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Qualifying Test Paper:

00453: Recorder (Civil) 2009

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This paper should be left in the test room at the end of the test session. The contents of the test should not be discussed with or divulged to anyone.

CANDIDATE BRIEF – PLEASE READ CAREFULLY BEFORE YOU START

You have 90 minutes to complete the entire test. There are fifteen questions. You should answer **all** of them. You may answer the questions in any order. However, you must clearly indicate which question you are attempting. **Answers may be given in bullet points.**

This test has been set to assess:

- Outstanding Intellectual Capacity – the ability quickly to absorb and analyse information
- Authority and Communication Skills – the ability to explain procedure and any decisions reached clearly and succinctly to all those involved

There is no need to recite the facts when answering the questions, save in so far as you find it helpful to do so. In addressing the problems set you should deal with them on the material that you have – deciding to adjourn for further information will not score marks.

Marks are available for:

- Coverage of key points – does your answer address the key points to which the question gives rise?
- Quality of conclusion – is your conclusion clear? Is it supported by and does it derive from your reasoning?

Marking scheme

Question	Coverage of key points	Quality of conclusion	Total
Scenario 1			50
1	3	3	6
2	7	1	8
3	4	1	5
4	5	3	8
5	6	2	8
6	1	2	3
7	1	2	3
8	3	2	5
9	None	4	4
Scenario 2			50
10	4	2	6
11	4	2	6
12	3	3	6
13	5	3	8
14	13	2	15
15	7	2	9
Discretionary marks for good points not anticipated by the marking scheme			10
Total			110

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INTRODUCTION

There are two scenarios in this qualifying test.

For the purposes of the first scenario you are to assume that the Landlord and Tenant Act 2010 was brought into force during the course of 2010 (please note: this is a **hypothetical** Act).

The second scenario is entirely separate from the first and relates to the Data Protection Act 1998 (please note: this is an **actual** Act which is currently in force).

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MATERIALS PROVIDED

[The mere fact materials have been provided does not automatically mean that they are relevant]

For scenario one:

Landlord and Tenant Act 2010 (this is a hypothetical statute):

- s101 (Surrender of a tenancy)

Please note: you are to assume that there are as yet no reported cases on this Act

For scenario two:

Data Protection Act 1998

- s1 (Basic interpretative provisions) (extract)
- s7 (Right of access to personal data) (extract)

Case law

- Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC112

Guidance

- President of the Family Division's Guidance: McKenzie Friends

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TEST PAPER

SCENARIO ONE

Please note: The questions relating to this scenario are not concerned with technical issues relating to estates in land. The problem should be approached by applying the terms of the statute to the facts and applying general contractual principles. Joint tenants owe obligations which are joint and several, and acts which are required to be done by or on behalf of the tenants have to be done by or on behalf of both tenants.

On 1 December 2011, John and Mary Smith became joint tenants of a residential flat which was let to them for a term of two years from the date of the agreement. On 1 February 2012, John was made redundant. On 1 March 2012, John and Mary Smith separated; Mary left the flat telling John that she wanted nothing more to do with him and that he was not to try to find her. John could not afford to continue to rent the flat and he decided to leave the flat and live with his parents.

On 15 March 2012, John moved all his possessions out of the flat and took the keys back to the landlord's letting agents. He told the agents that he was giving up the flat and they were free to re-let it. The agents told John that they were only letting agents for the landlord. The agents explained that their only function was to find a potential new tenant when specifically instructed by the landlord to do so and that it was for the landlord to decide what to do with respect to John. In order to be helpful, the agents said that they would inform the landlord of what John had said. The agents also added that they thought that the landlord would be able to find another tenant and that 'everything should be alright'. In the meantime, the agents agreed that they would take the keys from John. John felt reassured by what the agents had told him.

