

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JUNE 2021 LEVEL 6 – UNIT 21 -PROBATE PRACTICE

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the June 2021 examinations. The suggested points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

Candidates and learning centre tutors should review the suggested points for responses in conjunction with the question papers and the Chief Examiners' **comments contained within this report**, which provide feedback on candidate performance in the examination.

CHIEF EXAMINER COMMENTS

The June 2021 examination paper was a challenging honours level paper which covered a broad range of learning outcomes from the Unit Specification (US). The paper provided a thorough and robust test of the candidates' knowledge, understanding and application of the law in practice, relevant to the different scenarios.

Candidates are reminded that this is a practice paper. It is not enough to know the law and to be able to recite it verbatim; it is essential to be able to apply knowledge and understanding to the facts presented in the QP.

Congratulations to those candidates who passed the exam and those who did not should be encouraged and supported to re-sit. Weaker candidates showed lack of knowledge and skills and very poor preparation in some areas of the examination paper.

In the examination, any part of the learning outcomes from the US can be included. It is not possible to question spot in advance, although it was clear that some candidates had cherry picked which areas to learn and were then at a disadvantage in the exam.

General Advice to Candidates

- Prepare for at least 90% of the learning outcomes.
- Prepare thoroughly and give sufficient time for preparation. Candidates are encouraged to revise thoroughly prior to the exam. Attempt timed past papers. Plan a learning, revision and recall structure that suits. Candidates are encouraged to test their plan in their preparation.
- Read the questions thoroughly. Candidates are encouraged to manage their time, particularly where questions are split into parts. Always attempt all questions. Candidates should spend less time giving background information and focus on the key points, particularly if they are running out of time. If necessary, use bullet points.
- There are no marks on offer for merely repeating the question.
- Candidates should use the reading time to carefully read, understand, select and plan the questions in which they are strongest. Always consider answering your strongest question first, to get some marks in place, calm nerves and build confidence for the remainder of the paper.
- Candidates should always address as many relevant issues as they can in a structured, clear and coherent manner. Address how the law applies to the facts in the question given – if no application is given, marks are lost. At Level 6 it is not sufficient to make vague references to the relevant law. Full statutory references are necessary. If writing short introductions and conclusions, ensure they contain relevant points not already stated.
- Candidates are reminded that “clear thoughts equal clear answers”. Far too many candidates were not methodical in their approach to answering the questions. This resulted in muddled answers which in turn meant that marks could not be awarded as the answer was insufficiently clear.
- A clear structure to the answer may also assist in candidates making best use of grammar and punctuation.
- Case Study Materials are released weeks in advance of the examination. Candidates are encouraged to ensure that they thoroughly review these materials in advance of the examination; the reading time in the examination session is not sufficient to review these materials from scratch and prepare to answer the questions in the examination paper.
- Candidates are reminded that they cannot rely solely on the information contained in the Case Study Materials. The examination paper will also include questions which could not possibly be foreseen from the Case Study Materials. It is important to understand, and to be able to apply to, the questions all of the relevant knowledge required in the Unit Specification. As happens in day-to-day practice, the information presented to the adviser can change and so it is that the exam paper might contain new or additional information beyond what has been seen in the Case Study Materials.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

This question required candidates to provide advice on estate planning, with particular reference to saving Inheritance Tax (IHT). A significant number of candidates offered an IHT calculation, based on the assumed values provided, even though this was not part of the question. Most candidates were able to explain the use of annual/small gifts exemptions.

Many candidates failed to appreciate the importance of the circumstances of the two beneficiaries and therefore failed to identify a discretionary trust as the most appropriate solution. Whilst some candidates did identify a trust as being a means of saving IHT, they chose an interest in possession trust which would not address the problems of the beneficiaries. This also led to a number of those candidates going into detail in relation to taper relief, which was not relevant.

Some candidates were weak on the application of rules relating to gifts with reservation of benefit, although many did comment correctly on this and the need for payment of a full market rent for any continuing use of the holiday home by Olga.

The stronger candidates were able to clearly discuss the assignment of the life assurance policy and the effect of this as a PET. Those candidates also correctly referred to the use of the normal expenditure out of excess annual income allowance.

