CHIEF EXAMINER REPORT

January 2025

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 January 2025 examinations.

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

Candidates will have received credit, where applicable, for other points not addressed in the suggested points for responses or alternative valid responses.

Chief Examiner Overview
It was pleasing to see some good references to relevant case law across many of the scripts which gained appropriate credit. The facts in the case study materials were not used well by a few candidates which was particularly evident in Question 1. The case study materials are released early to give candidates time to familiarise themselves with the facts the questions are based on and candidates should ensure they do this as it appeared that some candidates had not done so, missing issues such as the revocation of Niki's will by a later Civil Partnership, the issue of a failed potentially exempt transfer and the issue of quick succession relief being available all in Q3. There were some very good answers across all of the questions, but some candidates showed clear errors in their understanding and knowledge of the law.

Candidate Performance and Suggested Points for Responses

It is noted that the low numbers of candidates taking this examination limits the scope for constructive and valid feedback to be given and for firm conclusions to be reached and embraced for positive use by candidates.

Therefore, no feedback on candidate performance has been included.

Question 1a	10 marks

There were too many generic answers with insufficient consideration of the case study materials; the majority of candidates did not consider the possibility of Jaime having other assets in Spain and/or a Spanish Will. Also, a common error was to include advice that could be given to Jaime and Isla without linking this to information that would be required from them, which was what the question asked for.

Suggested Points for Response:

Background information from Jaime

a. You will need to check whether Jaime is domiciled in England and Wales even though he has lived here for 24 (25) years / since 1990
b. And whether he has any assets abroad / in Spain, especially as he may have inherited property and other assets still there following the death of his parents
c. This is important as if he is domiciled in England and Wales, he must be advised that he will be liable to Inheritance Tax (IHT) on all his property worldwide, but if he is still domiciled in Spain, he will only be liable to IHT on his assets in England (the UK)
d. Also, if he has property in Spain / abroad you will want to know whether he has made a Will in that country disposing of those assets
e. As you will need to take care when drafting Jaime's English Will that it does not revoke or conflict with any foreign Will.
f. Confirmation from Jaime that he has no relatives other than his sister and that his assets in the UK are as Isla described.

Background information from both Isla and Jaime

g. Whether there are any circumstances, such as a holiday or illness etc, that would make execution of Wills for either of them a matter of urgency.
h. Whether they would like to include a direction as to funeral wishes in their Wills
i. Whether they would like to include a survivorship period, e.g. 28 days, that the second of them must survive the first to die as a condition of inheriting from the first to die.
j. Who each of them would like to appoint to act as executor(s) of their Will if the other has died before them.
k. Whether either of them wishes to include any legacies to be paid before the residue is determined.
l. How each of them would like the residue of their estates to be divided on the death of the survivor.

Question 1b	15 marks

This was answered well by many candidates, especially the issues of lack of capacity related being unable to make a rational decision due to depression following Jaime's recent bereavement and possible undue influence, although the issue of Jaime's intention to make that Will due to lack of knowledge and approval of its contents due to his poor command of English was less well done. Candidates should note that obtaining a medical report is subject to permission of a client so the appropriate step was to ask for that permission from Jaime, although candidates were given credit for recognising the need for a medical report.

Suggested Points for Response:

Concerns about Jaime's capacity to make a Will

a. There may be questions about Jaime's mental capacity to make a Will because he appeared to have been suffering from depression caused by the recent death of Mia (combined with the anniversary of last seeing his parents).
b. Although Jaime is likely to pass the test for mental capacity from Banks v Goodfellow 1870 requiring a testator to understand that they are making a Will, the extent of their property, the claims they ought to be aware of and not be suffering from insane delusions
c. The case of Key v Key 2010 (or a subsequent case following this) established that the test should be extended to include circumstances sufficient to give rise to a risk of mental disorder which included depression / affective disorder which may be caused by bereavement
d. This could deprive a testator of the power of rational decision making so as to make any Will made while suffering from such a condition invalid.

