

COUNCIL OF LEGAL EDUCATION



**EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES**

ATP 102: PROBATE & ADMINISTRATION

MONDAY 27TH MARCH, 2023.

DURATION: 3 HOURS.

Instructions to Candidates:

- (a) This paper contains **SEVEN (7)** printed pages including the cover page, with a total of **SIX** questions.
- (b) A Candidate **MUST** answer **FIVE (5)** questions.
- (c) Question **ONE** is compulsory and carries **20** marks.
- (d) All other questions carry **10** marks each.
- (e) Answers **MUST** be supported by relevant case law and statutory provisions where required.

PLEASE TURN OVER

QUESTION ONE

Blessings married Carrington under civil marriage in 1970. Their marriage was blessed with two issues; James and Mary born in 1971 and 1973 respectively. Blessings was a nurse while Carrington a consultant pediatric doctor. Carrington is a consultant at the Kenyatta National Hospital as government employee and at the same time operates his private clinic. Blessings and Carrington were a hard working couple. They made efforts to purchase properties which they registered as joint tenants and tenants in common. Their matrimonial home, Nairobi/Karen/block 12YY, was registered in their joint names. Other properties registered jointly were: Nakuru/Ngata Block 12/HH, Nakuru/Municipality/Block 15/XX, Nairobi/Karen/Block 2DD and Mombasa/Municipality/Block/34/106. Mombasa/Nyali Block 2/22 is owned by Mary and Carrington as tenants in common. Properties acquired and registered by Carrington alone were: Nairobi/ Karen Block 2/ 103G, Kisumu/Milimani Block 12/104F, Kisumu Municipality Block 10/708N, Muhoroni/Addra Block 1/15 Z, Sam Levy Apartments in Lavington and two high range motor vehicles. Carrington and his doctor colleague, Joel, purchased land which they developed and set up business premises which they named JC Doctors' Plaza. JC Doctors Plaza was jointly owned by Carrington and Joel and both had their medical clinics run from there.

In the year 2000, Carrington was concerned that he had too much property and few children and was advised by his father to marry another wife to bear more children for him. Unknown to Blessings, a traditional wedding was organized and Carrington married Joan in 2001. In January 2002, Blessing learnt about the existence of the marriage when she stumbled upon the birth certificate in her house bearing the name of a child named after her father in law, Peterson. When she confronted Carrington, he opened up and told her that he had married Joan and that Peterson was their first-born son. The discovery upset Blessings creating a fertile ground for discontent and frictions in the marriage. Carrington built a palatial home in Kivu where he moved to stay with Joan. He would make occasional visits to Blessings. When Joan got her third child Duke in 2004, Blessing could not take it anymore and she decided to file for divorce in 2005. The marriage was dissolved in 2008. In 2010, Blessings sought for division of the matrimonial property. The parties entered into a mutual agreement to divide the properties between themselves except those that were owned jointly with other parties or those solely owned by Carrington. In the division of the properties the following were given to Blessings: Nairobi/Karen/block 12YY, Nakuru/Ngata Block 12/HH, Nakuru/Municipality/Block 15/XX, Nairobi/Karen/Block 2DD and one high range motor vehicle. The rest of the properties were given to Carrington except that which they were registered as tenants in common. On 16th January 2011, the court ordered Carrington to execute the relevant conveyance forms to facilitate the transfer of the respective properties. On the 17th January 2011, Carrington was involved in a plane

crash in the Mara and died on the spot. At the time of Carrington's death, all Joan's children Peterson, Wendy and Duke were all underage. Joan had resigned from her job to marry Carrington and he had told her that he would pay her monthly upkeep to stay home and take care of their young children.

Mary is mentally unstable and lived with her mother. James had married and was living in Germany with his wife. The family met after the burial to discuss the distribution of the estate of Carrington. Joan is unhappy and is adamant that her children are young and if there is anything to be distributed, she must have a greater share of the property owned by her husband. Joan was of the view that her children should have priority over the other children since she was the official wife of Carrington. She considered Mary as an invalid and undeserving of the inheritance and that Mary is already provided for by virtue of her ownership of Mombasa/Nyali Block 2/22A. That Blessings having been divorced is not a wife and therefore not beneficiary of the estate.

As an expert in probate:

- a) Using relevant legal provisions and case law, explain what the fate of JC Doctor's Plaza would be. (6 Marks)
- b) Advise Blessings on her rights of inheritance from the estate, if any. (4 marks)
- c) Advise Joan on how to safeguard her rights in the estate, if any, and those of her children. (4 marks)
- d) Proffer legal opinion on the position of Mary as a beneficiary. (6 Marks)

QUESTION TWO

Mr. Abisai had one wife - Alice who bore him 4 children. He also had a son - Abednego whom he got with a lady he had a secret relationship with. Mr. Abisai had in place a will wherein he bequeathed everything to Alice and her 4 children. Back in his mind, he knew he would later amend his will to include his son Abednego. However, this did not happen as he died abruptly following a tragic road accident. After his burial, Alice armed with the will, sought the services of a lawyer. One of the witnesses to the will who was a close friend of Mr. Abisai informed Abednego about the will and even gave him a copy. Abednego who was a second year university student, was distraught that he was left out of his father's will and decided to take legal action. He has subsequently visited 'the pro bono lawyers association' where you are employed as a legal counsel. His matter has been allocated to you for your action.

