

GUIDANCE TO CARE MANAGERS ON SUPPORTED LIVING TENANCY ARRANGEMENTS—MAY 2011

Many local authorities have changed services from residential care to supported housing for people with learning disabilities. Much of this change has focussed on achieving wider access to welfare benefits and having a tenancy. However, another aim of supported living has been to achieve choice, control and community inclusion for learning disabled service users.

Legal Background to Tenancies

Capacity and enforcement- Introduction

Mental capacity and tenancy is a grey area and there is legislation that works for and against people with learning disabilities, who may lack capacity. The law states that if the landlord knows that the tenant lacks capacity, then the agreement is voidable by the tenant. The law also says that people who are deemed to lack capacity should also be able to contract for necessities and that includes housing.

However, for most people with learning disabilities, understanding the basics of the tenancy agreement (e.g. the tenant pays rent in return for specific accommodation and must look after the property) is sufficient to make it a legally binding agreement. This can be helped by providing simple tenancy agreements and using diagrams and pictures to explain.

For those people who do lack the mental capacity to understand the basics of a tenancy agreement, this should not be a barrier to enabling a person in this situation to have their own home. In these circumstances, an application should be made to the Public Trust Office to appoint a Deputy to handle the tenancy agreement.

It is not good practice to let person, who lacks capacity sign a tenancy agreement.

However, if a tenancy agreement was entered into and it later became clear that a person lacked capacity, they would still have protection against being made homeless since the tenancy would be voidable.

Capacity to Enter into a Tenancy Agreement

More recently the Mental Capacity Act 2005 has provided a helpful framework for working through some of the issues around a person with a learning disability entering into a tenancy arrangement.

One of the guiding principles of the Act is that capacity must always be assumed.

In most cases, learning disabled customers will understand the basics of a tenancy agreement, which is about having to pay money to a landlord and look after your home in return for being able to live there in peace and enjoyment.

There is no need to have an in depth understanding of tenancy law to have a tenancy as indeed is the case for most of the population.

As such, the grant of a tenancy may be proper even though capacity may be limited.

In any event, a tenancy is not void because of lack of capacity but merely voidable at the option of incapacitated person who can either elect to affirm or avoid the contract.

If the agreement is fair and in the occupant's interests then it is unlikely to be challenged.

Making sure that the tenancy agreement itself is easily understood by tenants, families and staff is a good starting point. There are many examples of how a tenancy agreement can be made easily understood using plain English, symbols, photographs and pictures, attached at Appendix 1.

However, if an individual is unable to understand the basic requirements of a tenancy, then the Department of Health has issued informal Guidance, which states that a Court appointed Deputy or a person, who has an Enduring or Lasting Power of Attorney may sign the tenancy on their behalf.

What is a Tenancy or a Licence to Occupy?

In order for a tenancy to exist the occupant must be provided with a right to occupy at least some of the accommodation exclusively (i.e. a bedroom) and the accommodation must be the main element of what is being provided.

Generally if a room is being rented in a group house, with shared communal rooms with other people and the main purpose of the stay is to receive support, then the arrangement is one of a licence.

Tenancies grant more rights and security to an occupant than the lesser right to occupy under a licence.

The reality of the arrangement is more important than what it is called by the parties– Courts are therefore required to determine the issue based on an examination of the substantive terms and not the label the parties put on it: see ***Street v Mountford* [1985] AC 809**.

The key issues are therefore exclusive possession and whether the landlord provides services which require him to exercise unrestricted access to and use of the premises.

Sometimes, the domiciliary carer will provide support services which require them to have access to the service users' rooms for the purpose of carrying out their support functions but this should only be in circumstances where it is necessary and proportionate to safeguard the service user.

Further Guidance on Commissioning of Accommodation for Customers with a Learning Disability and Tenants' Rights is provided in Appendix 3.