Concerns about Jaime's intention

e. If anyone wants to challenge Jaime's Will on the grounds of lack of intention, they must prove that he did not have knowledge of and approve the contents of it.
f. Knowledge of its contents could be an issue in view of Jaime's poor English
g. However, lack of knowledge may be difficult to prove as Jaime had been living and working in England for 24 / 25 years
h. Especially where the Will has been explained by an independent and experienced lawyer
i. Approval of the contents could be an issue if Jaime was induced to make his Will (or certain provisions in it) because of the undue influence of Isla.
j. In Hawes v Burges 2013 even though the testator had capacity to make a Will the CA held that the circumstances in which it was made justified the court insisting on positive proof of knowledge and approval and the burden of proof was not discharged.
k. These circumstances included:
    - (1) the facts that the testatrix, who had three children, remained close to her son who was cut out of the residue of her estate, and she had not told him she was making a new Will;
    - (2) one of her daughters was instrumental in making the arrangements to see the solicitor and in relation to the instructions given for the contents of the Will and that daughter remained in the room throughout all of the discussions;
    - (3) the testatrix had only told her daughter she wanted to revise the burial and funeral arrangements in her Will;
    - (4) the new Will was made without the knowledge of the other two siblings; and
    - (5) the solicitor did not send the testatrix a draft of the Will to check before attending at the office to execute it.
l. The circumstances that may raise suspicions of undue influence / lack of knowledge and approval in Jaime's case include the facts that
    - (1) he had only known Isla for 3 – 4 months and they had only been living together for a maximum of 1 month;
    - (2) it was Isla who did all the talking for Jaime, family, assets and instructions; and

- (3) it was Isla who had made the appointment and was present throughout Jaime giving his instructions.
- (4) Jaime's sister and nephew were being excluded from his new Will without explanation
- (5) There is a large disparity in value between the assets owned by Isla and the assets owned by Jaime.

Steps that should be taken

m. Following the 'golden rule' instructions should be taken from Jaime in the absence of Isla as she stands to benefit from his Will, and she may have some influence over him.
n. As part of those instructions, we should discuss any previous Will that Jaime may have made and if there is one, explore the reasons for him wanting to change it.
o. We the firm could explore the issue of clinical depression following bereavement with Jaime / ask whether he received any treatment or medication for depression and whether he is still being treated for it.
p. If this raised any issues of doubtful capacity, we should request Jaime's permission to contact his GP for medical approval of his capacity.
q. Following Gill v Woodall 2010 it would be preferable to send Isla and Jaime drafts of their Wills separately asking each of them to confirm their agreement to the terms of the drafts even though the instructions are currently for mirror image Wills.
r. Full file notes should be made, and kept, detailing all discussions with Jaime (including any in which Isla is present) regarding the instructions for his Will, its preparation and its execution as well as correspondence with him so that they can be produced in the event of any challenge to the validity of Jaime's Will in the future.

Question 2	
Question 2a	9 marks

Many candidates failed to understand that the term 'issue' refers to all direct descendants and that without qualification with words such as 'per stirpes' this would include all of Arthur's grandchildren as well as his children. This is a fundamental issue which candidates should be aware of, not only for distribution of an estate but also when explaining draft Wills to clients.

Suggested Points for Response:

a. Recent cases involving the construction of Wills state that the aim is to interpret the words used in them in their documentary, factual and commercial context.
b. The meaning of 'issue' includes all direct descendants living at the time of a testator's death.
c. It does not matter that Grace is illegitimate as the fact that Arthur was not married to her mother is not relevant
d. where a Will is made after 4 April 1988.
e. It is a gift by description and if Arthur did not want to include Grace or her children, he should have shown clear contrary intention in his Will.
f. Also, a child *en ventre sa mére* which is subsequently born alive is treated as if they were living at the time of a testator's death.
g. Prima facie 'issue' therefore includes Arthur's three children Charles, Daniel and Grace, his grandchildren Esme, Fran, Harry and Grace's unborn child.
h. As there were no qualifying words such as 'per stirpes' showing contrary intention 'in equal shares' means that distribution is per capita whereby each member of the class receives one seventh of Arthur's residuary estate.
i. There was no contingency / qualifying words in Arthur's Will stating that any issue had to reach a certain age before being entitled to their share of his estate therefor Esme, Fran, Harry and the unborn child all have a vested interest in his residuary estate.
j. As Esme, Fran, Harry and Grace's unborn child are all younger than 18 years of age the monies must be invested for them until they are 18 by Charles and Daniel.

k. If any child dies before they reach 18 their share would devolve as part of their estate rather than falling back into the residue of Arthur's estate.
l. Conclusion: Charles, Daniel, Esme, Fran, Grace, Henry and the unborn child are entitled to a 1/7th share of Arthur's residuary estate (£50,000 each) although if Grace's unborn child was not born alive then this would be a 1/6th share.