- a) Explain the type of application you would institute on his behalf. (2 marks)
- b) With the help of case law and relevant statutory provisions, discuss 4 circumstances that the court would consider when ruling on applications of this nature. (8 marks)

QUESTION THREE

- A. Julie wrote a will in 2006 leaving all her estate to her siblings Peris and Jenny should she precede them in death. Due to Julie's health condition, Peris was entrusted to take care of her. Her condition required someone to be around her to assist with her movement and daily care. Julie's demands often left Peris exhausted and so she would forget to attend to some of the chores in the house. This infuriated Julie and made her to revisit the will to remove Peris from it. In one of the days, Julie grabbed her will from her bedside drawer with intention to revoke it. Patrick and Coolie, her nephews, had visited her that day and were in her bedroom when she intimated to them that she wanted to revoke her will and would need their assistance. She handed the will to them who burnt it within her compound. Three days later, Julie died and an issue arose as to the will she had written.

Using the relevant legal provisions and case law, discuss the validity of Julie's actions. (5 Marks)

- B. By a will, Diana bequeathed all her estate to Paul, her only surviving relative, and, Rose her best neighbor. She had a copy of the will in the bedside drawer and one kept by her attorney, Caleb. Diana and Rose had issues that constrained their friendship over the years. Diana decided to make some changes to the will and deleted Rose's name from the will. She then took out the will and cancelled Rose's name using red pen signaling her dislike for her. Diana appended her signature and date on the deleted sections of the will. Diana died and her will was found in her bedroom with the deletions. Paul is happy as he now remains the sole heir of Diana. Paul has gone to inform Caleb of the changes Diana made to the will and insists that he be given all the properties left by Diana to the exclusion of Rose. He also informs Rose that Diana had removed her as a beneficiary under the will. Rose has sought help from you.

Advise her on her legal rights, if any.

(5 Marks)

QUESTION FOUR

Gabriella was diagnosed with Covid 19 Corona virus in February 2020. She was immediately rushed to hospital and put on oxygen immediately. After a few days she was sent to a quarantine facility in the outskirts of the city. Having looked at the media reports on the disease, she believed her days were numbered. She called her daughter Madonna and her son Maradona and informed them that in case of anything all her assets should be divided equally between the two of them. She further told them that her fiancé Ronaldo would administer the estate since he was trust worthy and he knew

everything about her properties and finances. She also told them that she intended to give him the commercial plot in Membley as a gift. She felt that by gifting him the said plot, he would not neglect her children. She then called Ronaldo and told him that she had given him the said Membley commercial plot as a gift and that he would administer her estate and ensure that her children got equal shares of all her property and assets. She then told him to organise for a zoom meeting between her two children, himself and herself so that she could proclaim everything in the presence of everyone. Two days later, they had a zoom meeting and Gabriella emotionally proclaimed;

"I am not certain I will survive this disease and this are my wishes in the event I pass on. All my possessions including cash in banks, shares, plots and real estate investments shall be shared equally between my 2 children Madonna and Maradona. Ronaldo shall be the administrator of my estate and I hereby appoint him the executor of my wishes. I have given my commercial plot at Membley to Ronaldo as a gift. I have also given him the Land rover defender 110 as a gift since he helped me buy it."

She asked her daughter Madonna who had a good handwriting to put everything in writing and to have each of them append their signatures. This was done and dated 14th February 2020.

Gabriella stayed at the quarantine facility and was discharged after two months. The doctors told her she was at liberty to go home and continue with daily life as she no longer had the virus. Gabriella was finally re-united with her children and fiancé. In December 2020, whilst on Christmas vacation, realizing how fragile life was, Gabriella and Ronaldo decided to formalize their relationship. They set in motion plans for a traditional marriage ceremony. They set the date of the wedding as 22nd August 2021. Before then, Ronaldo's extended family was to visit the Gabriella's family for purposes of fulfilling the traditional rites of dowry. In consultation with her family, the visit to her home was set for 15th April 2021. On 13th April 2021, while on the way to her rural home for preparations, her car was involved in a tragic accident and she died on the spot. She left behind her son who was still a minor of 17 years and her daughter who was 20 years old and had just been admitted to a Ivy league university to study Psychology.

After the funeral, Gabriella's elderly father was keen on petitioning for grant of letters of administration to enable him administer the estate. Ronaldo was of the view that he was the deceased's husband since they lived and cohabited together and had already planned a wedding. The children were of the view that their mother's wishes in the document dated 14th February 2020 should be upheld as a valid will.

- a) With help of case law and statutory provisions give a legal opinion on the validity of the gifts that Gabriela gave Ronaldo on 14th February, 2020. (4 marks)

- b) Assume that Ronaldo has gone ahead to petition for letters of administration stating that he was the deceased's husband. Madonna and Maradona approach you for advice after seeing it in the special gazette notice. Maradona has turned 18 years. They are both worried he may lock them out of their mother's estate since he did not include their names in the petition.

