

CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

SEPTEMBER 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 September 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 most important that candidates read through all the questions in the examination paper very carefully before starting to write their answers. This will ensure that they have a clear understanding of all the issues being raised before they commence their answers.

It is also important that when answering the questions, candidates should pay attention to the specific instruction set out in the question. This is relevant to ensure that the question is properly answered both in terms of content and format. Similarly, if the question asks the candidates to provide an explanation of a specific point, then they should provide the explanation for that particular point rather than give a wider answer that may be too general in nature. In particular, candidates should apply the law to the facts of the particular scenario.

Candidates should also consider the number of marks available for each part of each question. This will give some indication of how much content and detail a particular question requires. It will also give them an indication of how much time they should spend on a particular question.

Candidates should remember that this is a practical examination. As such it will often include questions requiring candidates to provide advice to clients. When giving their advice, candidates should assume that the examiner, like a client, may not have any prior knowledge of the topic upon which the advice is being sought. Therefore, although it may seem to the candidate that they are stating the obvious it is often necessary to include as part of the advice, basic information which a candidate may take for granted.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1

This question comprised of three parts..

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

Part (b)(i) asked the candidates to explain the factors to be considered when choosing an attorney. This was mostly well answered with many candidates identifying many of the relevant factors and scoring high marks.

Part (b)(ii) asked the candidates to explain the duties and responsibilities of the attorney. Again, 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, how they are appointed and what the position entails.

Part (c) 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 the candidates due to a lack of detail or in some cases, irrelevant information. Some candidates failed to apply the facts of the case to their answer.

Question 2

This question was divided into two parts and tested the candidates' knowledge of the Court of Protection procedure for applying for deputyship orders.

Part (a) 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 contents of the relevant documents and forms.

Part (b) 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 and there were some mistakes in stating the time limits that apply. Not all candidates applied the facts of the case to their answers.

Question 3

This question was divided into three parts. 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 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 asset. Most candidates could explain the consequences by applying the law to the facts of the question and achieved good marks.

SUGGESTED ANSWERS

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

Question 1(a)

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

Stage one of the test asks if Frank 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 Frank is unable to make specific decisions, at that particular time.

(b)

The letter may include the following points:

(i)

- Your attorneys should be people who you know well and trust.
- You need to ask them whether they are willing to act.
- Non-professional attorneys cannot be paid for carrying out their duties so Maisie, Sophie or Jenny cannot be paid unless you include a specific provision.
- You should consider more than one attorney in case one dies or can no longer act.
- Otherwise, you could consider appointing an alternative attorney.
- If you appoint your attorneys to act jointly, they must act unanimously, and if they are unable to agree, this could be a problem.

- In addition, if one dies, then the LPA will stop working.
- However, you could consider appointing them jointly and severally. This means that they could make decisions on their own or work together.
- If one attorney dies, the LPA will still work.
- Alternatively, you could appoint your attorneys jointly for some decisions and severally for others.
- For practical reasons, it is preferable if your attorneys live near to you and that they are a similar age or younger than you.

1(b)(ii)

- Your attorneys must act in your best interests at all times, as set out in the Mental Capacity Act 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 mustn't 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
- 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.
- Attorneys have a duty not to delegate their powers to anyone else.
- 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.

(c)

The Court of Protection (CoP) must be satisfied that it is in Frank's best interests to grant permission for a Statutory Will to be made on his 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 ss.4(6) and 4(7) of the Mental Capacity Act 2005 when it determines Frank's 's best interests. These factors are both case specific and fact specific, so there is no hierarchy to their importance. These factors include considering Frank's past and present wishes and beliefs, but there is no presumption of implementing them.

Question 2(a)

In addition to the application for Deputyship Order form COP1, annex A on Form COP1A must be completed. This form contains full information about Gwyneth's personal and financial circumstances.

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

There must be a declaration by Bethan on form COP4, in which she discloses information about herself and gives undertakings regarding her duties and responsibilities.

(Candidates are not expected to identify the form numbers)

(b)

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.

Bethan must then notify her mother of the application in person within 21 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, Ceri, Owain and Bethan herself.

Bethan 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.

Question 3(a)

Henry could qualify for a Disabled Facilities Grant of up to £30,000 as he is the owner of the property and intends to live there for at least the next 5 years. There is a means test that he would have to satisfy and he may not do because of the value of the painting.

The work must be necessary and appropriate to enable him to have enhanced mobility around the house and/or to provide essential facilities such as a downstairs toilet or bathroom.

Also, the work must be reasonable taking in to account the age and condition of the property.

(b)

Henry will be able to claim Attendance Allowance at the Higher Rate as it appears that he now needs help during both the day and night because he needs help getting up, washed and dressed, and getting undressed and getting into bed at night.

The Small Adaptations Grant would be available to Henry – up to the value of £1,000. Not means tested.

Winter fuel allowance may also be available.

3(c)(i)

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

(ii)

The acquisition value will be the value of the painting when you inherited it from your sister (£5,000). The disposal value will be the price at which you sell it (£65,000).

You are entitled to an annual CGT exemption for 2020/21 (£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 disposal value of the flat. 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%.