LEVEL 3 - UNIT 15 – THE PRACTICE OF LAW FOR THE ELDERLY CLIENT
SUGGESTED ANSWERS – JUNE 2017

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide students and tutors with guidance as to the key points students should have included in their answers to the June 2017 examinations. The suggested answers do not for all questions set out all the points which students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

Students and tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' reports which provide feedback on student performance in the examination.

Question 1(a)(i)

The two stage test laid down in the Mental Capacity Act (MCA) 2005 starts with the assumption that a person has capacity to make decisions for themselves. (S.1 MCA)

Stage one of the test asks whether the person has an impairment of or disturbance in the functioning of the mind or brain.

Stage two then asks whether the impairment or disturbance means that the person is unable to make specific decisions at the material times.

Question 1(a)(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);
- any claims to which he ought to have regard, even if he decides not to make provision for them.

Question 1(b)

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 neighbours such as Rachel 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; for example, David and Violet do not get on. In addition, if one dies, then the Lasting Power of Attorney (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. Therefore, it may not be practical to appoint Edward, as he is older than you and lives in Wales.

Question 1(c)

Your attorneys must act in your best interests at all times as set out in the Mental Capacity Act (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 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.

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) (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 Sofia's personal circumstances.

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

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

(Candidates are not expected to identify the form numbers)

Question 2(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.

Pablo must then notify his mother 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 would be Oliver, Teresa and Lucia.

Pablo 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 2(b)

The CoP must be satisfied that it is in Sofia'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 ss.4 (6) and 4 (7) MCA 2005 when it determines Sofia's best interests. These factors are both case specific and fact specific so there is no hierarchy to their importance.

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

Question 3(a)

The Applicant could qualify for a Disabled Facilities Grant of up to £30,000 if s/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 s/he would have to satisfy.

The work must be necessary and appropriate to enable them to have enhanced mobility around the house and/or to provide essential facilities. Also, the work must be reasonable taking in to account the age and condition of the property.

Question 3(b)

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

The Small Adaptations Grant would be available to Mildred – up to the value of £1,000. This is not means tested.

Question 3(c)(i)

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

Question 3(c)(ii)

The acquisition value will be the value of the house when you inherited it from your sister (£105,000). The disposal value will be the price at which you sell it to Brian (£125,000). As it is not your principal home, the principal private dwelling house exemption will not apply.

You are entitled to an annual CGT exemption which is £11,100 for 2016/17. 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 18%, while any part of the gain above the threshold for higher rate income tax will be taxed at 28%.