Question 2b	7 marks

Some candidate failed to recognise the contractual duty that solicitors owe to their clients who are making Wills, although knowledge of the duties in tort to both the client and potential beneficiaries were known better. Poorer candidates often only mentioned the tort duty of care to beneficiaries.

Suggested Points for Response:

a. In contract anyone who drafts a Will owes a duty to their client, the testator, to provide a competent service
b. This means taking into account the testator's attributes, needs and circumstances
c. In particular Black and Blue, Solicitors, would have needed to take full instructions from Arthur about his family and any dependants, including specifically asking if he had ever had any other children,
d. made it clear to him who would be covered by the term 'issue'
e. and explained the consequences of the different options available to him for shares of residue, e.g. equal shares or equal share per stirpes etc
f. In tort anyone who takes instructions for and prepares a Will owes the testator a duty to act with reasonable care and skill in providing that service.
g. If Black and Blue, Solicitors, have breached their contractual duty to provide a competent service to Arthur they will also have provided a negligent service in tort.
h. Solicitors also owe a duty of care in tort to intended beneficiaries who have suffered a loss as a result of them not inheriting as a testator intended.

Question 2c	5 marks

The majority of candidates obtained marks totalling over 50% of the available marks.

Suggested Points for Response:

a. As Charles and Daniel have both been named as executors in Arthur's Will they are both entitled to prove the Will and take out a Grant of Probate although they are not obliged to.
b. Either or both of them could renounce their right to take out a grant under r37 Non-Contentious Probate Rules 1987 (NCPR 1987) by notice in writing.
c. Alternatively, either or both of them could have power reserved to them so they do not take out a grant immediately.
d. If only one of them wishes to apply for a Grant of Probate then the other must state why any named executor is not applying in the PA1P / online application (in Question 3).
e. Even though a minority arises as a result of the gifts in Arthur's Will there is no need for there to be more than one executor who proves the Will and acts initially in its trusts.

Question 2d	9 marks

Many candidates erroneously discussed Grace making a claim under the I(PF&D)A 1975 rather than taking court action to enforce the terms of Arthur's Will under which she was entitled to a seventh of his estate (even where candidates had incorrectly stated she was entitled to one third of his estate in Q2a). The CSM clearly identified that Grace was no longer a child, having been born in 1994, so the order for child maintenance payments would have ended.

Suggested Points for Response:

Position of Charles and Daniel

a. Under s25 Administration of Estates Act 1925 (AEA 1925) after collecting in the assets in Arthur's estate it is the duty of his personal representatives to administer the estate according to law.
b. This means that after paying Arthur's debts, funeral and testamentary expenses Charles and Daniel must distribute Arthur's residuary estate according to the terms of his Will or they will be in breach of this basic duty.
c. They must also do this with due diligence which means within a reasonable time taking such steps as are reasonably necessary.
d. As executors of Arthur's Will if they had any doubts as to Arthur's true knowledge and approval of its contents making it invalid they should have commenced a probate action to establish the validity of it or otherwise.
e. As part of the Legal Statement which they signed at the end of the PA1P / or completed online they confirmed that they would administer the estate of the person who has died (Arthur) in accordance to law.
f. Daniel should not have applied to be an executor of Arthur's Will if he wished to challenge the contents of the Will as he had a conflict of interest between his position as executor and his position as a beneficiary.
g. Any failure by Charles and Daniel to carry out their duties as executors is a *devastit* and this would make them personally liable to Grace (and her children) for any losses they suffered.

Action Grace could take

h. If Grace is concerned that Charles and Daniel may distribute Arthur's estate without following the terms of his Will she could bring a claim under Part 64 of the Civil Procedure Rules (CPR)
i. This would allow the court to determine any question arising out of the administration of the estate or make an administration order.
j. Grace would want the court to decide whether she (and her children) falls into the class of Arthur's issue and the extent of her / their interest.
k. She might also make a claim requiring Charles and Daniel not to distribute any of the residuary estate until her claim is determined
l. and to provide accounts of the monies they have received and paid out of the estate (may be set out in position of Charles and Daniel, only credit once).