Candidates seemed unprepared for the nature of this question and, in general, the quality of answers was poor, given that candidates had access to the case study materials many weeks in advance of the exam.

(b)

This question was not well answered. Very few candidates had any understanding of the taxation regime relating to discretionary trusts. Far too many candidates provided information on the liability to IHT on the creation of a discretionary trust, notwithstanding that the question paper expressly instructed that this was not required.

A significant number of candidates failed to appreciate that the answer required reference to IHT, CGT and income tax.

IHT - most candidates were able to refer to the anniversary charge and exit charges for IHT. However, all too often, there was very little relevant information beyond this basic knowledge.

CGT - most candidates had very little knowledge of CGT and its application to a discretionary trust. Many candidates appeared to confuse the CGT/IHT regimes. Income tax - here again, detailed knowledge was scant. Some candidates were confused as to where the liability for income tax would fall, with many believing that it would be Olga, not the Trustees, who would bear the income tax liability.

Question 2(a)

This question required candidates to provide detailed advice as to the payment of liabilities and expenses, including an explanation of the order for payment and the relevant statutory principles.

The candidates who performed best in this question were those who took a methodical approach to stating the law and then applied the statutory order in a step-by-step way.

Unfortunately, many candidates did not take this approach and, consequently, although they appeared to know the law, or were at least able to suggest an answer, marks could not be awarded because there was insufficient clarity and application to the scenario.

A number of candidates were unclear as to whether the estate was solvent (which it was) or not and so wasted valuable time in considering the payment of debts from an insolvent estate.

(b)

This question required candidates to explain the operation of s35 Administration of Estates Act 1925, regarding responsibility for the discharge of mortgages secured on property held in the estate. It also required a clear explanation of the discharge of mortgages secured against two separate properties, and how that liability would be apportioned.

Most candidates managed to score one or two marks at least. However, a surprising number of candidates considered that the properties in question would have to be sold, so that the mortgages could be redeemed, before the beneficiaries could receive their entitlement.

Question 3(a)

This question tested candidates' knowledge as to the rules of construction of a Will, the application of s21 Wills Act 1837, the doctrine of ademption and also the operation of s21 Administration of Justice Act 1982. Further statutory references, such as s24 Wills Act 1837 and s33 Wills Act 1837 could also be made.

Most candidates managed to score some marks. However, the citation of statute and its application to the scenario was often poor.

The lack of a methodical approach to the presentation of the answer meant that many candidates overlooked the issue of the two conflicting dates in the Will. Consequently, they did not refer to the requirements for affidavit evidence under R14 NCPR 1987.

Many candidates failed to appreciate that the gift of the red vase was a specific legacy subject to a contrary intention and would therefore adeem.

The gift of £50,000 to Patricia's children was a class gift, and therefore required reference to the class closing rules. Many candidates failed to appreciate this. Of those who did, some did not correctly apply the class closing rules.

There was good reference to the operation of s33 Wills Act 1837. However, many candidates failed to consider the implications of cases such as *Rainbird v Smith* 2012 and *Hives v Machin* 2017.

3(b)

This question required candidates to identify the documents to be sent to HMCTS in support of the application for the issue of the grant of probate in the estate of Sam Wilkes. Most candidates were able to identify at least two of the necessary documents.

However, many candidates failed to refer to the submission of affidavit evidence of due execution. A substantial number of candidates did not refer to the requirement to submit an engrossed copy of the Will, omitting the invalid alterations and leaving a blank space for the (unknown) amount of the gift to Xavier.

Question 4(a)

This question required candidates to apply the rules of intestacy under the Administration of Estates Act 1925, in a scenario of quick succession.

Most candidates were able to refer correctly to the operation of s184 Law of Property Act 1925. Therefore, it was understood that Henry was presumed to have died first.

Many candidates were also able to correctly apply the operation of s18 Wills Act 1837 and the effect of the subsequent marriage in revoking the Wills which had been made previously.

Some candidates were able to correctly refer to the operation of s46 Administration of Estates Act 1925 and the 28-day survivorship period.