Explain the proceedings you would need to file and the ground(s) thereof so as to protect their interests. (4 marks)

- c) Explain whether Ronaldo is a husband of the deceased for purposes of succession. (2 marks)

QUESTION FIVE

Debbie Espinosa is a rich woman living in Nairobi. She owns blocks of apartment (Debbie Suites) within Lavington comprising fifteen (15) units for residential and two (2) large offices. She uses the two large offices for official business. She has good relationship with her tenants. She lives in Karen and has two grown sons, Peter and Maxwell, who also work in Nairobi. The sons rarely visit Debbie in her office and are unknown to the tenants. Rent was paid directly to Debbie in her office. Three months ago, Debbie died in a road accident. She died intestate. The tenants have not paid rent for the past three months' despite being given time to clear the arrears. They are adamant that Debbie never introduced the two sons to them and that they have no proof of their status. They have therefore refused to pay rent. Peter and Maxwell have come to you for legal advice.

- a) Advise them on the relevant grant(s) they need to take out to enable them take action against the tenants. (5 marks)
- b) If Peter and Maxwell were minors what steps would be taken to ensure that legal action is taken against the tenants. (5 marks)

QUESTION SIX

Ann and Tony got married 5 years ago. Out of their marriage, they were blessed with a baby girl Camilla. Shortly thereafter, they were desirous of making wills and they visited their lawyer. They instructed him to prepare 2 mirror wills for each of them, leaving everything to each other and in the event none survived the other, then all was to devolve to their only daughter Camilla. The lawyer subsequently prepared the two wills and he called them to visit his chambers to approve and execute the will, but they were not available on the appointed date. A few days later, Tony was killed in a suicide bombing incident. Apart from his wife Ann and daughter Camilla, Tony was also survived by his only brother Jack.

After his funeral, Ann whilst going through his documents found a duly executed will prepared by their lawyer dated 10 years ago. In this will, Tony bequeathed his estate to a charitable trust and appointed Jack as the executor of the will.

Ann has subsequently approached you for legal advice.

- a) Advise her on the validity or otherwise of the will made 10 years ago. (3 marks)
- b) Explain who would be entitled to take out grant and what type of grant should be applied for. (3 marks)
- c) Ann is of the view that the intended will by Tony prepared by their lawyer is valid. She believes the same represents Tony's last wishes and should be upheld. With the help of relevant statutory provisions and case law, advise her on the validity or otherwise of the written will prepared by their lawyer. (4 marks)

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COUNCIL OF LEGAL EDUCATION
EXAMINATION FOR ADMISSION TO THE ROLL OF ADVOCATES

UNIT CODE:

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 SUBJECT/UNIT PROBATE AND ADMINISTRATION

REGISTRATION NUMBER:

DATE: 27th March 2023

INSTRUCTIONS TO CANDIDATES

1. Enter the Unit code, Subject of the Examination, Admission Number and Date in the spaces provided. The admission number should be as it appears on the Examination Card.
2. Do not write your name anywhere in this booklet.
3. Attempt each question on a fresh page of the booklet.
4. If an additional booklet is used, it MUST be fastened at the END of this booklet.
5. Insert in the column headed 'Question Number' the numbers of questions answered in the order in which you have attempted them.
6. Kindly ensure your handwriting is LEGIBLE.

Question Number	Examiner		Moderator		Quality Assurer	
	Mark	Initials	Mark	Initials	Mark	Initials
1	13	JO				
2	9	RO				
3	8	RO				
4	09	AM				
6	10	AM				
TOTAL MARKS	49	RO				

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QUESTION ONE

a) The Fate of JC Doctors Plaza

Carrington and his doctor colleague, Joel purchase land which they developed and set up business premises which they named JC Doctor's Plaza. JC Doctors Plaza was jointly owned by Carrington and Joel and both had their medical clinics run from there.

The principles of survivorship, nomination and donatio mortis causa exclude property passed under such doctrines from being passed under a will or through intestacy. In the present case, Carrington owed property jointly with Joel.

In the Estate of Jane Mwathi the court held that where property is jointly owned, such property will pass to the survivor of that property. The joint owner will apply to the registrar accompanied with a death certificate to have the name of the deceased deleted from the register and to retain the survivor.

Section 43 of the Law of Succession Act states that where two joint property owners died it is assumed that the older one died first and the younger one followed him. In cases of spouses, it is assumed that they died at the same time.

In the present case, Carrington died, and he was a joint proprietor of JC Doctor's Plaza with Joel. The property therefore automatically transfers to Joel. Joel may make an application to the Registrar to have Carrington's name removed and for him to be the sole proprietor.

b) i

Sec 29(a) of the Law of Succession Act provides for dependants who do not have to prove dependancy. They include: The wife or former wife of the deceased and children of the deceased.

Blessings is a former wife of the deceased whose marriage was dissolved in 2008. Subsequently in 2010, she sought for division of matrimonial property. The parties entered into an agreement to divide the properties between themselves except those that were jointly owned with other parties or those solely owned by Carrington.

Subject to the agreement, Blessings got her share of the property pursuant to property that was jointly owned.

Therefore, she will only be entitled to her share in common property given that she is a divorcee and the division of property has already taken place subject to the 2010 application for division of matrimonial property.

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Section 43 of the Marriage Act recognizes customary marriages, and states that where payment of dowry is proof of a customary then such evidence should be adduced to show proof of the existence of the marriage.

