THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA

UNIVERSITY OF THE FREE STATE

CENTRUM FOR FINANCIAL PLANNING LAW

WILLS CONSULTATION AND DRAFTING

EXAMINATION REPORT: FPSA BOARD EXAMS

NOVEMBER 2014

General comments:
PLEASE NOTE THAT THIS IS NOT A MEMORANDUM. THIS IS SUGGESTED ANSWERS.
MARKERS MARKED WITH MISTAKES.
THE EFFECT OF RELEVANT ASSUMPTIONS WAS TAKEN INTO CONSIDERATION.
For candidates to pass the examination, it was required to know and understand subject matter well enough to apply their knowledge, failing which they would have found it difficult to pass the paper, as in fact most did. As such, the paper certainly wasn't too difficult and within the guidelines issued for the subject.
Some candidates either didn't properly read questions to determine what had actually been asked, as answers given were not always pertinent to the question, or after having answered correctly up to a point, simply omitted dealing with the still outstanding part/s.

QUESTION 1

Question 1 dealt with the consequences of bequests made in an example will, with candidates having to comment on its practicability and the extent that it gives effect to the testator's wishes, involving:

1.1 Appointment of beneficiaries on life assurance policies
1.2 Statutory rules governing the distribution of retirement fund benefits
1.3 Bequests to minor children
1.4 Drafting of a clause to bequeath the residue

Your client, Hendrik Steyn, approaches you for advice in respect of his will.

Hendrik married Shirley Steyn in 2009. They are married in community of property. They have two minor children, named Pippa (4 years old) and George (3 years old).

Their joint estate consists of the following assets:

House in Bellville **(Note 1)**	R1 100 000
Life insurance policy at Professional Insurers **(Note 2)**	R1 000 000
Life policy at Save-Your-Bacon Insurance Company **(Note 3)**	R2 400 000
Retirement annuity at Save-Your-Bacon Insurance Company **(Note 4)**	R500 000
A flat in the Paddocks **(Note 5)**	R800 000
A unit trust investment at Allan Gray **(Note 6)**	R400 000

Notes:

1. Shirley Steyn bought the house in 2007 prior to meeting and marrying Hendrik Steyn. The house is registered in her name only in the deeds office.

2. The policy is on the life of Hendrik Steyn. He took out the policy as a young attorney prior to meeting Shirley. A beneficiary nomination in respect of the policy has been made in favour of Grandpa Steyn, Hendrik's father. This nomination has never been cancelled and the policy contract contains a standard clause prescribing the rules applicable to the revocation of beneficiary nominations.

3. Hendrik is the owner of the policy that is on his life. No beneficiary has been nominated in respect of the policy.

4. Hendrik started contributing to this retirement annuity prior to his marriage to Shirley. No beneficiary has been nominated.

5. Hendrik inherited the flat from his great uncle Kevin in 2011. In terms of his great uncle, Kevin's, will, the property is excluded from the legal effects of any marriage in community of property.

6. The investment is in the name of Shirley Steyn.

Hendrik wishes to make a number of specific bequests in his will and the remainder of his estate, if anything, must go to his wife, Shirley.

Hendrik's will contains the provisions set out below. You may assume that all formalities in respect of the signing and witnessing have been complied with and that this is a valid will.

Hendrik Steyn wants the assurance that his will is practicable and that it gives effect to his wishes. Consider the information provided and answer the questions below.

Last will and testament of Hendrik Steyn

1. I, Hendrik Steyn, married in community of property to Shirley Steyn, herewith revoke all previous wills made by me and declare this to be my last will and testament.

2. Unless the context indicates otherwise, words importing the singular shall include the plural, and words importing the masculine shall include the feminine, and vice versa.