Unfortunately, a lot of candidates did not correctly apply the statutory provisions, with a significant proportion believing that Fatima would, at least in part, be entitled to inherit from Henry's estate.

Most candidates scored well in relation to the statutory trust and the contingencies around that. Very few candidates considered the position if any one or more of the minor beneficiaries should fail to satisfy the contingencies.

(b)

This question required candidates to advise on the application for the grant of representation to Fatima's estate. Most candidates were able to correctly identify that the persons entitled to apply for the grant were the children who, all being minors, could not obtain a grant of representation.

Many candidates were able to identify the need for at least two administrators to be appointed, because of the minority interests. Very few candidates correctly referred to s114 Senior Courts Act 1984.

Many candidates were confused as to the identity of the persons entitled to apply for the grant of representation and the operation of R32 NCPR 1987.

A significant number of candidates failed to appreciate that the grant would be limited during minority and that a cessate grant would be required once the minors had reached the age of 18.

4(c)

This question was not well answered. This question required candidates to give advice to Amy on how to pass a share of the buy to let property to Emily. Most candidates were able to correctly identify the property as having passed by survivorship to Amy on Fatima's death.

Several candidates referred to Amy being able to make an outright gift to Emily and correctly identified the difficulties of this in view of Emily's age. However, most candidates failed to comment on the treatment of such a transfer as a PET for IHT purposes.

Very few candidates referred correctly to the completion of a deed of variation in relation to Fatima's half share of the property. The stronger candidates were able to correctly refer to statutory provisions for both IHT and CGT purposes. However, very few candidates explained the "best option", as required by the question.

Several candidates discussed the option of disclaimer. This was not relevant as, by that means, Amy would not be able to direct the interest in the property to Emily.

**SUGGESTED POINTS FOR RESPONSES
LEVEL 6 – UNIT 21 -PROBATE PRACTICE**

The purpose of this document is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the June 2021 examinations. The Suggested Points for Responses do not for all questions set out all the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed. Candidates and learning centre tutors should review this document in conjunction with the question papers and the Chief Examiners' reports which provide feedback on candidate's performance in the examination.

Question Number	Suggested points for responses	Max Marks
Q1(a)	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • Explanation of annual exemptions • Discussion of limited options given Jessica's circumstances and Luke's age • Options for holiday home and risk of gift of reservation • Assignment of life policy. <p>Responses could include:</p> <ul style="list-style-type: none"> • Tax payable depending on value of holiday home • Payment of life policy premiums in the future • Surrender value of life policy = value of PET <p>Each year she can give away £3000 and it is immediately exempt. As she did not use last year's annual exemption, she can bring it forward and give £6000 away. The current year's exemption is used first Can give £250 away in total per donee but not to someone who has received any of the £3000</p> <p>Due to Luke's age her options might be limited. He will be able to access money at 18 if she makes an outright gift which might not be sensible. Only way to prevent this is to create a trust</p> <p>Due to Jessica's historic gambling issue not wise to make outright gifts to her</p> <p>Olga's tax-free amount is a nil rate band of £325,000. No residential nil rate band available as no children or remoter issue</p> <p>She could put the holiday home into Trust – as she has made no other gifts if it is worth 331K or less then there would be no IHT to pay on the creation of the discretionary trust. She would need to pay a full market rent for any use as otherwise a gift with reservation of benefit</p>	12

	<p>She could assign her life insurance – the surrender value of the life policy is the value of the potentially exempt transfer.</p> <p>As she has excess income the payment of the future premiums should be immediately exempt under s21 IHTA 1984 – normal expenditure out of income.</p>	
Q1(b)	<p>An explanation which clarifies the situation with a detailed account of how and why it has occurred. It should make complex procedures or sequences of events easy to understand and define key terms where appropriate.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • Explanation of rate of tax payable in relation to this particular trust • Explanation of when tax payable <p>Responses could include:</p> <ul style="list-style-type: none"> • Annual allowances • What rate of tax payable is linked to <p>Income tax – first £1000 of income is charged at the basic rate band - 20% . No personal allowance</p> <p>Trust rate of 45% on non-dividend income and 38.1 % for dividends If non dividend income less than £1000 then any dividend income can be set against it until £1K reached so dividends then charged at 7.5%</p> <p>CGT rate is 20% For residential property it is 28%</p> <p>CGT annual exemption of half that applying to an individual</p> <p>CGT payable on sales and deemed disposals</p> <p>Can claim holdover relief if deemed disposal of business asset or immediate chargeable transfer for IHT</p> <p>Anniversary charge for IHT every 10 years takes into account cumulative total of settlor and any capital distributed in previous 10 years</p> <p>Max rate is 6%</p> <p>Exit charges apply when any capital leaves settlement. Rate of tax linked to that payable on creation if exit within last 10 years or rate at last anniversary charge</p>	12
Total		24 marks

