CHIEF EXAMINER REPORT

June 2024

LEVEL 6 UNIT 21 – PROBATE PRACTICE

The purpose of the suggested points for responses is to provide candidates and Training Providers with guidance as to the key points candidates should have included in their answers to the June 2024 examinations.

The suggested points for responses sets out points that a good (merit/distinction) candidate would have made.

Candidates will have received credit, where applicable, for other points not addressed.

Chief Examiner Overview
A number of candidates appeared to have in their possession only a light understanding of the topics within the specification. Most questions on core topics which recur regularly were answered as expected. Many candidates appeared to have prepared well for this examination and there were some very pleasing responses. Other candidates appeared to have large gaps in their knowledge. Candidates should be prepared to answer questions on all parts of the specification and the pre-release material is prepared to help candidates to identify and research topics prior to the examination being sat. Candidates are reminded to make full use of the pre-release material to focus their revision.

Candidate Performance and Suggested Points for Responses

It is noted that the low numbers of candidates taking the Level 6 exams limits the scope for constructive feedback to be given and for firm conclusions to be reached. Therefore, feedback on candidate performance may be limited.

Question 1a	17 marks

Both parts to this question were answered well by a significant number of candidates.

Candidates should note that as it is no longer possible to marry or enter into a civil partnership under the age of 18 a child must now attain the age of 18 to attain a vested interest under s47 AEA 1925. See the Marriage and Civil Partnership (Minimum Age) Act 2022.

Suggested Points for Response:

Deaths of Angela and Charles

- S184 of the Law of Property Act 1925 contains the *commorientes rule* / a presumption of survivorship regarding claims to property
- Where two or more people have died in circumstances in which it is uncertain which of them survived the other there is a presumption that they died in order of seniority the younger survived the elder where this affects the title to property.
- Angela and Charles died in a fatal vehicle collision which killed them both immediately which means that there does not appear to be any evidence to indicate who died first and the presumption will apply.
- Angela was 64 years old and Charles was 68 years old so as she was younger than Charles she is presumed to have survived him.

Assets forming part of Angela's estate.

- 'Swanmead' was owned by Frank and Angela as beneficial tenants in common so one half of the value (£220,000) will form part of Angela's estate.
- Even though the legal interest was held as joint tenants Frank does not inherit Angela's share through the survivorship principle.
- The remainder of the assets in Angela's sole name will form part of her estate, namely the contents of her Luton Bank current account, her wages to the date of her death, the household contents she owned before Charles moved in and her jewellery.
- As the TPA death in service benefit will be payable at the discretion of the trustees of the pension it will not form part of Angela's estate.
- Its nomination in favour of Charles will not apply as he will be presumed to have predeceased Angela.
- All of the assets which were jointly owned by Angela and Charles, namely the two Bedford Bank accounts and their jointly purchased household contents, would form part of Angela's estate as Charles' share would pass to her by survivorship as he is presumed to have predeceased her.

Distribution of Angela's estate

- The distribution of Angela's estate will be governed by the intestacy rules Part IV (s46) Administration of Estates Act 1925 (AEA 1925)
- As amended by the Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011
- Explanation as to why Angela did not have a surviving spouse: she divorced Frank in October 2011; Charles as a cohabitee would not have inherited under the intestacy rules (even if he had survived her or the presumption did not apply)
- We are told that Angela had no issue and that her parents had predeceased her