3. I direct that my heirs shall not be required to collate any donations that I made to them during my lifetime.

4. I bequeath my house in Bellville to the trustees of the Daddy and Mommy Trust, no. IT 210/2014.

5. I bequeath the proceeds of my life insurance policy at Professional Insurers to my wife, Shirley Steyn.

6. I bequeath my interest in the Save-Your-Bacon Retirement Fund to my wife, Shirley Steyn.

7. I bequeath my flat in the Paddocks, Milnerton, to my children, Pippa and George.

8. I bequeath a cash amount of R100 000 each to my children, Pippa and George.

9. I exempt the trustees of the Daddy and Mommy Trust no. IT 210/2014 of liability for any damages that may be suffered in respect of the trust fund of the Daddy and Mommy Trust, except where such damages may have been caused by their own fraudulent conduct.

10. I direct that the inheritance devolving upon any beneficiary under my will as well as the proceeds, the reinvestment of such proceeds and the income thereon shall be free from the legal effects, including any accrual system, of any present or future marriage of such beneficiary whether in or out of community of property.

Question 1.1

Explain how the proceeds from the Professional Insurers life insurance policy, referred to in clause 5 of the will, will be dealt with upon Hendrik's death? Refer to relevant case law as authority for your opinion. (3)

The policy has a beneficiary nomination in place in favour of Grandpa Steyn, which has not been cancelled/revoked.

The policy proceeds will be paid to Grandpa Steyn in accordance with the beneficiary nomination.

A bequest in a will does not constitute a revocation where the policy contract prescribes formalities for revocation of such a beneficiary nomination.

Hees v Southern Life or Shrosbree v Pieterse

Question 1.2

Explain to Hendrik Steyn how the Save-Your-Bacon Retirement Annuity, referred to in clause 6, will be dealt with upon his death. Motivate your answer with reference to authority. (3)

In terms of **sec 37C of the Pension Funds Act** a benefit payable on the death of a member does not form part of his estate.

It is payable to any one or more of the deceased's dependants (or their guardians) or the deceased's nominees – in such proportions as the trustees may decide.

If the fund cannot trace any dependant within 12 months of the member's death and there is no designated nominee, or the nominee has been nominated to receive only a portion of the death benefit, then the death benefit or the excess is payable to the member's estate

Question 1.3

Due to certain shortcomings you have identified in the will you have misgivings about the distribution of the bequest to the minor children, as contained in clause 8 of the will.

Explain to Hendrik Steyn how the bequest to the minor children (in clause 8) will be given effect to.

(3)

Section 43 of the Administration of Estates Act 66 of 1965 provides for the situation of movable property to which minors are entitled

No money is to be paid to the minor's guardian unless a contrary direction is expressed in the will and the guardian has provided security to the Master's satisfaction;

If no such direction exists then the money is to be lodged with the Guardian's Fund in the Master's office pending the minor attaining majority.

Question 1.4

A quick reconciliation of Hendrik Steyn's assets and his bequests reveals that his will does not deal with all his assets.

Draft the clause required to fix the oversight and give effect to Hendrik Steyn's instructions in respect of the distribution of his assets. (1)

I bequeath the residue of my estate to my wife Shirley Steyn, or failing her to my children or their issue by representation.

[10]

QUESTION 2

Question 2 dealt with the interpretation of an example will, with candidates having to apply collation in a situation where a descendant inherited in place of a predeceased parent.

Your client, Nick Thomson, has been appointed as the executor in the estate of his late father, Coenraad Thomson. Nick supplies you with a will of his late father and requests your help in interpreting this document.

(You may assume that all formality requirements have been complied with.)

Last will and testament of Coenraad Thomson

1. I, Coenraad Thomson, an unmarried widower, herewith revoke all previous wills made by me and declare this to be my last will and testament.

2. I bequeath the residue of my estate to my two sons, Nicolas and Cobus Thomson.

   Should either of my sons predecease me, then the benefit that he would have received shall devolve upon his descendants by representation and in the absence of such descendants, then upon my remaining son, failing whom, then upon his descendants by representation.

   Signed at Cape Town on this 21st day of April 2000 in the presence of the undersigned witnesses.

Nick also supplies you with the following additional information:

His brother Cobus, who predeceased his father, is survived by a daughter Cara.