Question Number	Suggested points for responses	Max Marks
Q2(a)	<p>A description which provides an account and how things are linked.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • Which law applies to the payment of liabilities and expenses and why • Explanation of order of payment – going through each paragraph and applying it to the facts • Stating which paragraphs of the schedule do not apply <p>Responses could include:</p> <ul style="list-style-type: none"> • Doctrine of marshalling • As estate not distributed adjustment can be made re the funeral debt • Investigation needed to see if the unsecured debts include store card debts. <p>This is a solvent estate as there are sufficient assets to cover the funeral, testamentary and administration expenses and debts and liabilities in full</p> <p>S34 (3) or Part II Sch 1 AEA 1925 applies. The Will makes no express provision setting out which property debts are to be paid from</p> <p>If all property in one category has to be used to pay debts, then the beneficiary in the category will receive nothing.</p> <p>Statutory order is:</p> <p>Property undisposed of by Will as there is a residuary clause this does not apply</p> <p>Property in a gift of residue this applies to both the gift to Tess and Donna</p> <p>Property specifically given for the payment of debts – does not apply</p> <p>Property specifically charged with payment of debts - the Diamond Bank account for Clara will need to pay the credit card debts</p> <p>Investigation needed to see if the unsecured debts include store card debts.</p> <p>Pecuniary legacies fund - the two remaining cash legacies abate proportionately</p> <p>Property specifically devised or bequeathed rateable according to its value as at the date of death Mortgage charged on property is deducted before calculating the value</p> <p>The doctrine of marshalling applies as funeral has been discharged out of the wrong asset</p> <p>As estate not distributed adjustment can be made re the funeral debt to come from the correct property</p>	21

Q2(b)	<p>An explanation which clarifies the situation with a detailed account of how and why it has occurred. It should make complex procedures or sequences of events easy to understand and define key terms where appropriate.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • Explanation of S35 AEA 1925 • Explanation of who is responsible for mortgage going forward <p>Responses could include:</p> <ul style="list-style-type: none"> • Explanation of holiday home and land bearing rateable proportion of mortgage • No contrary intention in Will <p>S35 AEA 1925 If a debt has been charged against a property during the deceased's lifetime then prima facie the property is liable for the payment of the mortgage The beneficiary is liable for the mortgage going forward As both the holiday home and land are charged as security for one debt each bears a proportionate part of the debt</p>	5
Total		26 marks

Question Number	Suggested points for responses	Max Marks
Q3(a)	<p>An answer which consists of reasoned assessment, breaking down the issue into sections and highlighting those of higher importance/relevance. There should be a conclusion which indicates merits and flaws and is supported with evidence where appropriate.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • Application of s 21 Wills Act 1837 • Ademption • S21 AJA 1982 <p>Responses could include:</p> <ul style="list-style-type: none"> • Non application of class closing rules • S24 Wills Act 1837 • Recipient if original gift failed • Rainbird v Smith <p>There are 2 dates in the Will R14 NCPR 1987 – likely to need affidavit evidence of the date of execution. Anyone can give the affidavit (r16 NCPR 1987) but usually the attesting witness or someone present</p>	17