- The next category of relatives entitled to Angela's estate under s46 AEA 1925 is brothers and sisters of the whole blood and the issue of such brothers and sisters who have predeceased her on the statutory trusts.
- The meaning of the statutory trusts is set out in s47 AEA 1925 and requires that Angela's residuary estate is held in trust, in equal shares if more than one, for all or any [brother or sister] of the intestate, living at the date of death of the intestate who attain the age of 18 years and for all or any of the issue [of the brother or sister] living at the death of the intestate who attain the age of 18 years or of any child of the [brother or sister of the] intestate who predeceases the intestate, such issue to take through all degrees, according to their stocks, in equal shares if more than one, the share which their parent would have taken if living at the death of the intestate. *(Definition in statute book candidates entitled to take into exam, but credit fully any other correct explanation of the term)*
- Angela had only one brother of the whole blood, Brian, (and no sisters) and he had predeceased her as had his only child / daughter Isla. The issue of Brian, alive at the date of Angela's death, were Brian's grandchildren, Gina and John.
- At the time of Angela's death Gina, aged 17, and John, aged 15, were entitled to share Angela's estate in equal shares between them subject to the contingency of them reaching the age of 18 years.
- Angela died two weeks ago and Gina died six days ago *(email was yesterday but fully credit five days)* so she did not attain a vested interest and the general rule is that she is treated as if she had never existed so John would be entitled to her share if he reached 18 years.
- However, there is an exception in s47 AEA 1925 / provided by the Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011 where such issue leave issue of their own and Gina left Harry as her issue. Gina is to be treated as if she predeceased Angela so that Harry would be entitled to her share provided he reaches the age of 18.
- Harry is illegitimate (as Gina was under the age of 18 so did not have capacity to marry) but he is treated in exactly the same way as if he was legitimate for determining whether he is entitled to share Angela's estate.

Question 1b	6 marks
A good answer could be achieved with standard information about the issue of a grant where there are minor beneficiaries.	
Suggested Points for Response:	

- The application should be for a Grant of Letters of Administration (Durante Minore Aetate)
- The order of persons entitled to apply for a grant where there is an intestacy are set out in r22 Non-Contentious Probate Rules 1987 (NCPR 1987)
- The rule follows the order of entitlement to share the estate meaning that the surviving issue of Angela's brothers and sisters of the whole blood, namely John and Harry, would be entitled to apply.
- However, a grant cannot be issued to a minor and as neither John nor Harry are aged 18 or over neither of them can apply.
- A grant durante minore aetate for the use and benefit of John or Harry until they reach 18 respectively should be granted (r32 NCPR 1987) to their parent or guardian
- As the sole surviving parent of John, Daniel would be entitled to apply for such a grant.
- However, under s114 Senior Courts Act 1981 as there are minors entitled to Angela's estate two administrators are needed so Daniel could not apply on his own.
- He could apply with any guardian appointed for Harry or he could nominate someone independent to act jointly with him.

Question 2a	12 marks

Question 2 (in general): This question was one of the least well answered on the paper.
In parts (a) and especially (c) it was disappointing not to see better discussions of revocation and alteration of Wills in the light of the pre-release material. Candidates were advised in the question that the Will was valid so there were no marks available for discussing the formal requirements for execution of a Will, although several candidates wrote about this.

Candidates dealt with both the topics of revocation and mental capacity relatively well.

Suggested Points for Response:

Effect of attempted revocation

- A testator can revoke their Will at any time before their death provided that they have testamentary capacity to do so.
- (S20 WA 1837 states that) the whole or any part of a Will can be revoked by the testator burning, tearing or otherwise destroying it
- or someone else doing so in his presence and at his direction if he has the intention to revoke it.
- The fact that Issa had torn his Will into four pieces may be sufficient to show that he had destroyed it, although screwing it up would not have been a sufficient destruction.
- A Will found in T's possession at the time of their death which is found torn or destroyed is presumed to have been revoked by T in their lifetime (unless there is evidence to the contrary to rebut this).
- However, Issa would not have the intention to revoke his Will if he no longer had the mental capacity he needed to make his Will in the first place.
- Mental capacity to make and revokea Will is assessed under the **Banks v Goodfellow 1870** test whereby a testator must understand: the nature of his act and its effects;
- the extent of his property; and the claims on his estate he ought to be aware of.
- The testator must also not be suffering from any insane delusions which affect the terms of his Will.
- Under s1(2) Mental Capacity Act 2005 (MCA 2005) a person is presumed to have capacity unless it is established that they lack capacity
- And under s2(1) MCA 2005 a person is said to lack capacity in relation to a specific matter if at the material time they are unable to make a decision for themselves
- because of an impairment of or a disturbance in the functioning of the mind or the brain.
- In particular it appears that Issa was suffering from insane delusions after Lalla's marriage as he believed that Lalla had abandoned him and the person who visited regularly was an imposter, so this would mean that he no longer had capacity to alter his testamentary dispositions.
- The delusions would also be a disturbance in the functioning of Issa's mind or brain so that he would not have had capacity to make the decision to intend to destroy his Will when he cut it and screwed it up.
- The fact that Jemila saw Issa's Will in its original state just after Lalla's marriage shows that the attempted revocation must have happened after that time.