His father, during his lifetime, gave an amount of R100 000 to each of his children and R50 000 to his granddaughter, Cara.

Question 2.1

Nick wants advice as to whether or not Cara, who is representing her father, has to collate and, if so, what amount. Provide him with reasons for your answers. **[5]**

Yes, Cara would have to collate.

She is a descendant of Cobus;

She is also an heir - i.e. she shares in the residue of the estate;

In addition, she would have, but for the existence of the will, been an heir *ab intestato* – i.e. her father through whom she is related to Coenraad has passed away.

Cara has to collate the R50 000 that she has received from her grandfather Coenraad; and, because she is representing her father Cobus, she also has to collate the R100 000 that he has received from Coenraad.

Refer: Estate Van Noorden v Estate van Noorden 1916 AD 175.

QUESTION 3

Question 3 dealt with a practical example of a pactum successorium as an agreement, focusing on:

3.1 Candidates had to identify the agreement and whether it was binding

3.2 Name exceptions to the rule

3.3 Suggest an alternate solution to stated requirements

John Davids has financial difficulties. He suffers from cancer and his prognosis is not good. He is a childless widower who recently lost his wife after a protracted illness. Her illness, followed by his own, has severely eroded his savings. Should he need to be hospitalised again, it is unlikely that he will be able to settle his bills and he may have to sell his house to do so. He would be unable to afford lodgings for any extended period of time.

His niece Mary-Lou, aware of his predicament, approaches him and offers to buy the house from him. John, however, is afraid to sell the house as he needs a place to live. He suggests to his niece that she rather lend him the money. In return for the loan, he undertakes to bequeath the house to her.

After discussing the matter with him, Mary-Lou's financial advisor agrees with the proposed plan, but suggests that John should rather bequeath the house to Mary-Lou's daughter, Gabrielle. Mary-Lou thinks this is a splendid idea, but she "wants something in writing" to protect her interest and insists that they have their agreement and the resulting will drafted to finalise their agreement. They approach you for advice in respect of the will.

Question 3.1

What this type of agreement is called and what security does it provide to Mary-Lou? Briefly motivate your answer. (2)

Pactum Successorium. A pactum successorium, apart from two exceptions, is invalid and does not bind the parties thereto.

As such it does not provide Mary-Lou with any security as John could change his will at any time.

Question 3.2

Are there any exceptions to the rule as stated in question 3.1 above? (2)

The exceptions to the rule are donatio mortis causa

and a testamentary condition in a valid antenuptial contract.

Question 3.3

Suggest an alternative structure to them that would ensure that John has a place to live for the rest of his life, while also providing Mary-Lou with security in respect of her investment. Motivate your suggestion. (2)

Mary-Lou could buy the bare dominium in the property from John with John retaining the usufruct therein. This way Mary-Lou is certain of getting the house – the full dominium in the property – when John passes away. John meanwhile receives the needed cash immediately and has a place to stay for life/or the agreed upon terms. **If other options are mentioned, they will be marked with discretion and the memo expanded accordingly.** **[6]**

QUESTION 4:

Question 4 dealt with an example will, with the candidates having to explain how effect will be given to will due to certain stipulations in it and to how the will was executed, as follows:

Question 4.1 Freedom of testation and how it is practically curtailed by the maintenance claim of a surviving spouse

Question 4.2 The consequences and choices an heir has to deal with when his spouse co-signed as witness to the will

Question 4.3 Dealt with the ability of adoptive children and children born out wedlock to inherit

Question 4.4 The practical devolution of the will without any of the heirs having taken any further actions to remedy certain problems in and around the will

Question 4.5 Dealt with the of a pre-conceived, unborn child to inherit and he impact on other children as heirs

Your client, Blondie Bumstead, approached you to explain how effect will be given to her father-in-law's will. Her father-in-law, the late Mark Bumstead, recently passed away. He was survived by his wife, Tanya, and his three children. Tanya is Mark's second wife. They were married out of community of property without the application of the accrual system.