ACTION

New Customers

In each case, assess the capacity of each new customer to understand the terms of a tenancy agreement and to sign it. Where the assessment concludes that the customer did not have capacity to enter into a tenancy agreement, then an application will need to be made to the Office of the Public Guardian for appointment of a Deputy (Finance and Welfare) to sign on their behalf. This would be a short term arrangement in keeping with the requirement to use such provisions as least restrictively as possible.

If the matter is already before the Court of Protection, then the Judge can be asked to consent to the tenancy agreement.

The application will be made by the Directorate for Adults' Financial Services Team on the Application at Appendix 2.

Existing Customers

For each existing customer, their capacity should be assessed at the date of their annual review. Where the assessment concludes that the customer does not have capacity to understand and sign the tenancy agreement then an application will be made to the Office of the Public Guardian for appointment of a Deputy (Finance and Welfare) to sign on their behalf.

In some cases, family members may be able and willing to make the application but if no relatives or close friends are in a position to do so, then care managers will need to refer the matter to Adults' Financial Services Team for advice and guidance.

In keeping with the requirements of the Mental Capacity Act, every reasonable effort will be made to maximise the person's capacity, for example by providing easy to read tenancy agreements and supporting material on what it means to be a tenant. Where a person is still not able to sign a tenancy agreement because even with support they lack capacity, then every reasonable effort will be made to ensure their views are represented via the 'best interests' process.

APPENDIX 3

COMMISSIONING AND TENANT'S RIGHTS

Further Guidance

1. The tenant's legal rights are observed, for example if they are not moved on unless they are clearly asking to do so or their landlord evicts them due to grounds prescribed under the relevant Housing Act. The existence of a tenancy agreement does not in itself determine that the tenancy is legitimate.
2. What is just as important is that tenants have the same choice and control over their home as non-disabled tenants would. Support staff should always be aware that they are working in the tenant's home and are respectful of the tenants' rights, choices and control over their home.
3. The landlord and support provider should know about the Mental Capacity Act 2005 and relevant housing law in relation to issuing a tenancy. The tenancy and support agreement is easy to understand and the tenant (or a representative) understands the tenancy (where possible) and Support staff understand the tenancy agreement and the rights of the tenant and get training and guidance that is clear about how to support people in their own home.
4. Person centred planning and approaches to help people think about where they want to live have been used. People get support to think about the type of house and location that is important to them. For people who do not communicate with words, using person centred approaches to think about what is important to them about where they want to live. Families, friends and advocates are involved in the planning process. The person has not been simply 'placed' because there is a vacancy.
5. Information is provided about housing choices that people and families can understand. Care managers, housing advisors and provider organisations know about the range of housing choices available. Regular reviews are conducted and tenants asked whether they want to move and this should be made part of a service agreement. Collate evidence of how people have chosen where they live, especially from people who do not use words to communicate (this may be required by CQC if registration status is being challenged).

6. The tenant has chosen who they want to live with (if anyone) or the type of people they want to live with. For people who do not communicate with words, using person centred approaches to think about whom they like living with or what type of person they like to be with/don't like to be with. If customers no longer appear to wish to live with another customer(s) they are supported to think about whether they want to move on. Tenants are regularly asked if they are happy or unhappy with their current living arrangements.
7. Commissioners and providers have a process for enabling people to make genuine choices about who they live with, such as a housemates' notice board, events and introductions to potential sharers. The landlord and support provider create a person centred process for supporting current tenants and potential tenants to choose housemates. Providers and commissioners create flexibility in shared housing so that people can more easily move on if they need to. Landlords and support providers may need to provide evidence of how choices about the people with whom the service users lives were made if registration status is being challenged by CQC.
8. Customers have genuine control over how they are supported and who supports them. Person centred planning and support planning is used to determine choices made and to support changes Recruitment and rota planning is based on individual tenant need/choice. The tenant has real control over their finances, with or without support. Ultimately, if a tenant does not want a particular member of staff or the provider to support them, they do not have to. It is their home.
9. Housing and support is contracted separately and support is not a condition of the tenancy. CQC will request evidence of this if registration status is challenged. There is a support contract in place that states that the tenant has a right to change support provider. Support providers need to move towards a system of individualised funding to meet the needs of personal budget holders and create flexibility in how they provide support.
10. The tenant is not denied or restricted access to any part of their home that they have a right to as stated in the tenancy agreement. Customers choose how the house is furnished and decorated where permitted in the tenancy agreement.
11. It looks like the tenant's home and reflects tenants' personalities, rather than a place of work.