Question 2b	6 marks
A number of marks could be achieved with standard information on documents to be sent to the Probate Registry with an application for a grant. This was the first time the question had been asked in the context of an online application.	
Suggested Points for Response:	
• All of the pieces of Issa's original Will • together with an engrossed copy of the Will in the form to be proved • which has blank spaces where any words have been completely obliterated by Issa scribbling them out • An affidavit of plight and condition (under r15 NCPR 1987) will have to be filed accounting for the four torn up pieces and screwed up state of Issa's Will and how this was the condition the Will was found it • Marcus Wu, as an attesting witness, could attest to the condition of the Will at the date of its execution and Jemila could attest to its state when it was found after Issa's death. • The registrar could also require affidavit evidence from a relevant medical practitioner of Issa's lack of mental capacity to revoke his Will or accept a medical report in lieu of this being filed. • A legal statement signed by the proving executors, Jemila and Lalla.	

Question 2c	7 marks
Some candidates did not recognise what the issue was in the question (post execution alterations).	
Suggested Points for Response:	
• S21 WA 1837 states that no obliterations, interlineation or other alteration made in a Will after it is executed shall be valid … except as far as the words or effect of the Will before the alteration shall not be apparent, unless the alteration has been executed in the same manner required for the execution of the Will. • Issa appears to have scribbled out all references to Lalla in his Will so whether she is still entitled to receive the gifts of the tidinit lute and ardin harp depends on whether sufficient words in clause 2 of his Will containing the gift are apparent / capable of being read by natural means • which means being decipherable by natural means such as using a light or a magnifying glass and without having to resort to non-natural means such as chemicals, infra-red photography or any other extrinsic evidence. • If the wording of the gift is apparent, then an engrossed copy of the Will which does not contain the alterations is admitted to probate • and Lalla will be entitled to receive the tidinit lute and ardin harp • However, if the wording is not apparent then an engrossed copy of the will with blanks appearing where the obliterated words were is admitted to probate • And if the apparent words cannot be construed in such a way as to be given effect to, and especially if it is Lalla's name that has been obliterated, • the gift to her will fail and will fall into the residue of Issa's estate going to Jemila under the terms of his Will. • The photocopy of Issa's Will in the state it was in immediately after execution is not admissible as evidence to show the wording of the original gift.	

Question 3a	5 marks

Candidates were well prepared to answer a question on the general powers of trustees, but not so well prepared to answer a question on powers and duties relating to investment of capital. Few candidates recognised the fact that any statutory power of investment is subject to contrary provision in the Will and the trustees must always comply with any powers or restrictions places on statutory powers in a Will.

Suggested Points for Response:

- The trust created an immediate post death interest (IPDI) as it was set up by the death of Patrick after March 2006 and Marie has the current right to enjoy the income from the trust property.
- To comply with anti-money laundering regulations the trustees have a duty to register IPDI trusts with HMRC.
- The trustees of the Patrick Morgan Will Trust (Kevin Kempston and Marie Morgan) owe a duty of care to the beneficiaries of the Trust (Marie and Patrick's two children).
- The duty to the beneficiaries includes investing the capital of the Will Trust in such a way as to balance Marie's right to as much income from it as possible with the right of Partrick's children to as high a capital growth as possible.
- Under **(s5) Trustee Act 2000 (TA 2000)** the trustees have a duty to take proper advice on investment of the trust funds and
- will need to obtain advice from an independent financial adviser or stockbroker.
- Kempstons can only provide this advice if they are authorised to do so under the Financial Services and Markets Act 2000.
- The trustees have a duty to comply with the powers of investment they were given by Patrick's Will.
- **s3 TA 2000** gives the trustees authority to invest the capital as if they were absolutely entitled to the assets of the trust, subject to any modifications to this power Patrick's Will may have made.