Mark's son, Leo Bumstead, is Blondie's husband. Leo and Blondie have two children – June and Annie. June was born to Leo and Blondie two months prior to their marriage in June 2006. Due to complications at birth, Leo and Blondie were unable to have any other children and so they adopted Annie in 2008.

Mark's daughter, Juliette van Vuren, is divorced. She has one child, a daughter Wanda. Mark also has a son, Quincy, from whom he was estranged.

Mark's distributable estate is R9 000 000.

You notice the following while perusing Mark's will:

- the will consists of 1 page; and
- is signed at the end thereof by Mark as testator and by Blondie Bumstead and Cindy Eksteen, a friend of Mark's who was present that day, as witnesses.

Last Will of Mark Bumstead

1. I, Mark Bumstead, hereby state that this is my last will and I revoke all previous wills made by me.
2. I bequeath the residue of my estate to my two children, Leo Bumstead and Juliette van Vuren, in equal shares.
3. As executor of my estate, I appoint XYZ Trust who shall not be required to furnish security.

Signed at Cape Town on 28 May 2014 in the presence of the undersigned witnesses, all being present at the same time.

Signed Mark Bumstead

Signed Blondie Bumstead

Signed Cindy Eksteen

Question 4.1

Blondie is worried about the fact that Mark has disinherited his wife, Tanya. According to her, Tanya has threatened litigation because she is of the opinion that "it is illegal for him to disinherit her". Discuss the issue with reference to Mark's freedom of testation on the one hand and Tanya's rights and Mark's duty (or duties) towards her on the other hand. Refer to any relevant legislation. (4)

In principle a person's freedom of testation extends to the disinheritons of anyone to whom he sets his mind including his spouse and children. However, there are three exceptions to this principle of complete freedom of testation.

The one applicable here is:

(b) In terms of the Maintenance of Surviving Spouses Act 27 of 1990 a surviving spouse has a claim for reasonable maintenance needs against the estate of the first-dying spouse until death or remarriage of the survivor insofar as the survivor is unable to self-provide therefor (s 2(1)).

Accordingly, in order for any claim to succeed Tanya would have to show that she unable to provide for herself.

Amongst the factors to be considered in determining the amount to be paid as maintenance to the surviving spouse are the assets available for distribution, the means, the needs and the age and standard of living during the marriage of the survivor (s 3).

Section 3 of the Act sets out the factors that a court should take into account in determining a surviving spouse's reasonable maintenance needs. In determining an award of maintenance, a court always considers the needs of the claimant and the means of the party bearing the maintenance obligation – see *Oshry NO v Feldman* [2011] 1 All SA 124 (SCA). (See generally Corbett 43–47; Meyerowitz par 15.79 A.) **'n Any other case law by candidate which is applicable hereto is marked correctly**

Question 4.2

Discuss whether Leo will be able to inherit from his father's estate. Refer to relevant legislation and case law. (6)

In terms of section 4A(1) of the Wills Act 7 of 1953 a person signs a will as witness and such person's spouse at the time of execution of the will is disqualified from benefiting in terms of the will.

Because Blondie witnessed the will Leo is prohibited from inheriting.

However, sec 4A(2) provides for some exceptions to the aforementioned rule:

Sec 4A(2)(b) provides that if the person or his spouse would have been able to inherit in terms of the laws of intestate succession had the testator died intestate, then such person may inherit a portion that would not exceed that person or his spouse's intestate share.

Leo is accordingly able to inherit, but limited in his ability to do so and is entitled only to one quarter of Mark's estate.

Alternatively, in terms of sec 4A(2)(a) – a court may declare such person competent to inherit if it is satisfied that such person or his spouse did not defraud or unduly influence the testator in the execution of the will; or Leo now has a choice.

He can either accept the reduced amount, or he can decide to bring an application to court for an order to declare him competent to inherit, in which case, should it be granted, he could receive his full inheritance.

