

CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2020

LEVEL 3 - UNIT 15 THE PRACTICE OF LAW FOR THE ELDERLY CLIENT

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested answers is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the January 2020 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers 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 by the suggested answers.

Candidates and learning centre tutors should review the suggested answers 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

It is important that candidates read all the questions carefully during the reading time, before they attempt their answers.

It is also important that candidates should pay attention to the specific instruction in the question. This will help to ensure that the question is appropriately answered in terms of content and format. If the question asks the candidate to provide an explanation of a specific point, they should provide the explanation for that point, rather than give a wider answer.

Candidates should also consider the number of marks available for each part of each question, as this gives some indication of the content that the question requires, as well as the amount of time to spend on the question.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1

This question comprised of three parts, the first part being split into three parts. It carried a total of 25 marks.

Part (a)(i) asked the candidates to set out the test in Mental Capacity Act (MCA) 2005 for determining whether a person lacks mental capacity. While many candidates correctly identified the two stage test, some candidates only identified the test as referred to in section 3.

Part (a)(ii) asked the candidates to set out the test in Banks v Goodfellow. This was mostly well answered, with most candidates achieving full marks.

Part (b) asked the candidates to explain why medical evidence was required. This was mostly well answered, although the answers were sometimes generic rather than focusing on the specific facts of the case.

Part (c) asked the candidates to explain the duties and responsibilities of the attorney. This was generally well answered although one or two candidates failed to focus on the duties and responsibilities and gave a more generic explanation of what an attorney is and how they are appointed.

Question 2

This question was divided into three parts, part (c) being split into two parts and carried a total of 20 marks. The question tested the candidates' knowledge of the benefits available to an elderly client and capital gains tax.

Part (a) asked the candidates to explain the qualifying criteria for a disabled facilities grant. Most candidates answered this very well with some obtaining all the available marks.

Part (b) asked the candidates to explain the state benefits the client could be entitled to receive. Again most candidates answered this well, although few identified the availability of the winter fuel allowance.

Part (c)(i) asked the candidates to explain the principles of Capital Gains Tax. Candidates answered this well with most achieving maximum marks for the question.

Part (c)(ii) asked the candidates to explain the Capital Gains Tax consequences of selling the ring. Most candidates could explain the consequences by applying the law to the facts of the question and achieved good marks.

Question 3

This question was divided into two parts. It carried a total of 25 marks and tested the candidates' knowledge of the Court of Protection procedure for applying for deputyship orders and Statutory Wills.

Part (a)(i) asked the candidates to list and explain the documents to be sent when applying for a deputyship order. Most candidates were able to identify the documents, but not all explained the relevant documents and forms.

Part (a)(ii) asked the candidates to explain the procedure for obtaining a deputyship order. This question was satisfactorily answered by the candidates, however some failed to give sufficient explanations of the steps which need to be taken.

Part (b) asked the candidates to explain the principles the court will apply when deciding whether to grant permission for the making of a statutory Will. This question was less well answered by candidates and few gave sufficiently detailed answers. Some candidates failed to apply the facts of the case to their answer.

SUGGESTED ANSWERS

LEVEL 3 - UNIT 15 THE PRACTICE OF LAW FOR THE ELDERLY CLIENT

Question 1

(a)(i) Section 1 Mental Capacity Act (MCA) 2005 states that Mr Mogg is assumed to have capacity unless the contrary is established, for example, through medical evidence.

Stage one of the test asks if Mr Mogg has an impairment of, or a disturbance in the functioning of, his mind or brain.

Stage two then asks if that impairment or disturbance means that Mr Mogg is unable to make specific decisions at that particular time.

(ii) The test in Banks v Goodfellow (1870) states that a person must understand the nature of the act of making a Will, the extent of the property they own (even if only in general terms) and any claims of which they ought to have regard, even if they decide not to make provision for them.

(b) Mr Mogg is elderly. It is unclear from the interview whether he has understood what was being discussed, because he did not ask any questions and seemed to be confused. In addition, he is suffering from Parkinson's Disease. Christopher and Philippa were present at the interview and may have been instrumental in having the Lasting Power of Attorney and Will prepared. Significantly, Mr Mogg was not seen alone and he has not confirmed his instructions to you directly. This is important because he is making a significant change to his Will.