Question 3b	20 marks

Q3b was answered well by many candidates, especially with regard to lifetime IHT exemptions and reliefs. As the question was about Inheritance Tax no credit was available to candidates who discussed Income Tax with regard to the Will Trust, nor for a discussion of possible lifetime gifts of Marie's interest in the Will Trust as the question made it clear that there were no changes made to the Will Trust during Marie's lifetime.

A common but fundamental mistake made by a number of candidates was that as Marie only had a life interest in the Will Trust it would not form part of her estate for IHT purposes.

Suggested Points for Response:

<u>General Inheritance Tax (IHT) advice</u>

- Under the **Inheritance Tax Act 1984 (IHTA 1984)** inheritance tax will be charged at 40% whenever there is a lifetime gift making a transfer of value which reduces the value of Marie's estate during her lifetime and on her death when there is a deemed transfer of value of all the assets she was beneficially entitled to immediately before her death, her 'IHT estate', subject to various exemptions and reliefs.
- Transfers of value of up to £325,000 made within the last seven years are charged at 0%, the nil rate band.
- Also, any nil rate band not used when a spouse dies can be used on the death of the surviving spouse.
- None of Patrick's estate would have been subject to IHT when he died as all the gifts in his Will were spouse exempt at the time so he would not have used any of his nil rate band which can

be added to Marie's unused nil rate band on her death making a possible £650,000 to be taxed at 0%.

- Any gifts, without limit in value, Marie makes to a charity either during her lifetime or on her death will be exempt from IHT (as will gifts to qualifying political parties and certain national bodies such as (e.g. a national museum, the National Trust, a university, *any one example)*)
- If 10% of property chargeable to IHT after all exemptions and reliefs have been deducted is left to charity the rate of IHT is effectively reduced to 36%

Woodland Cottage on death

- A residential nil rate band (RNRB), of up to £175,000 currently, will reduce the value of Marie's IHT estate if her residence is closely inherited, her net estate is less than £2 million and her PRs claim the relief.
- As Marie lived in Woodland Cottage it can count as her residence. It will be closely inherited if it passes to a lineal descendant of Marie on her death and as Marie intends to leave it to her daughter Nicola directly in her Will this will be satisfied.
- Marie's PRs would also be able to claim Patrick's unused percentage of RNRB even though Patrick did not own any residential property at the time of his death
- Marie would therefore have a RNRB of £350,000 to reduce the value of her estate as on current figures it appears to be less than £2 million. The RNRB is not any higher even though Woodland Cottage is worth approximately £425,000.

Patrick Morgan Will Trust on Marie's death

- The Patrick Morgan Will Trust created an IPDI with Marie being entitled to the income from it for her lifetime. Even though she was not entitled to the capital her IHT estate is treated as if she had an absolute interest in it.
- Therefore, the capital value of the trust, currently £275,000, would be added to the £825,000 of assets in Marie's name for the calculation of IHT.
- The IHT payable would be apportioned between Marie's estate and the trust proportionately according to their value.

Lifetime gifts of the necklaces and of cash

- Under **(s19) IHTA 1984** everyone has an IHT lifetime transfer £3,000 annual exemption
- Also, if any annual exemption is not used in one tax year it can be carried forward to the following tax year.
- Therefore, assuming Marie has not made any transfers of value in the 2023-24 tax year the first £6,000 of lifetime transfers she makes will be exempt from IHT.
- Under **(s20) IHTA 1984** there is also a small gift exemption which will allow any number of lifetime gifts of up to £250 per donee in any tax year to be exempt from IHT
- This will only be of assistance to Marie if she wishes to make a lifetime gift of up to £250 to Nicola in a tax year that she does not make any further lifetime gifts to Nicola.
- Under **(s21) IHTA 1984** transfers of value which are normal expenditure out of income are exempt from IHT to the extent that they are made out of the donor's income and the donor still has sufficient income to maintain the usual standard of living.
- As Marie now has extra income as a result of Patrick's death from both his Will Trust and her savings account which includes the proceeds of Patrick's life assurance policy and his death in service benefit she would be able to give this extra income to Nicola without any charges to IHT.
- Under**(s22) IHTA 1984** a gift can be made in consideration of marriage of up to £5,000 by a parent to a child
- If Nicola were to marry Marie could give her up to £5,000 free from IHT