On 1 April 2012, John was passing the agents' window and saw that the flat was advertised as available to let. John heard nothing from the landlord until 1 July 2012, when he received a letter from the landlord's solicitor who asserted that the landlord had not been able to find a new tenant for the flat and that the tenancy would continue for the two year term. The letter claimed arrears of rent up to date and also damages for breach of a term of the tenancy which required the tenant under the tenancy to continue to reside in the flat at all times.

The landlord has now sued John and Mary for a declaration that the tenancy is continuing and that John and Mary are jointly and severally liable for arrears of rent and damages. John has served a Defence alleging a surrender of the tenancy on 15 March 2012, alternatively, on such date as the court may determine. Mary has not been served with the proceedings. John is acting in person but he has brought to court a friend, who is a law student.

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John wants the law student to be able to address the court and cross-examine witnesses. The law student has also signed a witness statement concerning what was said by the letting agents to John on 15 March 2012, when the law student happened to be present with John.

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Question 1 (6 marks)

What would you do in view of the non-service on Mary if

- (1) both parties want the trial to take place on that day;**
- (2) only the landlord wants this to happen; and**
- (3) only John wants this to happen?**

Give short reasons to explain your decisions.

Question 2 (8 marks)

What would you do in respect of the law student? Give short reasons to explain your decision.

Question 3 (5 marks)

What significance do Mary's acts have? Give short reasons to explain your response.

Question 4 (8 marks)

What significance do John's acts have? Give short reasons to explain your response.

Question 5 (8 marks)

What significance do the acts of the letting agent have? Give short reasons to explain your response.

Question 6 (3 marks)

Is the requirement in s. 101(3)(a) satisfied? Give short reasons to explain your response.

Question 7 (3 marks)

Is the requirement in s. 101(3)(b) satisfied? Give short reasons to explain your response.

Question 8 (5 marks)

Is the requirement in s. 101(3)(c) satisfied? Give short reasons to explain your response.

Question 9 (4 marks) This question relates to the following two alternative outcomes to scenario 1:

Alternative 1: the court holds that the tenancy was surrendered; John asks for his costs to be paid by the landlord; the landlord argues that he should not pay the costs because John brought the problem on himself by not dealing with the ending of the tenancy in a business-like way.

Alternative 2: the court holds that the tenancy has not been surrendered; the landlord asks for his costs to be paid by John; John argues that he is out of work and has very little money and it would be oppressive for him to pay for the landlord's solicitors and counsel when he was saving money by acting in person.

What would you do in relation to costs in BOTH Alternative 1 and Alternative 2? Give short reasons to explain your decisions.

SCENARIO 2

Anton is the precocious but wayward 14 year old son of Boris. Anton's mother died some years ago and he is not getting on well with his father. Anton attends a private school, where he is doing badly in his lessons. He is due to move shortly to a new school. Boris pays for him to be interviewed by an educational psychologist, Charmaine, with a view to making an assessment whether he has learning difficulties.

As Anton is aware, Boris sends a letter of instruction to Charmaine, but Anton is not told or shown the contents of that letter. In the letter, Boris says that in his opinion Anton is intelligent but dyslexic, and that that explains why Anton is doing badly at school.

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Charmaine interviews Anton. Anton asks Charmaine if he can tell her something which Charmaine will not tell Boris and Charmaine agrees to this. Anton then tells her that he deliberately does badly in lessons as a way of getting at his father. Charmaine puts Boris' letter and her notes of the interview in a folder with Anton's name on the cover and tabs for 'Information from Parents', 'Interview with Child', 'Other Information' and 'Report' and places the folder in a filing cabinet in which folders relating to the children she sees are placed in alphabetical order. Charmaine prepares a short report saying that in her view there is nothing wrong with Anton, files a copy in Anton's folder and provides copies to Anton and Boris.

Charmaine indicates that she wishes to provide her report and the information she has on file about Anton to Anton's new school so that it can be fully appraised of Anton's position when he starts there. Boris and Anton both agree that the report can be provided to the new school, but object to any other information being provided.

Anton (assisted by a family friend) makes a subject access request to Charmaine under s. 7 of the Data Protection Act 1998 ('DPA') for disclosure of all personal data relating to him held by Charmaine.