(c) Your attorneys must act in your best interests at all times, as set out in the MCA 2005 Code of Practice. They also owe a fiduciary duty, which means that they cannot take advantage of their position as attorneys.

They must not put themselves in a position where their personal interests conflict with their duties towards you, and they must not allow any other influences to affect the way in which they act as attorney.

Attorneys must not profit or derive any personal benefit from their position, and they should keep their money and property separate from yours. They should take your views and wishes into account when they act.

When making investments, your attorneys should have regard to your age and life expectancy and consider seeking advice from an independent financial advisor. Any investment products they buy on your behalf should be provided by firms regulated by the Financial Conduct Agency.

In addition, they should apply for permission to make gifts or transactions that may potentially infringe the Code of Practice, respect any conditions or restrictions that you have placed on them, respect the confidentiality of your affairs, and must keep accounts and produce them to the Office of the Public Guardian when requested to.

Question 2

(a) Elsie could qualify for a Disabled Facilities Grant as she is the owner of the property and intends to carry on living there for at least 5 years. She would have to satisfy a means test.

The work must be necessary and appropriate to enable Elsie to have enhanced mobility around the house and to provide essential facilities. Also, the work must be reasonable taking into account the age and condition of the property. This would include installing a stair lift, fitting a downstairs toilet and widening doorways.

(b) Since it seems that Elsie now needs help during the day and at night, she will be entitled to claim attendance allowance at the higher rate. She may also be entitled to the winter fuel allowance.

(c)(i) If you sell your ring, Capital Gains Tax (CGT) is payable on any increase in value from the time the asset is acquired to the date of its disposal.

(c)(ii) The acquisition value will be the value of the ring when you inherited it from your sister (£10,000). The disposal value will be the price at which you sell it (£55,000).

You are entitled to an annual CGT exemption which is £12,000 for 2019/20. As long as you have not already used this during the financial year in which the disposal takes place, this can be off-set against the gain you make on disposal of the ring. The gain will be added as a top slice to your income. As you are a basic rate tax-payer, the first part of the gain will be taxed at 10%, while any part of the gain above the threshold for higher rate income tax will be taxed at 20%.

Question 3

(a)(i) In addition to the application for Deputyship Order form COP1, annex A on Form COP1A must be completed. This form contains full information about Indira's personal circumstances.

The application should also be accompanied by an Assessment of Capacity form COP3, which contains information about the application and Dr Lowe's assessment of Indira's mental capacity.

There must be a declaration by Arjun on form COP4, in which he discloses information about himself and gives undertakings regarding his duties and responsibilities.

(a)(ii) After the application has been submitted, the Court of Protection (CoP) will check it and then issue it by stamping the application form and returning it.

Arjun must then notify his sister of the application in person, within 14 days, by handing to her the notice of proceedings on form COP14 and an acknowledgement on COP5.

Notice of the application on form COP15, together with an acknowledgement of service form COP5, must be given to at least three people who are named on the form, for example, Deeba, Gini and Nisha. Arjun must then confirm to the CoP that the notices have been served by completing a certificate of service on form COP20. This form must be completed and returned to the CoP within 7 days of serving form COP14.

The CoP will then issue the Deputyship Order, unless there are any objections, once any security bond which they require to be taken out has been put in place.

(Candidates are not expected to identify the form numbers)

(b) The CoP must be satisfied that it is in Indira's best interests to grant permission for a Statutory Will to be made on her behalf, in accordance with s.1(5) MCA 2005. The CoP will apply an objective test when considering all of the circumstances, e.g. NT v FS and others (2013).

The CoP applies factors found in s.4 Mental Capacity Act 2005 when it determines Indira's best interests. These factors are both case specific and fact specific, so there is no hierarchy to their importance.

These factors include considering Indira's past and present wishes and beliefs, in particular in excluding Deeba from her Will, but there is no presumption of implementing them.