- Any lifetime gifts which Marie makes to Nicola directly which are not covered by the above exemptions from IHT would be Potentially
  Exempt Transfers (PETs). PETs are not chargeable transfers of value under **(s3A(1)) IHTA 1984** provided that Marie survives for seven years after making the PET.
- If Marie were to make a lifetime gift of the necklaces and / or a gift of cash to Nicola in a tax year in which she had used up her annual exemption through a cash gift over and above normal expenditure out of income the gift(s) would be PETs.
- No IHT would be payable if Marie survived for a further seven years but if she dies within the seven year period the gifts would become chargeable to IHT and would have to be aggregated with the remainder of her IHT estate for the calculation of IHT.
- If Marie were to make a lifetime gift of the necklaces to Nicola but keep them in her own possession / still wear them herself this would be seen as a gift with a reservation of benefit (GROB) (under **s102 Finance Act 1986)** and for IHT purposes is treated as if the gift had never been made, so still form part of Marie's IHT estate at the date of her death.
- Failed PETs which still form part of Marie's IHT estate at the date of her death will use Marie's NRB first and only what is left over can be set off against the remainder of Marie's death estate assets.
- As Marie's necklaces and the money in her savings account total less than £650,000, her NRB combined with Patrick's unused NRB, no failed PETs will exceed her NRB.

<u>Conclusion</u>

- As Marie's IHT estate would be £1,100,000 and she has NRB amounting to £650,000 and RNRB amounting to £350,000 (subject to any lifetime gifts having to be taken into account) IHT at 40% would be payable on £100,000 (£40,000).
- From an IHT savings point of view it would be sensible for Marie to make lifetime gifts to Nicola to keep the value of her IHT estate to under £1 million subject to this leaving her with sufficient funds for her own needs, especially as she is only 54 years old so is statistically likely to survive for seven years after making any PETs.

Question 3c	5 marks
The topic of CGT has not been examined for a while, but the question was very straightforward. A few candidates achieved full marks for the question. On occasion, candidates did not appear to realise that there is a CGT disposal if an item is gifted rather than sold.	
Suggested Points for Response:	

- If Marie were to give the necklaces to Nicola this would be seen as a chargeable person making a disposal of a chargeable asset under the **Taxation of Chargeable Gains Act 1992 (TCGA 1992)**
- Capital Gains Tax (CGT) is payable on any gains that are made on the disposal of a chargeable asset over and above the acquisition value or expenditure of the asset.
- The disposal value of the necklaces would be their full value on the open market at the date of the gift to Nicola, £64,500, and Marie's acquisition value would be the 2014 probate value of the necklaces in her Godmother's estate.
- Marie should get a valuation of the necklaces before / at the time she gifts them to Nicola
- Marie has a CGT annual exempt amount of £3,000 (2024/25 – reduced from £6,000 in 2023-24) but if the gain in value of the necklaces was more than this exempt amount, she would be liable to pay CGT.
- The CGT would be calculated as the top slice of Marie's income, at the rate of 10% if Marie is a basic rate income taxpayer and at the rate of 20% if Marie has income over £50,270 and is a higher rate income taxpayer.

- Marie earns £42,000 per annum as a nurse but in addition to this she will have the income from Patrick's Will Trust as well as income from her savings, so she is most likely to be a higher rate income taxpayer and any CGT will be charged at 20%.
- For CGT purposes it may be advisable for Marie to make a gift of one necklace in this tax year (2024-25) and then a gift of the second necklace in a subsequent tax year to make use of two lots of the £3,000 annual exemption as there is no carry forward of unused CGT annual exemptions if Marie did not use her exemption in the previous tax year.