Question 3a	8 marks

A significant number of candidates failed to recognise that Niki's Will was revoked and gained no marks for this question, however, they were not double penalised in the following parts of question 3.

Suggested Points for Response:

a. Under s18B Wills Act 1837 a Will is revoked by a later civil partnership
b. Niki made her Will on 27 July 2012, and she entered into a civil partnership with Otka on 23 June 2013 so her Will was revoked on 23 June 2013
c. There does not appear to have been a later Will so Niki has died intestate and the rules governing the distribution of her estate are contained in the Administration of Estates Act 1925 (AEA 1925)

d. Niki is survived by a civil partner, Otka, and issue, Tessa,
e. as even though Tessa was adopted she is treated as the legitimate child of her adoptive parents, Niki and Otka
f. Under s46(1) AEA 1925 Otka is entitled to all of Niki's personal chattels, which means any tangible moveable property Niki owned
g. other than money or securities for money, property used by Niki solely or mainly for business purposes or held solely as an investment.
h. Niki's personal chattels are her Tesla car and all her household and personal effects,
i. including the items inherited from her mother, totalling £82,000
j. As well a statutory legacy of £322,000 and one half of the remainder
k. With the other half of the remainder being held on the statutory trusts for Niki's issue, Tessa.
l. Under r22 NCPR 1987 the entitlement to a grant of letters of administration follows entitlement to the estate; (under s114 Senior Courts Act 1981) administrators must be 18 years old or over; and there must be at least two administrators where there is a life interest or a minority.
m. Otka, as surviving civil partner, is the first person to be entitled to apply. Tessa would be the next person entitled to apply, but as she is only 15 years old under 18, she cannot apply so Otka can nominate a suitable person, such as Palmer, to act as co-administrator.

Question 3b	6 marks
A common error was not recognising the ability of Otka, as a civil partner, to require the family home to be appropriated to her rather than the ability of PRs to appropriate assets to any beneficiary as part of their share of an estate.	
Suggested Points for Response:	

a. Sch 2 of the Intestate's Estate Act 1952 (IEA 1952)
b. Gives civil partners / spouses the right to elect to take the family home provided they were resident there at the time of the intestate's death
c. Otka, Niki and Tessa were living together at 8 Fen Walk so this is satisfied.
d. Otka can require Niki's PRs to appropriate the family home to her in partial satisfaction of her statutory legacy and half share of Niki's residuary estate.
e. The election is made by notice in writing to the PRs made within 12 months of the grant (of letters of administration)
f. As Otka will be one of the PRs she should give the election / notice to the other PR who is appointed (Palmer)
g. Otka is very unlikely to be required to pay any equality money as on current values although the house (£375,0000) is worth more than the statutory legacy (£322,000) on its own added to her half share of the residue her beneficial interest in Niki's estate should exceed the value of the 8 Fen Walk.
h. Although the family home is valued at the date of appropriation rather than the date of death.

Question 3c	11 marks
Many candidates showed a good knowledge of the working of quick succession relief and the application of IHT to an estate in general. However, there were too many candidates who did not discuss the issue of a PET and / or QSR.	
Suggested Points for Response:	

a. IHT is payable at 40% on the gross value of the assets in Niki's estate less her liabilities (£880,079 - £5,079) £875,000
b. plus the cumulative value of any failed potentially exempt transfers (PETs) subject to various exemptions and reliefs.

c. A PET is a transfer of value that does not incur a charge to IHT if the donor survives for a further 7 years. If the donor does not survive for 7 years the gift becomes a failed PET.
d. Niki was entitled to make transfers of value of up to £3,000 in any tax year that would be exempt from IHT and also to carry forward any unused annual exemption from the previous tax year.
e. Therefore, when Niki gave £100,000 to Tessa in September 2023 this amounted to a transfer of value of £94,000, as a failed PET, as she had not made any other transfers of value / gifts making the total value of Niki's taxable estate £969,000.
f. Transfers between civil partners (spouses) are exempt from IHT (s18 IHTA 1984) so everything that Otka inherits from Niki can be deducted from the taxable estate.
g. £639,500 of Niki's estate will be spouse exempt.
h. Being the £322,000 statutory legacy, £82,000 personal chattels including car, and ½ of residue £235,500 (residue being £471,000).
i. Niki is also entitled to a Nil Rate Band whereby the first £325,000 of her chargeable estate is taxed at 0%.
j. The first £94,000 of this will be set against the failed PET, so no IHT will be payable by Tessa on that, leaving £231,000 available to Niki's PRs.
k. IHT will therefore be payable at 40% on £4,500 (£969,000 less £639,500 spouse exempt and £325,000 total NRB) which amounts to £1,800
l. Successive Charges Relief / Quick Succession Relief (QSR) will also be available to reduce this IHT liability as Niki died within 5 years of a chargeable transfer to her on Ralph's death.
m. As Ralph died in November 2022 so between 2 and 3 years before Niki. Niki's PRs are entitled to offset 60% of the IHT paid on the amount Niki inherited.
n. The total amount of IHT paid on Ralph's estate was £230,000.
o. Niki shared Ralph's estate equally with Palmer so her half share of the IHT paid would be £115,000 and 60% of this is £69,000.
p. As the available QSR available is more than the £1,800 IHT due on Niki's estate no IHT is payable.