Boris tells Charmaine that he objects to Charmaine providing Anton with the information in his letter, because it might damage their relationship. Boris is also now suspicious about what Anton might have said to Charmaine about him, and so makes a subject access request of his own to Charmaine under s. 7 of the DPA for disclosure of all personal data relating to him held by Charmaine. Anton objects to Charmaine providing information to Boris. Charmaine thinks it is best to resist both subject access requests and leave it to the court to sort out what she should do.

Each of Anton and Boris applies to the court for orders requiring Charmaine to provide information to them in compliance with their subject access requests under the DPA. The family friend, who has been assisting Anton, acts as his litigation friend; it should be assumed that he is a suitable litigation friend.

Please note: In answering the following questions, you should only deal with matters relating to the operation of the DPA (ignore issues in relation to the common law regarding confidential information and Article 8 European Convention on Human Rights; you should also assume that no relevant assistance on interpretation of applicable provisions of the DPA is given by the EC Directive which the DPA implements nor in any authority).

Question 10 (6 marks)

Counsel for Boris contends that Anton is a child, and that it is up to him (Boris) as his father to decide whether a subject access request should be pursued by Anton; Boris says it should not be pursued. Counsel for Anton cites *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 and submits that Anton is clearly competent to make a subject access request on his own behalf.

What do you decide? Give short reasons to explain your decision.

Question 11 (6 marks)

Charmaine contends that none of the material in the letter, the interview notes or the report constitute 'data' under the definition of that term in s. 1(1) of the DPA. In particular, she says that it is not held in computerised records nor in a 'relevant filing system'. Anton and Boris both contend that all the material is held in a 'relevant filing system' and constitutes 'data'.

What do you decide? Give short reasons to explain your decision.

Question 12 (7 marks)

What items of information regarding Anton are capable of being personal data in respect of Anton? Give short reasons to explain your response.

Question 13 (9 marks)

What items of information regarding Boris are capable of being personal data in respect of Boris? Give short reasons to explain your response.

Question 14 (12 marks)

What do you decide in respect of Anton's subject access request under s. 7(1)(c) of the DPA? Give short reasons to explain your decision.

Question 15 (10 marks)

What do you decide in respect of Boris' subject access request under s. 7(1)(c) of the DPA? Give short reasons to explain your decision. (Assume for the purposes of answering this question that in answer to question 13 it is concluded that the information notes in which Anton explained that his intention in acting to do badly at school is to get at Boris constitutes "personal data" of Boris)

END OF TEST

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DATA PROTECTION ACT 1998 (extract with provisions relevant to this scenario)

1. Basic interpretative provisions

(1) In this Act, unless the context otherwise requires—

“data” means information which—

(a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,

(b) is recorded with the intention that it should be processed by means of such equipment, [or]

(c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system... [not relevant]

“data controller” means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;

“data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;

“data subject” means an individual who is the subject of personal data;

“personal data” means data which relate to a living individual who can be identified—

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

“processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—

- (a) organisation, adaptation or alteration of the information or data,
- (b) retrieval, consultation or use of the information or data,
- (c) disclosure of the information or data by transmission, dissemination or otherwise making available, or
- (d) alignment, combination, blocking, erasure or destruction of the information or data... [not relevant]

“relevant filing system” means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.

(2) In this Act, unless the context otherwise requires—

- (a) “obtaining” or “recording”, in relation to personal data, includes obtaining or recording the information to be contained in the data, and
- (b) “using” or “disclosing”, in relation to personal data, includes using or disclosing the information contained in the data... [not relevant]

7. Right of access to personal data

(1) Subject to the following provisions of this section ..., an individual is entitled—