12. There are agreements in place, if support staff need to hold keys. The landlord does not hold keys and does not visit the property excessively unless necessary (the tenancy agreement should outline this) so that the tenant experiences 'quiet enjoyment' of their home and clearly enjoys their personal space. Tenants are able to answer their own phone, door and open mail (with support if necessary).
13. The person's home is called a person's home and not called a 'supported living scheme', therefore, language in contracts, agreements and training and induction should reflect the fact the person's home is not the service. The service is the support provided. There is not an office and unnecessary paperwork and equipment owned by the support provider in the home. The support provider provides separate office space for staff meetings etc. Support providers and landlords do not have mail addressed to the tenants' home.
14. People who do not use words still make choices by showing preferences, likes and dislikes and these choices are just as valid as those made with words. A choice of support provider may not be an active verbal choice but may be indicated by the person showing they like a member of staff, clearly enjoying life and those that know them well and care about them witnessing this. The Mental Capacity Act 2005 is a legal framework that supports choice and decision-making and can be used to determine the choice and control a person has as a tenant if this is being challenged.
15. A vacancy in a shared housing scheme needs to be filled to make the support financially viable. The tenants are very particular about the type of person they want to move in and are rejecting possible co-tenants. How much say should the existing tenants have? Firstly, it should be absolutely clear in the tenancy agreement what the process is for getting a new tenant and how much say existing tenants have. Good practice for example might look like the following process; Tenants individually describe their ideal tenant and the qualities that would be unacceptable as a tenant (e.g. a smoker or someone who does not like pets may be completely unacceptable) Tenants jointly agree on what is desirable and what is essential for a housemate and draw up a simple criteria An agreed amount of time is used to find the right tenant If the right tenant is not found within agreed timeframe tenants can opt on a compromise on their ideal tenant and continue to search for an agreed amount of time If no suitable tenant can be found in an agreed amount of time, the tenants have a choice to either renegotiate the finances of their housing and support arrangement so that it is financially viable, accept a tenant that the landlord finds or give notice to quit and seek alternative housing.

16. Deprivation of Liberty Safeguards in Tenancy Based Housing

- The Deprivation of Liberty Safeguards (DOLS) was introduced into the Mental Capacity Act 2005 by the Mental Health Act 2007.
- The DOL Safeguards provide a framework for approving deprivation of liberty (DOL) for people who lack the capacity to consent to treatment or care in either a hospital or care home registered under the Care Standards Act 2000.
- The guidance states that the safeguards do not apply to people living at home. It will only be lawful to deprive somebody of their liberty elsewhere (for example, in their own home, in supported living arrangements other than in a care home, or in a day centre) when following an order of the Court of Protection on a personal welfare matter.
- In such a case, the Court of Protection order itself provides a legal basis for the deprivation of liberty.
- What constitutes a deprivation of liberty is not straightforward and depends on individual circumstances. A common example in supported living that indicates there is a deprivation of liberty would be homes with locked doors specifically to prevent people leaving and/or high staffing ratios relying on staff to prevent the person leaving. Situations where people do not have door keys may also indicate a deprivation of liberty but if a tenant does not have a door key because they are unable to use one, good person centred planning and approaches can determine how best the person would manage getting in and out of their home and who can hold keys on their behalf. Further Guidance is provided in the Code of Practice on Deprivation of Liberty Safeguards at Chapter 2 and in case law.
- An Order under s16 Mental Capacity Act 2005 is required to deprive a person of their liberty in supported living settings.