Question 4a	6 marks

A common error was to discuss the entitlement a grant to the estate under r22 rather than r20. As Vince had left a valid Will a Grant of Letters of Administration with the Will Annexed was required if Xander decides not to act as executor.

Suggested Points for Response:

a. r20 NCPR 1987 would have to be followed to see who would be entitled to take out a Grant of Letters of Administration with Will Annexed (if Xander does not take out a Grant of Probate).
b. This essentially follows the order of entitlement to property under the terms of Vince's Will
c. And any person with a higher right to take a grant must be cleared off.
d. Xander's renunciation would therefore have to cover his right to take out a grant both as an executor and as a beneficiary to clear the first three categories
e. As he is the sole executor, trustee of residue and residuary beneficiary in Vince's Will.
f. There is no PR of a residuary beneficiary as Xander is alive
g. The fifth category includes any other legatee, devisee or creditor
h. Which means that any of Vince's creditors could apply for a grant.

Question 4b	5 marks

Knowledge of the working of the Administration of Estates (Small Payments) Act 1965 was not good, with many candidates being entirely unaware of it, perhaps as it is less likely to be encountered in a work situation.

Suggested Points for Response:

a. Under the Administration of Estates (Small Payments) Act 1965
b. Payment can be made without production of a grant / formal proof of title
c. to people who appear to be beneficially entitle to an asset
d. provided the asset is not valued at more than £5,000.
e. Technically banks such as the Bedford Bank are not covered by the Act
f. But the Bedford Bank may be prepared to release the £78-52 if they are satisfied Xander is solely entitled to the money
g. By producing Vince's death certificate and Will even though he has not proved it
h. However, it is likely that he would have to provide the bank with an indemnity against anyone making a claim against them.
i. Xander would be able to sell Vince's guitars (any of his personal effects) without the need for a grant as these do not require proof of title to transfer ownership.

Question 4c	9 marks

This question was answered well by most candidates who were able to gain good marks by explaining the s27 TA 25 procedure of advertising for creditors.

Suggested Points for Response:

a. If Xander acts as executor of Vince's estate he cannot use Vince's assets to only pay the liabilities he knows about
b. Because he will be personally liable to any other unpaid creditor
c. As the estate is insolvent, he will receive nothing as a beneficiary, so any personal liability will be in his capacity as a personal representative.
d. S27 Trustee Act 1925 (TA 1925) can provide personal representatives with protection from personal liability provided certain conditions are met.
e. Firstly, he will have to give notice that he intends to distribute the assets in Vince's estate requiring all interested parties to send particulars of their claim to him
f. By a specified date which is not less than two months from the date of the notice
g. The notice must be published as an advert in the London Gazette
h. As Vince did not own any land there is no need to put a notice in a local paper circulating in the Brick Lane / Tower Hamlets district
i. However, it might still be appropriate as Vince was living in the district
j. as a notice that would be directed by a court of competent jurisdiction in an action for administration.
k. As an executor Xander has authority to place such an advert immediately after Vince's death rather than waiting for a grant
l. In addition, Xander should make a search in the Local Land Charges Registry
m. And make a bankruptcy search against Vince's name.
n. Once the notices have expired Xander can distribute Vince's assets to the creditors he has knowledge of
o. Without being personally liable to any creditors who have not made themselves known to him.
p. A different option that could be less expensive than placing s27 TA 1925 adverts would be to obtain insurance cover against unpaid liabilities.