- (a) to be informed by any data controller whether personal data of which that individual is the data subject are being processed by or on behalf of that data controller,
- (b) if that is the case, to be given by the data controller a description of—
 - (i) the personal data of which that individual is the data subject,
 - (ii) the purposes for which they are being or are to be processed, and
 - (iii) the recipients or classes of recipients to whom they are or may be disclosed,
- (c) to have communicated to him in an intelligible form—
 - (i) the information constituting any personal data of which that individual is the data subject, and
 - (ii) any information available to the data controller as to the source of those data, ... [not relevant]

(4) Where a data controller cannot comply with the request without disclosing information relating to another individual who can be identified from that information, he is not obliged to comply with the request unless—

- (a) the other individual has consented to the disclosure of the information to the person making the request, or
- (b) it is reasonable in all the circumstances to comply with the request without the consent of the other individual.

(5) In subsection (4) the reference to information relating to another individual includes a reference to information identifying that individual as the source of the information sought by the request; and that subsection is not to be construed as

excusing a data controller from communicating so much of the information sought by the request as can be communicated without disclosing the identity of the other individual concerned, whether by the omission of names or other identifying particulars or otherwise.

(6) In determining for the purposes of subsection (4)(b) whether it is reasonable in all the circumstances to comply with the request without the consent of the other individual concerned, regard shall be had, in particular, to—

- (a) any duty of confidentiality owed to the other individual,
- (b) any steps taken by the data controller with a view to seeking the consent of the other individual,
- (c) whether the other individual is capable of giving consent, and
- (d) any express refusal of consent by the other individual... [not relevant]

(9) If a court is satisfied on the application of any person who has made a request under the foregoing provisions of this section that the data controller in question has failed to comply with the request in contravention of those provisions, the court may order him to comply with the request... [not relevant]

CASE LAW

Gillick v West Norfolk and Wisbech Area Health Authority

[1986] AC 112

The Department of Health and Social Security issued to area health authorities a memorandum of guidance on family planning services ("the guidance") which contained a section dealing with contraceptive advice and treatment for young people. It stated that clinic sessions should be available for people of all ages, that in order not to undermine parental responsibility and family stability the department hoped that attempts would always be made to persuade children under the age of 16 who attended clinics to involve their parent or guardian at the earliest stage of consultation, and that it would be most unusual to provide contraceptive advice to such children without parental consent. It went on to state that to abandon the principle of confidentiality between doctor and patient in respect of children under 16 years might cause some not to seek professional advice at all, thus exposing them to risks such as pregnancy and sexually-transmitted diseases, and that in exceptional cases it was for a doctor exercising his clinical judgment to decide whether to prescribe contraception. The plaintiff, who was the mother of five girls under the age of 16 years, wrote to her local area health authority seeking an assurance from them that no contraceptive advice or treatment would be given to any of her daughters while under 16 years of age without her knowledge and consent. The area health authority refused to give such an assurance and stated that in accordance with the guidance the final decision must be for the doctor's clinical judgment. The plaintiff began an action by writ for, inter alia, a declaration that the guidance gave advice which was unlawful and wrong and which adversely affected parental rights and duties. Woolf J. held that in order to obtain the relief sought the plaintiff had to establish that adherence to the advice contained in the guidance would inevitably result in the commission of unlawful conduct, that the probabilities were that a doctor would not render himself liable to criminal proceedings by following the advice in the guidance, and that a girl under 16 was capable of consenting to medical treatment so that a lack of parental consent would not render the doctor's conduct unlawful. He concluded that the plaintiff was not entitled to the relief sought. The Court of Appeal allowed the plaintiff's appeal on the grounds, inter alia, that a girl under 16 was incapable either of consenting to medical treatment or of validly prohibiting a doctor from seeking the consent of her parents, and that the advice contained in the guidance was contrary to law in that any doctor who treated a girl under 16 without the consent of her parent or guardian would be infringing the inalienable and legally enforceable rights of parents relating to the custody and upbringing of their children which save in an emergency could not be overridden otherwise than by resort to a court exercising its jurisdiction to act in the best interests of the child.