Additionally in *Gituanja v. Gituanja* the court stated that customary marriage are marriages where one proves the existence of such and it should be done on a preponderance of evidence.

Joan can safeguard her interests by rightfully claiming that she is a wife and was married in 2001 through a traditional wedding and that her children are children given that their birth certificates contain the name of Carrington as their father.

She can make an application to court relying on section 3(c) of the Law of Succession Act and if her union is recognised under this section then her children will be subsequently recognised as children.

Section 41 of the Law of Succession Act provides for the instance where there are minors. The administrators are required to be more for example 2 more in order to hold the property in trusteeship until the children attain the age of majority. However pursuant to section 50 of the Law of Succession Act the administrators should not be more than four.

d)

Mary is a child of the deceased whom they bore with Blessings. By virtue of section 29(a) of the Law of Succession Act she is a child of the deceased and she is not required to prove dependency.

Mary co-owns property with Carrington being Mombasa/Nyali Block 2/222. Therefore, given that her father is dead, she is entitled to the share of her property in Mombasa/Nyali Block 2/22A.

Section 40 of the Succession Act provides instances where the person/deceased was in a polygamous marriage, it states that the estate will be divided according to the units of each house, including the wife and children as units of each house. Mary is therefore entitled to the share of her father's estate in equal measure as Peterson, Wendy, Duke, who are children of Joan.

The court in John Mubea v. Milka Mubea held that in distribution of the estate of the deceased the court ordered that the age of the children may be taken into consideration and the needs of minor children may be taken into consideration when distributing the property.

Given that Mary is mentally unstable, her share of the property may be vested in her mother or her brother who will hold the property in trust for her until she attains stability. This is as provided in section 41 of the Law of Succession Act.

The persons who may hold the property in trust for her include her mother, her brother or a Public Trustee, where he deems wastage is likely.

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Questions TWODo not write in
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(a)

I will make an application for reasonable provision in accordance with section 26 of the Law of Succession Act.

If Alice has not applied for grant, I will apply through a petition.

If Alice has applied for grant, I will make an application through summons.

Section 30 of the Law of Succession Act provides for timelines within which such application may be made. I will make the application before grant has been confirmed.

(b)

Section 28 of the Law of Succession Act provides for circumstances under which the court considers in making a ruling on reasonable provision. They are as follows:

a) Any existing and future needs of the defendant. The court considers if the applicant has any future and the present needs in the making of the ruling. The court in *Re Estate of Mwigai Njarambi* considered the needs of the defendant who was left out a will, the court considered the fact that he was still a student studying at Mushorogi Secondary school and that therefore he was in need of the proceeds of the estate of the deceased.

In the present case, the court will take into consideration the fact that Abednego is a second year university student. As such, he may be in need of school fees or any such money.

required for his maintenance

b¹ The behaviour of the dependant towards the deceased / the relations of the dependant with the deceased.

The court may also consider the relationship of the dependant with the deceased. The court will take into consideration if they had a good relationship and what could have prompted the deceased to leave the dependant out. In the case of John Kariuki Githongo v. Matthew Kariuki Githongo, the court considered that John was living abroad and he was not in constant communication with the deceased. Further, he did not attend the burial of the deceased. He had only come back to the country to request for his share of the property. The court found that the deceased's reasons for leaving out the son were justified.

c) Any property / gifts advanced to the dependant during the deceased's lifetime

The court will also consider any property advanced to the dependant during the lifetime of the deceased ie any gifts inter vivos, any gift in contemplation of death advanced to the deceased. In Re Estate of Mbari ^{Otieno} ~~Odongo~~ the court considered that the deceased had left two cars to the son during his lifetime; therefore it could take it into consideration when providing for a ^{reasonable} ~~adequate~~ provision for the son.

② Any present or future income of the dependant.

In making a provision for reasonable provision, the court may consider any present or future income of the dependant. If the dependant has a great source of income presently, the court may use that ground to make provision for the amount to be allocated under reasonable provision.

Section 27 of the Law of Succession Act provides that the court may order for lumpsum payment or payment in installments.

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Questions THREEDo not write in
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(9)

Section 18 of the Law of Succession Act provides for revocation of will. For a will to be properly revoked, there must exist two elements:

i) intention to revoke

ii) Actual destruction

The court in *Cheese v. Lovejoy* was faced with the question of revocation of wills. In this case the deceased had torn a will and thrown it into ^a dustbin. The heir found the will and placed it in a drawer. 8 years later, the will was retrieved. Some argued that the will had been revoked and others argued that the will was effective therefore valid. The court held that for the will to be considered revoked, there has to exist intention to revoke and actual destruction. Actual destruction can be by way of burning, destroying it or tearing it into pieces which cannot be reconstructed.

The court in *Bolton v. Lewis* held that the destruction must be done in the presence of the testator. In this case, the testator ordered the people surrounding him to destroy a will, they left him and went to the kitchen to destroy a will. The court held that the destruction was improper as it ought to be done in the presence of the testator.

In another decided case, the deceased had called their lawyer to request him to destroy the will which was in possession of the lawyer. The court found such destruction to be unapplicable. It stated that destruction should be done in the presence of the testator. In case the testator sends written instructions they should be written and properly attested by two independent and competent witnesses.