	<p>Red Vase – gift adeems Section 24 Will Act does not apply because there is a contrary intention Use of the word my means the vase owned at the date of the Will</p> <p>Patricia receives £15K S21 Will Act 1837 applies. Alteration not valid unless signed according to S9 . As original wording is apparent then the 15K is admitted to probate</p> <p>Xavier’s gift fails as original wording is not apparent unless doctrine of conditional revocation applies. If this applies forbidden evidence can be made to find the original wording</p> <p>Extrinsic evidence can be used under S21 AJA 1982 to identify who XB is as the words XB are meaningless</p> <p>£50K - class will remain open until Patricia dies</p> <p>Application of S33 Will Act 1837 depends on the interpretation of any words which may show contrary intention if <u>Rainbird v Smith</u> (2012) applied or not if <u>Hives v Machin</u> applied</p>	
Q3b	<p>An explanation which clarifies the situation with a detailed account of how and why it has occurred. It should make complex procedures or sequences of events easy to understand and define key terms where appropriate.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • PA1P • Will • IHT205 or IHT421 <p>Responses could include:</p> <ul style="list-style-type: none"> • Copy of engrossed will <p>An engrossed copy of the Will omitting the invalid alterations and with a blank for Xavier’s gift must be prepared for the Registrar</p> <p>PA1P</p> <p>Will and IHT 205/IHT 400</p> <p>Affidavit regarding date of execution/or any other relevant (identified) affidavit</p>	5
Total		22 marks

Question Number	Suggested points for responses	Max Marks
Q4(a)	<p>An explanation which clarifies the situation with a detailed account of how and why it has occurred. It should make complex procedures or sequences of events easy to understand and define key terms where appropriate.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • Application of S46 (3) AEA 1925 • 28-day survivorship of spouses • Explanation of statutory trust <p>Responses could include:</p> <ul style="list-style-type: none"> • Illegitimacy does not bar inheriting • What happens on failure of statutory trust • S47 AEA 1925 <p>Both Fatima and Henry died intestate S18 Will Act 1837 applies and their later marriage revoked their Wills S46(2A) AEA 1925 – entitlement of spouse is conditional on surviving the intestate by 28 days Fatima and Henry don't inherit from each other Emily inherits from Henry on the statutory trusts imposed by S47 AEA Emily Sarah and Craig inherit equally from Fatima on the statutory trusts Statutory trusts - Contingent on reaching 18 or marrying or forming a civil partnership under that age If any of the children dies before attaining a vested interest leaving issue then those issue inherit in substitution (s3 Estate of Deceased Persons Forfeiture Rule and Law of Succession Act 2011) If Emily dies without issue before 18 then Henry's parents if alive or his siblings if not will inherit his estate.</p>	12
Q4(b)	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • Rule 22 NCPR 1987 • Letters of administration <i>durante minore aetate</i> • David and Amy are possible applicants for the grant <p>Responses could include:</p> <ul style="list-style-type: none"> • S114 SCA 1981 • Potential administrators having the highest priority are all minors • Rule 32 NCPR 1987 	7

	<p>A minor can't take out a grant. As there are minor beneficiaries administration should normally be granted to two individuals unless the court considers it expedient to appoint a sole administrator S114 SCA 1984 Letters of administration <i>durante minore aetate</i> will be issued As only minors are entitled to Fatima's estate the grant will be issued to someone until the minors become 18 and then the grant ceases Under R32 NCPR 1987 grant is usually made to parent or guardians. Here Amy and David could apply.</p>	
Q4(c)	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • Property currently passes by survivorship • PET v deed of variation • Deed of variation best option <p>Responses could include:</p> <ul style="list-style-type: none"> • Method of making a deed of variation • S142 IHT1984 • S62(6) TCGA 1992 <p>Property currently passes by survivorship to Amy. Amy could receive the half share of the property and then gift it to Emily. This is a potentially exempt transfer and if she survives 7 years it will fall outside the IHT calculations on her death, but danger is that may not survive 7 years.</p> <p>Amy inherits Fatima's half at the date of death value S142 IHTA 1984 – can sign a deed of variation to direct inherited half to Emily. If signed within 2 years of the date of death and in writing and no consideration (2) then treated as if Fatima made the disposition. If gone up since the date of death, then need to ensure writing back to the date of death and CGT gain held over and include S62 (6) statement. Best to sign a deed of variation</p>	9
Total		28 marks