

**LEVEL 3 - UNIT 15 – THE PRACTICE OF LAW FOR THE ELDERLY CLIENT
SUGGESTED ANSWERS – JANUARY 2018**

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide candidates and tutors with guidance as to the key points candidates should have included in their answers to the January 2018 examinations. 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 tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' reports which provide feedback on candidate performance in the examination.

Question 1(a)

Marshall is 79 and has some physical limitations. It is unclear from the interview whether he fully understood what was being discussed because at times he seemed forgetful and confused. He has already consulted his GP about his memory problem. This does not mean that Marshall necessarily lacks capacity to make his own decisions about who he wishes to appoint as his attorneys. In addition, Marshall was not seen alone and may have been unduly influenced by Fiona and Ruby. Instructions cannot be accepted from Marshall unless he has capacity. It is better to have medical evidence of capacity in case of any future dispute.

Question 1(b) (i)

Banks v Goodfellow

The testator should understand:

- the nature and effect of his act. In other words, that he is making a Will and what that means;
- the extent of his property. Although he does not need to know the exact details of all his property, he should have a general idea of whether he has a house, is rich or poor etc.;
- the claims to which he ought to have regard. This means that he ought to be able to bring to mind people who he might reasonably expect to consider as beneficiaries even if he then decides not to include them.

Question 1(b) (ii)

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 himself, (s.1). Stage one of the test asks whether the person has an impairment of, or disturbance in, the functioning of the brain.

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

Question 1(c) (i)

Answer may include any of the following points:

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 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 should keep your money and property separate from theirs. They should also 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 1(c) (ii)

The Court of Protection (CoP) must be satisfied that it is in Marshall'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 Marshall's best interests. These factors are both case specific and fact specific, so there is no hierarchy to their importance. These factors include considering Marshall's past and present wishes and beliefs, but there is no presumption of implementing them.

Question 2(a) (i)

If you decide to grant a mortgage over your home to a lender, you retain the ownership of the property and you can stay in your home for as long as you wish to do so. You will also benefit from any increase in the value of your home. This is what is known as a lifetime mortgage. In return, you can decide to receive either a lump sum or income up to an agreed limit, known as a drawdown facility. This can save on the interest payable because interest is added annually to the value of the loan, but is only charged on the amount of cash released to you. Consequently, the funds which remain in the drawdown facility only incur interest when they are withdrawn.

One advantage to you of a lifetime mortgage is that you repay nothing immediately to the lender because the interest on the loan is rolled up, and the

loan and interest is only repaid when you die or move out of your home and it is then sold.

As you will appreciate, if your home falls in value the equity reduces and, if you live long enough, the loan and the interest which is compounded, could reduce the equity to nothing. However, Equity Release Council members will not claim more than the value of the property.

In addition, further disadvantages may be the penalties that can apply if you pay it off before you die, the reduction in the inheritance you will leave to your family. Finally, a drawdown of capital can affect any means tested benefits to which you may be entitled.

Question 2(a) (ii)

Another type of equity release plan is called a home reversion plan, whereby you sell your home or a percentage of it to the plan provider in return for a lump sum and/or income. You will have a lifetime lease of the property giving you the right to stay there rent-free for life.

You should be aware of the fact that the plan provider will pay below the true market value of your home, taking into account such things as your age and state of health. As there is no loan, there is no build-up of interest.

As you are retaining the ownership of your home wholly or in part, you will appreciate that any increase or fall in the value of your home will be shared by you and the plan provider.

If you die or sell your home in the near future, you will have sold for less and without getting the full benefit.

Question 2(b)

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

You are entitled to an annual CGT exemption and, unless you have 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. As you are a basic rate tax-payer, you will pay CGT at 18% on the gain, and 28% on any amount above the threshold for higher rate income tax.

Question 3(a)

Gloria could qualify for a Disabled Facilities Grant of up to £30,000 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. She may also qualify for the Small Adaptations Grant because a mixture of small and larger works on the property may be required.

Question 3(b)

The work must be necessary and appropriate to enable Gloria 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.

Question 3(c)

Since it seems that Gloria 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.

Question 3(d)(i)

An advance decision would allow Gloria to specify the future medical treatment she wishes to receive or refuse. It is legally binding on a medical practitioner.

Question 3(d)(ii)

It must be in writing and signed by Gloria and witnessed if her wishes include the refusal of life-sustaining treatment. However, her advance decision cannot promote or facilitate euthanasia or suicide.

Question 3(d)(iii)

The basic rule is that a Lasting Power of Attorney (LPA) remains valid despite the presence of an advance decision (AD) – (s.25 MCA 2005).

Where an AD contradicts the terms of the LPA a potential conflict arises. In those circumstances the AD prevails (s.25(7)MCA).

Although the AD and the LPA operate independently of each other, it would be advantageous for the AD to refer to the LPA.