Julie's actions are not valid. Despite her having an intention to revoke a will, the revocation/actual destruction should be done under her instructions and in her presence.

⑥

Rose can claim that the will was not properly altered. Section 20 of the Law of Succession Act provides for alteration of wills. The process of alteration of wills requires formal execution and attestation as required in the making of a will.

For alteration to be considered effective/valid, the testator must have executed it by placing a signature of the will and the date on the selected sections of the will. Additionally, the will should be attested by two independent and competent witnesses.

In case one of the witnesses is a beneficiary, it should be further attested by two independent and competent witnesses.

The alteration by Diana was therefore not valid as she only appended her signature and wrote the date. The alterations to the will were not signed by two independent witnesses.

Rose can therefore rightfully claim the bequests left to her by Diana under the will.

⑧

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Questions FOURDO NOT WRITE IN
either marginQUESTION FOUR

a)

The gifts made by Gabriela to Rono are gifts in contemplation of death. Section 31 of the Law of Succession Act provides for the formal requirements to be met for gift in contemplation of death to pass. They include:

a) The gift must be made in contemplation of death due to illness or imminent danger.

b) The gift should be moveable property.

c) possession of the subject matter of the gift should pass for example, if the gift is a car, the donor must part with possession of the key and give such key to the donee.

d) The donor must die as a result of the illness or imminent danger.

e) The donee should not predecease the donor.

i) The gift should be made in contemplation of death due to illness or imminent danger and the donor must die as a result.

The court in *Cain v. Moon* stated that the gift can only pass when it was made in contemplation of death due to illness or imminent danger and the donor dies as a result of such imminent danger or illness.

In the present case, Gabriela made the gifts to Ronaldo in contemplation of her death during to the Covid 19 coronavirus diagnosis. She feared that she would die as a result of the Covid 19 coronavirus diagnosis. However she was discharged and she died ⁱⁿ a tragic road accident.

ii) The gift should be moveable property capable of being passed under a will.

In her declarations on 14th February 2020, Gabriella gave to Ronaldo a commercial plot at Membley as a gift and a Land Rover Defender 110.

The commercial plot at Membley is immovable property therefore incapable of being passed as donatio mortis causa.

iii) The donor should part with possession of the subject matter of the gift during their lifetime.

Parting with possession can be characterised by giving a key to the beneficiary while they are still living in case of a car. Alternatively, giving the donee a logbook of a car.

In this case, Gabriella did not give Ronaldo a key to the car or the logbook.

Therefore, the commercial plot in Membley given as a gift was not valid as it is immovable property. The Land Rover Defender 110 as a gift to Ronaldo was not valid as Gabriella did not give Ronaldo the key or logbook of the Land Rover Defender. Besides, Gabriella made the gifts in contemplation of her death by Covid 19 virus. However, she died as a result of a road accident. Therefore, the gifts are not valid.

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Questions 4

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⑥

After one applies for grant, a gazette notice is published to welcome anyone who has any contentions to the application for grant to make an objection.

I will pursue objection proceedings. Section 68 of the Law of Succession Act provides that a person who objects to the application ~~making of~~ for grant may lodge objection proceedings to the court in the prescribed form. The court then may give notice to the objector to file either an answer to the application or a cross-application.

In the court in the estate of Ngegi Muigai stated that the a person objecting to the application for grant may make such an application of the following grounds: stating that the will is invalid, contesting the existence of a will, contesting the suitability of the petitioner and also stating that they should be included in the ~~grant~~ application for petition for letters of administration.

In this case, Madonna and Maradona will be making an objection proceedings pursuant to Section 68 of the Law of Succession Act and Rule 17 of the Probate and Administration Rules. Their grounds include: They should be included as petitioners as they are beneficiaries of the estate of the deceased. Additionally, they are competent and of age to be petitioners of the estate of Gabriella.

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A husband is a person legally married under the provisions of law or customary marriage.

Section 6 of the Marriage Act provides for different types of marriage such as Hindu, Christian, Civil, Customary and Islamic.

Ronaldo was not married through a Christian or civil marriage. Neither was he through a Hindu and Islamic Marriage. There were plans underway to have a traditional marriage ceremony on 22nd August 2021. Before then, Ronaldo's extended family was set to visit Gabriella's family for purposes of fulfilling the traditional rites of dowry on 15th April 2021. Unfortunately, Gabriella died on 13th April 2021.

Owing to the foregoing, Ronaldo was not the husband of the deceased for purposes of succession.

09/10

QUESTION SIX

(a)

Section 19 of the Law of Succession Act provides for revocation of wills by marriage. Ann and Tony got married 5 years ago. The will discovered by Ann whilst going through Tony's documents was prepared by their lawyer 10 years ago. In the said will, Tony bequeathed his estate to a charitable trust and appointed Jack as executor of the will.

Section 19 of the Law of Succession Act provides that marriage revokes a will unless the will was made in contemplation of marriage. Tony in this case did not make the will in contemplation of marriage as he did not leave any property to Ann and their daughter Camilla. Instead, he bequeathed his estate to a charitable trust and appointed Jack as the executor of the will.

Therefore, the subsequent marriage to Ann after Tony made a will is considered to have revoked the will made by Tony 10 years ago. Therefore, the will is not valid.