On appeal by the department: -

Held, allowing the appeal (Lord Brandon of Oakbrook and Lord Templeman dissenting), (1) that the national health service legislation indicated that Parliament regarded contraceptive advice and treatment as essentially medical matters and that there was no statutory limit on the age of the persons to whom contraceptive facilities might be supplied; that a girl under the age of 16 years had the legal capacity to consent to medical examination and treatment, including contraceptive treatment, if she had sufficient maturity and intelligence to understand the nature and implications of the proposed treatment

(2) That the parental right to control a minor child deriving from parental duty was a dwindling right which existed only in so far as it was required for the child's benefit and protection; that the extent and duration of that right could not be ascertained by reference to a fixed age, but depended on the degree of intelligence and understanding of that particular child and a judgment of what was best for the welfare of the child; that the parents' right to determine whether a child under 16 should have medical treatment terminated when the child achieved sufficient intelligence and understanding to make that decision itself; that although in the majority of cases parents were the best judges of matters concerning the child's welfare, there might be exceptional cases in which a doctor was a better judge of the medical advice and treatment which would conduce to a child's welfare and where it might be desirable for a doctor to give a girl, in her own best interests, contraceptive advice and treatment, if necessary without the consent or even the knowledge of the parents; and, that, accordingly, the department's guidance did not contain advice which was an infringement of parents' rights

LANDLORD AND TENANT ACT 2010 (Please note: this is a hypothetical statute)

101. Surrender of a tenancy

- (1) A tenancy may be surrendered by deed executed by both the landlord and tenant.
- (2) A tenancy may be surrendered without a deed but only in accordance with the following requirements of this section.
- (3) The requirements referred to in sub-section (2) above are:
 - a. The tenant does an act which is consistent with the immediate termination of the tenancy and is inconsistent with the continuation of the tenancy;
 - b. The landlord knows of the act referred to in a. above;
 - c. The landlord acknowledges to the tenant that he accepts the act of the tenant as being effective to terminate the tenancy with immediate effect.
- (4) A tenancy may not be surrendered otherwise than in accordance with sub-sections (1) and (2) above.
- (5) Nothing in this section affects the law as to the making of an agreement to surrender nor the law as to estoppel.

President of the Family Division's Guidance: McKenzie Friends

Date 14th October 2008

In the light of the recent decision of Munby J in the case of *Re N (A child) (McKenzie Friend: Rights of Audience)* [2008] EWHC 2042(Fam), the President's Guidance of 14th April 2008 requires amendment to the penultimate paragraph headed "Rights of Audience". The Guidance of 14th April is therefore now withdrawn and reads as follows in its reissued form.

In the light of the growth of litigants in person in all levels of family court, the President issues this guidance, which supersedes that of 13th May 2005. [2005] Fam Law 405, and is to be regarded as a reminder that the attendance of a McKenzie friend will often be of advantage to the court in ensuring the litigant in person receives a fair hearing.

- A litigant who is not legally represented has the right to have reasonable assistance from a layperson, sometimes called a McKenzie Friend ("MF"). This is the case even where the proceedings relate to a child and are being heard in private.
- A litigant in person wishing to have the help of a MF should be allowed such help unless the judge is satisfied that fairness and the interests of justice do not so require. The presumption in favour of permitting a MF is a strong one.
- A litigant in person intending to make a request for the assistance of a MF should be encouraged to make the application as soon as possible indicating who the MF will be.
- It will be most helpful to the litigant in person and to the court if the particular MF is in a position to advise the litigant in person throughout the proceedings.
- A favourable decision by the court, allowing the assistance of a MF, should be regarded as final and not as something which another party can ask the court to revisit later, save on the ground of misconduct by the MF or on the ground that the MF's continuing presence will impede the efficient administration of justice.
- When considering any request for the assistance of a MF, the Human Rights Act 1998 Sch 1 Part 1 Article 6 is engaged; the court should consider the matter judicially, allowing the litigant reasonable opportunity to develop the argument in favour of the request.
- The litigant in person should not be required to justify his desire to have a MF; in the event of objection, it is for the objecting party to rebut the presumption in favour of allowing the MF to attend.
- Factors which should not outweigh the presumption in favour of allowing the assistance of a MF include
 - the fact that proceedings are confidential and that the court papers contain sensitive information relating to the family's affairs
 - the fact that the litigant in person appears to be capable of conducting the case without the assistance of a MF
 - the fact that the litigant in person is unrepresented through choice
 - the fact that the objecting party is not represented
 - the fact that the hearing is a directions hearing or case management hearing
 - the fact that a proposed MF belongs to an organisation that promotes a particular cause