Question 4a	12 marks

Candidates often stated that IHT is due 6 months after the deceased's date of death rather than 6 months after the end of the month in which death occurs. There were a number of good answers which were able to discuss instalment option property and apportionment of the IHT due in respect of this although the majority of candidates did not recognise the possibility. A few candidates were not able to discuss how to arrange for payment of IHT from a bank in any detail or at all.

Suggested Points for Response:

When IHT is payable

- To ensure that no interest is payable on IHT due it **should** all be paid within six months after the end of the month in which death occurs. As Struan died in May 2024 Rory should aim to pay it by the end of November 2024.
- However, as Struan owned land at 73 Oxford Road, Bedford, this qualifies for the IHT instalment option so that the IHT due on it can be paid in 10 equal annual instalments with only the first instalment being due by the end of November 2024.
- Interest will still accrue on the instalments which remain unpaid after the end of November 2024.
- Technically the IHT 400 account **must** be delivered to HMRC and the IHT on the non-instalment property must be paid within 12 months after the end of the month in which death occurs, so by the end of May 2025.
- However, the IHT account must be delivered to HMRC and the non-instalment IHT must be paid before Rory can apply for a Grant of Probate.

How much IHT is payable to obtain the grant

- The IHT payable on Struan's estate must be apportioned between instalment option property and the rest of his estate.
- The estate rate is arrived at by dividing the total tax bill by the total chargeable estate
- Therefore £21,364 IHT will have to be paid to obtain the grant.

The most appropriate way for Rory to raise funds to pay IHT

- As Struan had £22,743 in his Bedford Bank savings account using these funds would be the most appropriate to use to pay the £21,364 IHT (as most banks and building societies will release funds to pay IHT before a grant is issued.)
- (As the Bedford Bank account is in the sole name of Struan) Rory can use the Direct Payment Scheme for paying the IHT.
- Rory should make an application to HMRC for an IHT reference number, either online or using form IHT422, at least three weeks before the IHT400 is submitted.
- At the same time as sending the IHT400 to HMRC Rory would send a form IHT423 to the Bedford Bank quoting the relevant IHT reference number
- And the bank would transfer the money required to pay the IHT to HMRC without Rory having to find the funds himself.

Question 4b	5 marks
Candidates were often unable to discuss the conditions for making an informal calculation of estate ICT in non-complex estates.	
Suggested Points for Response:	
• Provided Struan's estate is not considered to be a complex one by HMRC, Rory can send HMRC's Cardiff office a calculation of the income tax (ICT) due for the administration period and make a one-off informal payment of the total ICT due. • There are three conditions, all of which must be met, for HMRC to accept that the estate is not a complex one. • The first condition is that the total tax liability for the whole administration period is less than £10,000. This includes both ICT and CGT. • Secondly the probate value of the estate is not more than £2.5 million. As the probate value is £500,000 this condition is met. • Finally, the proceeds of any assets sold by the PRs in any tax year does not exceed £500,000.	

Question 4c	5 marks
Q4c was answered well by a number of candidates who discussed the online Probate Registry search facilities. Credit was given to candidates who mentioned searches of the Will Certainty Register, although these searches are significantly more expensive than Probate Registry searches and standing searches.	
Suggested Points for Response:	
• A Will becomes a public document after a grant of probate has been issued • And Rory can complete an online search to check whether a Grant of Probate has been issued • And order a copy of the Will if it has been. • Rory could also use the Probate Registry standing search facility (under **r43 NCPR 1987**) • as this will tell him whether a grant of representation has been issued and the contents of any Will Walter left. • To make the application Rory should complete a prescribed form (**Form 2 Sch 1 NCPR 1987 / PA1S**) and send it to the Probate Registry. • If a grant of representation has been issued within the 12 months before the receipt of the application, or six months afterwards, Rory will be sent an office copy of the grant, which includes a copy of the Will. • If no grant of representation has been issued by the end of the six-month period Rory could renew his application by paying a further fee.	