(b)

Ann and Tony made two mirror wills leaving everything to each other and in the event that none of them survived the other, then all was to devolve to their only daughter Camilla. Despite the calls by their lawyers to visit his chambers to approve and execute the will, Ann and Tony were not available because the formal requirements for a valid will were not met. Therefore Tony died intestate.

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Questions 6

section 53 of the law of succession Act provides for various types of grant. They are as follows:

- a) where the deceased left a valid will and appointed an executor, grant of probate.
- b) where the deceased left a valid will but did not appoint an executor, grants of letters of administration with will annexed.
- c) where the deceased died intestate, grant of letters of simple administration

Section 66 of the law of succession Act provides for the priority of persons who may apply for grant. The priority is as follows:

- a) spouse
- b) other beneficiary under Part V of Law of Succession Act
- c) The public Trustee
- d) The creditor

In this case given that Ann is the spouse of the deceased ^{she} ~~part~~ will be entitled to take out grant pursuant to section 66 of the law of succession Act and given that the will was not valid because of lack of execution, the type of grant she will apply for is grant of letters of simple ~~part~~ administration (Form 80).

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Questions 6

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C

A will may either be oral or written. For a written will, section 11 of the Law of Succession Act provides for the threshold to be met for it to be considered valid. Some of the requirements include:

a) Execution

The will must be properly executed by the testator. The execution may be by a thumbprint, words like 'loving mother', signature or initials of testator.

If the will is executed by someone else on behalf of the testator, that should be clearly indicated in the will.

b) Attestation

The will must be properly attested by two independent and competent witnesses who should sign ~~and~~ in the presence of the testator and they should see the testator sign the will.

Section 13 of the Law of Succession Act provides that attestation by a beneficiary may render any bequest under the will void unless the will is attested further by two independent and competent witnesses.

The will made by Tony was invalid as it was not executed by Tony. Also, the will was not properly attested by two independent witnesses.

In cases where the will is held to be invalid, the testator is assumed to have died intestate. Tony's will was invalid. He will be considered to have died intestate.

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 SUBJECT/UNIT PROBATE & ADMINISTRATION

REGISTRATION NUMBER:

DATE: 27/03/2023

INSTRUCTIONS TO CANDIDATES

1. Enter the Unit code, Subject of the Examination, Admission Number and Date in the spaces provided. The admission number should be as it appears on the Examination Card.
2. Do not write your name anywhere in this booklet.
3. Attempt each question on a fresh page of the booklet.
4. If an additional booklet is used, it MUST be fastened at the END of this booklet.
5. Insert in the column headed 'Question Number' the numbers of questions answered in the order in which you have attempted them.
6. Kindly ensure your handwriting is LEGIBLE.

Question Number	Examiner <i>AM</i>		Moderator		Quality Assurer	
	Mark	Initials	Mark	Initials	Mark	Initials
2	01	RO				
5	02	RO				
6	00	AM				
3	03	AM				
1.	02	JO				
TOTAL MARKS	08	RO				

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Questions 2. (c)

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2(a) The type of application I would institute in court on behalf of Abednego is an application seeking to prevent the execution of the will in Alice's possession pending hearing and determination of Abednego's claim to Mr. Abisai's - deceased estate. I will approach the court seeking orders for revocation of grant of probate where such has been granted by the court or in the other hand seek a temporary relief preventing Alice from executing and/or administering the estate.

(b) Four circumstances that the court would consider when ruling on applications of this nature:-

(i) Whether Abednego has a valid claim to Mr. Abisai's estate. Under this limb, the onus is on Abednego to show sufficient cause as to why the court should exercise its discretion and refuse to grant probate to Alice and allow her to execute the said will by Mr. Abisai.

By virtue of the fact that his mother was in a cohabitation of some sort with his mother, if he satisfies the court about the same, then the court will duly oblige and rule in his favour and allow the estate to be administered afresh with him included in the proceedings.

(ii) Whether there was mistake on ^{the} part ~~on the~~ of the testator when he drafted his will. (Suspicious Circumstances)

In the Estate of Reginald Mengi - deceased, this is a Tanzanian case involving the deceased Tanzanian Tycoon, Reginald Mengi. He drafted a will and bequeathed his estate to his widow and wife at the time of his death. The High Court of Tanzania held that there was mistake by the testator as well as a cloud of mystery whereby the testator left out all his other children and bequeathed the entirety to his widow and her minor twin sons. (His widow was the last person by his side while

(iii) The construction of the will as provided under schedule one of the Law of Succession Act.

Under this limb, the court when construing the will of Mr. Abisai the court is guided by schedule 1 of the Law of Succession Act.

A good example is the armchair rule whereby the court "puts" itself in the shoes of the testator to try and establish his intentions when drafting the will.

Another example is the courts looking into the ordinary meaning of the wording of the will to enable them to reach a just determination of Abednego's prayers.

(iv) Whether there was coercion or undue influence on the testator.

The onus herein rests on the shoulders of Abednego. The burden of proof with regards to coercion and/or undue influence lies on Abednego. Abednego should provide the court with sufficient grounds as to why grant of probate should not be issued to Alice where he can show a sufficient cause.

