

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

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

Section 2 MCA 2005 states that a person lacks capacity if he is unable to make a decision for himself because of an impairment of, or a disturbance in the functioning of, his mind or brain.

Section 3 MCA 2005 states that a person is unable to make a decision for himself if he is unable to understand the information relevant to making a decision, or retain it or use it or communicate the decision.

**Question 1(b)**

Hugh is nearly 86 years of age and has some physical limitations such as poor eyesight, and his children have expressed their concerns. It is unclear from the interview whether he has understood what was being discussed because he did not ask any questions and he seemed to be confused. Hugh could be suffering from the effects of his recent bereavement. Denise and Sylvester were present at the interview and may have been instrumental in having the Lasting Power of Attorney and the Will prepared, so there could be a conflict of interest. Significantly, Hugh was not seen alone and he has not confirmed his instructions to you expressly. This is important because he is making a significant change to his Will. The existence of a medical report might avoid problems later if claims are made against the estate.

**Question 1(c)**

Denise should apply to the Office of the Public Guardian (OPG) to register her father's Enduring Power of Attorney (EPA) by using form EP2PG. After notices on form EP1PG have been served upon Hugh personally, and sent to at least three of his relatives, namely Sylvester, Denise and Michael, (although she is not

required to give herself notice). Form EP2PG must be submitted to the OPG within 10 days of the date of the last EP1PG being served.

The original EPA should be sent with the application, together with the registration fee of £110.

Any of the relatives who are notified have 28 days in which to object, and in the absence of any objections, the OPG will stamp the EPA and return it to Denise for her use.

### **Question 1(d)(i)**

To seek the permission of the Court of Protection (CoP) to make a Statutory Will on your father's behalf, you should apply using form COP1. This must be supported by an explanatory Affidavit in which you must explain why it is in your father's best interests to make the proposed Will.

You must exhibit to your Affidavit a copy of your father's existing Will and a draft of the proposed Will. In addition, you need to exhibit the proposed executors' consent to act, and details of your father's finances. Lastly, a family tree and a medical report on your father's testamentary capacity should also be exhibited to your Affidavit.

Anyone prejudiced by the proposed Will, such as your brother Sylvester, must be named as a respondent.

I would mention to you that the CoP may instruct the Official Solicitor to give advice upon whether permission should be given. If the CoP agrees to your application, it makes an order authorising the making of the Will in accordance with the draft.

### **Question 1(d)(ii)**

The Court of Protection (CoP) must be satisfied that it is in Hugh's 'best interests' to grant permission for a Statutory Will to be made on his behalf. The CoP applies s.4 MCA 2005 when it determines what is in Hugh's best interests. These include ignoring assumptions arising only from Hugh's age and appearance, whether he may be able to make a decision himself in the future, and encouraging him to participate in the decision. This includes considering Hugh's past and present wishes, and beliefs and values. Hugh's expressed wish to include Michael in his Will, and the views of Denise and Sylvester, will all be considered. The CoP will apply an objective test when considering all the circumstances, e.g. NT V FS and others (2013).

### **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 to the lender immediately, 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.

### **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 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.

If 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 were to die or to sell your home in the coming years having made such a plan, you will have achieved a lower amount financially without getting the full benefit.

### **Question 2 (b)**

If you decide to raise money through an equity release plan, your state pension will not be affected as it is not means-tested. Similarly, your entitlement to receive winter fuel payment will not be affected because it is not means-tested.

Your entitlement to pension credit will only be affected if any income you receive takes you above the income limit, or if any lump sum you draw down takes you above the capital limit, presently £10,000.

Your entitlement to council tax reduction will not be affected unless you are no longer eligible to receive the guarantee credit part of pension credit.

### **Question 3(a)**

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

Even though you acquired the flat in 1977, due to subsequent changes made to CGT, you are deemed to have acquired it in April 1982. Consequently, its value then will be deemed to be its acquisition value.

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, for 2016/17 you will pay CGT at 18% on the first part of the net gain, and 28% on any amount above the threshold for higher rate income tax.

### **Question 3(b)**

From what was discussed during your discussion with Mr Andrews, your estate is potentially chargeable to inheritance tax. You could use some of the premium bonds prize to go on a cruise or, of course, spend the money for your own benefit and enjoyment, thereby reducing the value of your estate. You could make gifts to charity sufficient to bring your estate below the inheritance tax threshold. I would also point out that if the gifts to charity amounted to 10% or more of the value of your estate on death, if it was still chargeable to inheritance tax, the rate would be reduced from 40% to 36%.

You could make significant gifts to your children and/or grandchildren, and provided you survive seven years from making the gifts, these would not form part of your estate on death. These gifts are called potentially exempt transfers, but I would stress these would only fall out of your estate if you survive the seven years.

You can use your annual allowance of £3,000 in any one tax year, and use any unused part of your previous tax year's annual allowance. The effect of this would enable you to gradually reduce the value of your potential estate. Similarly, you can make any number of small gifts of up to £250 each tax year, again, thereby gradually reducing the value of your estate over time.

Provided you retain your house until your death and you leave your house in your Will to your children or lineal descendants, the residential nil-rate allowance will be available to your estate.