Question 4.3

Explain what the ability of Leo's daughters, June and Annie, is to inherit from Leo and/or Mark? Refer to relevant legislation. (2)

Sec 2D(1)(a) and (1)(b) applies. In terms thereof:

(a) **an adopted child shall be regarded as being born from his adoptive parent or parents** and, in determining his relationship to the testator or another person for the purposes of a will, as the child of his adoptive parent or parents and not as the child of his natural parent or parents or any previous adoptive parent or parents, except in the case of a natural parent who is also the adoptive parent of the child concerned or who was married to the adoptive parent of the child concerned at the time of the adoption;

(b) the **fact that any person was born out of wedlock shall be ignored in determining his relationship to the testator or another person for the purposes of a will**;

Both the girls will qualify as heirs or legatees.

Question 4.4

Assuming that no further action is taken by any of the family members and heirs, how will Mark's estate devolve? Motivate your answer by referring to any relevant legislation. (4)

No further action is taken, so Tanya and Quincy does not inherit anything as per the will. (This was given in the question.)

As Leo took no further action – i.e. did not apply in terms of sec 4A(2)(a) - he is restricted to ¼ of Mark's estate being his intestate portion in terms of sec 4A(2)(b)
Intestate portion to be determined in accordance with sec 1(c) of Intestate successions Act.

Leo's two children, June and Annie will inherit the remaining portion of his inheritance in terms of the will, i.e. 1/4 of Mark's estate, or the other half of his inheritance, in his stead in terms of sec 2C(2)

Juliette will inherit only her half share.

Question 4.5

Would your response to question 4.4 be different should it have transpired that Blondie was pregnant with Leo's third child at the time of Mark's death? Explain by referring to authority. (4)

Sec 2D(1)(c) enables children in utero at time of death to inherit,
If conceived prior to the deceased person's death

And if subsequently born alive

The only difference in the devolution of Mark's estate would be that the 1/4 of the estate that Leo was prohibited from inheriting by virtue of Blondie signing the will, will now be divided equally among three children and not just the two.

[20]

QUESTION 5:

Question 5 dealt with the practical application of the doctrine of election in a massed estate in an in community of marriage, with:

Question 5.1 Dealt with options available to the surviving spouse and it's consequences

Question 5.2 Dealt with the revocation of election and the beneficiary's right to seek relief

Mr Vogel is an 85 year old gentleman who approaches you for advice. He recently lost his wife to whom he was married in community of property. He and his wife had a joint will in which they made the following bequests:

> *"Upon the death of the first-dying of us, we bequeath the whole of our massed estates to the XYZ Trust, subject to the condition that the trustees may utilise so much of the trust income as they in their discretion may deem sufficient for the maintenance of the survivor of us."*

Question 5.1

Mr Vogel wishes to know what his options are. Explain the doctrine of election to Mr Vogel and the consequences thereof, depending on his election. (6)

The doctrine of election requires that such beneficiary has to choose whether he is willing to accept (adiate) the benefit along with the corresponding obligation or whether he would prefer to forfeit (repudiate) the benefit in order to avoid accepting the obligation.

It is not possible to simultaneously adiate and repudiate, accordingly if Mr Vogel chooses to repudiate the massed will, then he will not be able to receive any benefit in terms of the will. In those circumstances he will retain his half of the joint estate and the other half of the estate would have to be dealt with according to the terms of the will – if still possible, or, if the repudiation has rendered the will impossible to give effect to (or partially impossible) then the estate (or portion thereof) will have to be dealt with in terms of the laws of intestacy.

Question 5.2

Mr Vogel adiated the will and shortly afterwards was assessed by SARS for donations tax as a result of a deemed donation in terms of section 58 of the *Income Tax Act 58 of 1962*.
May Mr Vogel revoke his choice? Refer to case law as authority for your opinion. (3)

Once made the election is irrevocable.

This is subject to the right of a beneficiary to seek relief from the court if the choice was made in excusable ignorance of rights."

or

"As reg en billikheid verg dat so 'n langslewende deur die hof tegemoetgekom moet word, behoort dit gedoen te word."

Le Roux and Another v Ontvanger van Inkomste and Another

Few other case law's were mentioned which marks were awarded for.

[9]

[TOTAL 50]