Similarly as is the case with (In the Estate of Reginald Mengi), the children of the deceased from his first marriage provided sufficient grounds for invalidating the will in his current wife's possession through coercion and undue influence where the deceased's widow who was with him during his last days while he was undergoing treatment in Dubai.

(a)

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(a) The following are the relevant grants they need to take out to enable them take action against the tenants:-

(i) Grant ad litem.

This is a temporary ^{grant} that is obtained by the deceased's beneficiaries either individually allowing them to sue and/or receive proceeds through a judgment on behalf of the estate of the deceased.

Since Peter and Maxwell intend to bring an action for the recovery of rent arrears from the tenants, it is crucial that they jointly obtain a grant ad litem jointly on behalf of the estate of their mother Debbie through which they will receive the decretal sum obtained from a judgment in their favour.

(ii) Grant of probate.

This is an absolute grant to the duly appointed executor and/or administrator to proceed and execute the property/estate and/or administer the deceased estate pursuant to court directions. With grant of probate

(b) Steps that would be taken to ensure that legal action is taken against the tenants if Peter and Maxwell were minors:-

(i) Seek leave of court to have an administrator administer the property on behalf of the minors.

This is a very crucial step as you cannot act on whims with regards to the property in question. Through representation on their behalf i.e., a relative who is an adult of sound mind, with due capacity can obtain permission to administer the property on their behalf as a trustee until such a time they attain majority age.

(ii) Seek a limited grant ("..... minore")

This is a temporary grant (the name has escaped me) whereby the court grants order to a duly appointed court administrator to administer the estate on a temporary and transparent manner on behalf of Peter and Maxwell provided they obtain the court's authority to proceed with the administration of the estate.

(iii) Seek a temporary injunction pending hearing and determination of the case.

The first order of business for an advocate in this particular scenario is to first seek an injunction preventing the tenants from vacating the property until they pay their rent arrears in full pending the hearing.

Through an injunction order, the tenants will by court order be legally prevented from acting in any way or manner that is against the interests of the property in question till such a time the said injunction is lifted by the court.

(iv) Obtain a grant ad litem.

As expounded in detail in 1(a) above, this grant will enable the intended administrator to act in capacity as a representative of the minors in any proceedings in a court of law with the requisite jurisdiction to entertain matters for recovery of sums owed to the estate of the deceased like is the case with the rent arrears by the tenants.

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Questions 6

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(a) Validity or otherwise of the will made 10 years ago.

(i) Whether the will meets the requisite criteria required for a valid will.

The first thing the court will look into when exercising its discretion over the matter as provided under the Law of Succession Act (Section 70, Power of the Court) is whether the said duly executed will meets the ~~essetia~~ essential conditions for validity of a will i.e. testamentary capacity of the testator and the attestation. If Ann can successfully show the court that the will is a valid creation ~~of the~~ not a reflection of her husband's wishes then the court can rule that the property be distributed through intestacy.

(ii) Whether the court can exercise its discretion to determine the validity of the will. (Opposition to execution by Jack)

As highlighted above, the validity of the will will be determined by the court with the requisite jurisdiction. The court is the one that will decide whether Tony's bequeathing of the estate to the charitable trust invalidates the will in Ann's possession and prevent Tony from executing the will and as such can include Camilla as a beneficiary where she can be appointed as administrator in her capacity.

(b) With regards to who would be entitled to take out grant, it would rest on the court to exercise its discretion over the matter.

Where there is no opposition from Ann, Jack may proceed and obtain grant of probate from a court with the requisite jurisdiction and execute the will in accordance with the wishes of Tony.

(c) (i) Testamentary capacity.

This is the first and most important issue that the court looks into while construing the validity of the contents of a will and testament.

(ii) The will as a declaration of Tony, the testator

As Ann is convinced and believes the contents of the will to be a true reflection of Tony's wishes then the court can grant probate and allow Jack to proceed with execution.

(iii) Matrimonial property.

Where there is matrimonial property, Ann can have the same distinguished from the estate bequeathed to the charitable trust before Jack can proceed to execute the will.

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(a) The validity of Julie's actions:-

(i) Whether Julie's actions constituted revocation of the will.

By grabbing the will from her bedside drawer with the intention to revoke it. Patrick and Coolie can attest to the fact that Julie's actions were not by way of coercion and/or undue influence and that she was in the right frame of mind when she revoked the will by burning.

(ii) Whether the will was a conditional will.

You can argue that Julie's will was conditional in nature by the fact that Peris was entrusted to take care of her in her condition. You can also argue that the will would come into effect provided Peris kept taking care of her. In the case of *Re Spratt's Goods*, the condition to be fulfilled was for the army officer to not return safely.

(iii) The testamentary capacity of Julie.

The basis for a valid will is the testamentary capacity of the testator.

Just as the testator can validly draft her will, she can also revoke the same before it is effected upon her death.

Subsequently, the court will look into the testamentary capacity with regards to the will in question.

In the estate of Kirima-deceased, the widow ~~look~~ looked up the deceased in an apartment while he was ailing.

The court held that the deceased was distressed and did not have testamentary capacity hence the will was revoked.

(B) (i) Revocation of the will.

Rose can approach the court seeking the revocation of the will by Diana provided she can show sufficient cause as to why the court can exercise its discretion to render the said will invalid. Grounds for revocation can be alteration of the contents of the will by Paul.