- The proposed MF should not be excluded from the courtroom or chambers while the application for assistance is made, and the MF should ordinarily be allowed to assist the litigant in person to make the application.
- The proposed MF should produce a short curriculum vitae or other statement setting out relevant experience and confirming that he/she has no interest in the case and understands the role of a MF and the duty of confidentiality.
- If a court decides in the exercise of its discretion to refuse to allow a MF to assist the litigant in person, the reasons for the decision should be explained carefully and fully to both the litigant in person and the would-be MF.
- The litigant may appeal that refusal, but the MF has no standing to do so.
- The court may refuse to allow a MF to act or continue to act in that capacity where the judge forms the view that the assistance the MF has given, or may give, impedes the efficient administration of justice. However, the court should also consider whether a firm and unequivocal warning to the litigant and/or MF might suffice in the first instance.
- Where permission has been given for a litigant in person to receive assistance from a MF in care proceedings, the court should consider the attendance of the MF at any Advocates' Meetings directed by the court, and, with regard to cases commenced after 1.4.08, consider directions in accordance with paragraph 13.2 of the Practice Direction. Guide to Case Management in Public Law Proceedings.
- The litigant in person is permitted to communicate any information, including filed evidence, relating to the proceedings to the MF for the purpose of obtaining advice or assistance in relation to the proceedings.
- Legal representatives should ensure that documents are served on the litigant in person in good time to seek assistance regarding their content from the MF in advance of any hearing or advocates' meeting.

What a McKenzie Friend May Do

- Provide moral support for the litigant
- Take notes
- Help with case papers
- Quietly give advice on:
 - points of law or procedure;
 - issues that the litigant may wish to raise in court;
 - questions the litigant may wish to ask witnesses.

What a McKenzie Friend May Not Do

- A MF has no right to act on behalf of a litigant in person. It is the right of the litigant who wishes to do so to have the assistance of a MF.
- A MF is not entitled to address the court, nor examine any witnesses. A MF who does so becomes an advocate and requires the grant of a right of audience.
- A MF may not act as the agent of the litigant in relation to the proceedings nor manage the litigant's case outside court, for example, by signing court documents.

Rights of audience and rights to conduct litigation

- Sections 27 and 28 of the Courts and Legal Services Act 1990 (the Act) respectively govern rights of audience and the right to conduct litigation. They provide the court with a discretionary power to grant unqualified persons, including MFs, such rights in relation to particular proceedings.
- While the court should be slow to grant any application under s.27 or s.28 of the Act from a MF, it should be prepared to do so for good reason bearing in mind the general objective set out in section 17(1) and the general principle set out in section 17(3) of the Act and all the circumstances of the case. Such circumstances are likely to vary greatly: see paragraphs 40-42 of the judgment of Munby J. in *Re N (A child) (McKenzie Friend: Rights of Audience)*[2008]EWHC 2042(Fam).
- If the litigant in person wishes the MF to be granted a right of audience or the right to conduct the litigation, an application must be made at the start of the hearing.

Personal Support Unit & Citizens' Advice Bureau

- Litigants in person should also be aware of the services provided by local Personal Support Units and Citizens' Advice Bureaux. The PSU at the Royal Courts of Justice in London can be contacted on 020 7947 7701, by email at cbps@bello.co.uk or at the enquiry desk. The CAB at the Royal Courts of Justice in London can be contacted on 020 7947 6564 or at the enquiry desk.