertain who those beneficiaries (and creditors) are. If she is unable to do so, she must protect herself against devastavit, a claim of breach of duty, for example, by maladministration (Re Whorwood (1887)), which may result in personal liability.

Sunita could consider advertising and carrying out searches in accordance with s27 Trustee Act 1925 (TA 1925) to try to locate Xander. s27 requires that an advertisement is placed in the London Gazette and a newspaper in the location of the beneficiary's last known abode with a time limit of at least two months in which the beneficiary can come forward. However, the fact that Xander is known to Sunita as a potential beneficiary means those advertisements would not protect Sunita; it affords protection only if Sunita was unaware of the existence of a beneficiary as re-emphasised by the Court of Appeal in Aon Pension Trustees v MCP Pension Trustees (2010).

Under the current circumstances, Sunita is better advised to apply to the Court for a Benjamin Order. In Re Benjamin (1902) a residuary beneficiary disappeared some months before the testator's death. Despite advertisements, the missing beneficiary did not come forward. The basis upon which the Court permitted the distribution of the estate was that the beneficiary had predeceased the testator. Furthermore, in Re Gess (1942) the Court allowed a distribution to be made subject to a contingency fund being created to meet known liabilities in case of reappearance.

Before making an order a court will give directions as to the enquiries and advertisements to be made, usually including those within s27 TA 1925. If a missing beneficiary subsequently appears, he can recover his entitlement from any overpaid beneficiaries.

Thus, a Benjamin order would entitle Sunita to distribute the estate on the basis that Xander is deemed to have predeceased Reesha, while at the same time protecting Sunita from personal liability if Xander later reappears. Such an order is also useful when there are unascertained creditors.

Alternatively, a more cost effective method and one recommended by the Court in Re Evans (1999) is the taking out of an insurance policy against the possibility of the missing beneficiary appearing. This would indemnify Sunita against liability if she were to be sued by Xander.

However, before a policy is issued the insurers would seek to ensure that all investigations and enquiries have been made in the United Kingdom to try to ascertain Xander's whereabouts or to find out if he was still alive. Furthermore, the premium would be decided upon this basis and be payable from the estate.

Sunita could also consider taking an indemnity from the overpaid beneficiaries of Reesha's estate since they are all over 18 years of age. However, enforcing the indemnity may prove difficult, for example, if one of the beneficiaries becomes bankrupt. Thus the better course of action would be for Sunita to either take out an insurance policy or to seek a Benjamin Order.

Finally, if Xander has been missing for at least seven years, Sunita may consider seeking a declaration from the High Court that Xander, the missing beneficiary, is deemed to have died (Presumption of Death Act 2013). However, it is considerably more costly than an indemnity policy or a Benjamin Order.

Sunita's adoption

Sunita's position as an adopted child is governed by s67 Adoption and Children Act 2002, which applies to adoption orders made by a court in the United Kingdom. An adopted child is treated as the legitimate child of the adopting person only. Consequently, Sunita is treated as the child of Zelda. However, s67 is subject to any contrary intention being shown in the will.

For example, in Hardy v Hardy and Anor (2013), the testator gave his residuary estate "for such of my children as shall survive me and attain the age of 21 years". However, the testator also described the adopted child as one of "my son(s)" in an earlier clause in his will when appointing him as his executor. The Court decided that the description of him as one of the testator's "sons" was a clear indication in the will of the testator's intention that his adopted child should be regarded as one of his "children" in the clause giving his residuary estate to "his children…"

Following Hardy, as Reesha has also described Sunita as "my daughter" when appointing her executor, Sunita will be entitled to receive a one- third share of the residuary estate when William has died.

Life interest in the residuary estate

s 114(2) Senior Courts Act 1981 states that where under a will (or an intestacy) there is a life interest (or a minor interest) the Court usually requires at least two personal representatives or a trust corporation. Where there is only one personal representative, as is the situation with Sunita being the only appointed executor, the Court has power upon application by any interested person to appoint an additional personal representative during the subsistence of the life interest (or minority interest, s114(4)). Thus, based on the facts, an application could be made by any of the beneficiaries: William, Tia or Uma.