(ii) Revival of the will.

As an alternative to revocation, Rose can approach the court and seek to revive the will of which she had a copy in her bedside drawer and one kept by her attorney. If she can provide sufficient grounds then the will can be revived.

(iii) Fraud and/or coercion and/or undue influence.

Under this limb, the onus is on Rose to show the court satisfactorily that Paul's actions in the circumstances are fraudulent with regards to the alterations of the contents of the will.

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Questions 1

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(a) The fate of JC Doctor's Plaza.

(i) Whether JC Doctor's Plaza can be regarded as matrimonial property.

"The parties entered into a mutual agreement to divide the properties between themselves except those that were ^{owned} jointly with other parties or those solely owned by Carrington." Based on this excerpt, provided Mary can show that JC Doctor's plaza owned jointly by Carrington and Joel falls within the criteria for matrimonial property then she has a valid claim to JC Doctor's Plaza.

(ii) Whether Joel's input is necessary in ascertaining ownership of JC Doctor's plaza.

As the joint owner of JC Doctor's plaza with Carrington, Joel can be included as a party to the proceedings and made to explain the Constitution of the partnership with Carrington.

Based on the partnership agreement, where there is a clause that provided for Mary as the next in line to the shares Carrington had in JC Doctor's Plaza, then Mary shall have a valid claim to the property.

(iii) Whether JC Doctor's is residuary estate and should be sub-divided amongst Carrington's beneficiaries.

If JC Doctor's Plaza forms part of the residuary estate of Carrington, then automatically the provisions of survivorship as provided under Section 43 of the Law of Succession Act will come into play. Since Mary was legally divorced to Carrington before his death, the doctrine of survivorship will not apply to her and can only apply to her legitimate children with Carrington, James and Mary both of whom are adults of sound mind and as such they are the ones who should approach the court in order to be included as beneficiaries to JC Doctor's Plaza.

(b) Blessings on her rights of ~~the~~ inheritance from the estate if any.

The rights blessings has over the estate are through her legitimate children with the deceased, James and Mary.

The other right she has is the matrimonial property or the residual estate where the same was acquired jointly with Carrington.

(c) How Joan can safeguard her rights in the ^{estate} ~~opinion~~, if any and those of her children.

The following are the ways Joan can safeguard her property;-

(i) Apply for grant ad litem where she is recognised as the temporary administrator pending hearing and determination.

(ii) Apply for grant of probate.

(iii) Distinguish between the matrimonial property owned by Blessing and Carrington and what Carrington owned individually

(iv) Secure the rights of her children through ~~se~~ survivorship.

(v) Obtain a permanent injunction over the administration of Carrington's estate pending hearing and determination of the matter.

(vi) Obtain a caveat over the deceased's estate.

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OUR REF: HN/GEN/23/02

YOUR REF: T.B.A

Date: 20th February, 2011.

Mary Blessings,

P.O. BOX 82416-80100,

Mombasa.

Dear Madam,

RE: LEGAL OPINION.

The above matter and our tele-conversation dated 19th February, 2011 refers.

BRIEF FACTS.

The brief facts are that your former husband, Mr. Blessing, who died on the 17th day of January, 2011 vide a plane crash died intestate and left behind five children from two different marriages. The deceased also left behind one widow, Joan and a divorced wife, Mary herein.

ISSUES ARISING.

The issues arising are ~~are~~ ^{as} follows:-

- (i) Whether Mary can be regarded as a beneficiary to the deceased's estate.
- (ii) Whether Mary has any rights to the deceased's estate if any.

LAWS APPLICABLE.

- (i) Law of Succession Act.
- (ii) Matrimonial property Act.

ANALYSIS

- (i) Whether Mary can be regarded as a beneficiary of the deceased's estate.

By virtue of her divorce to Carrington, Blessing is disqualified as a beneficiary as they had ceased having legal spousal capacity once the divorce was effected. She can however be included as a beneficiary where matrimonial property is involved.

Justice Musyoka In the Matter of the Estate of Luta held that the deceased ~~falls~~ widow of the deceased falls short over her claim of the deceased's estate, her father-in-law and that only her children, the deceased's grandchildren have a valid claim to the deceased's estate. In relation to our case, just as Luta's daughter-in-law was not included as a beneficiary to the estate, Mary can also be regarded as such.

- (ii) Whether Mary has any rights to the deceased's estate if any.

Section 43 of the Law of Succession Act provides for the inheritance of property through survivorship where the deceased died intestate.

In this case, by way of survivorship, Joan as the surviving widow of Carrington takes precedence as beneficiary and potential administrator of the Estate.

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By not leaving behind a valid will, Carrington practically waived the rights of Mary to claim the estate by virtue of their divorce. If she had been included as a beneficiary in a duly executed will by Carrington then she would automatically have a valid claim to the property.

CONCLUSION

In conclusion, the divorce from Carrington by Blessing which was duly executed and property shared in accordance with the terms renders Mary's claim to the deceased's property as invalid. Her children with Carrington however, both legitimate have a valid claim to Carrington's estate.

Yours Faithfully,

H.N. NJIRU & COMPANY ADVOCATES



H.N. NJIRU

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