

Woodchurch House Limited

Care Suites Tenancy Agreements Policy

1. Background

Woodchurch House Limited (the “Landlord”) has a number of residents who live in “supported living” accommodation, namely the Care Suites. When a resident moves into a Care Suite, they are asked to sign a Tenancy Agreement which sets out the rights and obligations of both the Tenant and the Landlord. However, for some residents who lack capacity, the procedure set out in this policy and the accompanying flowchart should be followed to ensure Tenant’s and Landlord’s rights are protected as much as possible.

2. The Law

The law relating to mental capacity has over recent years become central to the social care and living arrangements of those who lack capacity to take important decisions, in particular about where they are to live. The Mental Capacity Act (MCA) 2005 sets out the principles which apply in determining whether a person has capacity to make a specific decision and where that capacity is lacking, in making decisions in that person’s best interests. Social and healthcare staff have a duty under the MCA to have regard to the Mental Capacity Act Code of Practice (the “Code of Practice”) when making decisions in relation to a person who lacks capacity.

In the case where a Tenancy Agreement is not signed by the person who lacks capacity, the judgement of *Wychavon District Council v EM (2012)* clarified the position in relation to Tenants’ and Landlords’ rights and obligations. The judgement confirms that a person lacking mental capacity is liable to pay rent for a tenancy of a property which is necessary for them to occupy and this also gives rise to an entitlement to Housing Benefit in respect of the rent. The landlord’s entitlement to rent is based on the common law doctrine of necessities.

3. Assessing capacity

A person who lacks capacity means a person who lacks capacity to make a particular decision at the time it needs to be taken. For example, a person may lack capacity to decide where they want to live or they may not be able to decide whether they should sign a Tenancy Agreement.

Determining whether a person has capacity to make a specific decision at a particular time is fundamental as it is only when the person lacks capacity that the law permits others to make a decision on their behalf. A person who lacks capacity is one who suffers from an impairment and who is unable to make a decision at the relevant time because of their impairment. A person is unable to make a decision if at the time, they are:

- a. unable to understand the information relevant to the decision;
- b. unable to retain that information;

- c. unable to use or weigh that information as part of the process of making the decision; or
- d. unable to communicate the decision.

A person who is assessed as not having capacity to make a decision at a particular time should be supported to make this decision at another time. This is because capacity can fluctuate and the person may have capacity at a different time. Supporting a person to make a decision may include trying to communicate with the person in a different way as well as at a different time.

4. Best interests decisions

It is only when lack of capacity to take a specific decision is established that a decision can be made on the person's behalf if it is in their "best interest". When a Best Interest Decision is to be made about where a person will live, a best interest meeting should be held in accordance with section 5 below.

Whilst a Best Interest Decision can be made in relation to someone's care and treatment or where they are to live when they lack capacity, this does not extend to the signing of Tenancy Agreements. If the person does not have an Attorney with a Lasting Power of Attorney (LPA) for health and care decisions or a registered Enduring Power of Attorney (EPA) or a Court Appointed Deputy who can sign the Tenancy Agreement on their behalf, the Landlord can either accept an unsigned Tenancy Agreement or an appropriate person can apply to the Court of Protection to be authorised to sign the Tenancy Agreement on the person's behalf.

5. Procedure

The Court of Protection's guidance on Tenancy Agreements, published in February 2012 sets out the procedure which should be followed when an appropriate person decides to apply to the Court of Protection for an order that it is in the person's best interest for the Tenancy Agreement to be signed or terminated on their behalf. This guidance is attached to this policy and should be followed if it is identified that an appropriate person is available to make an application to the Court of Protection.

In the case where a person lacks capacity to sign a Tenancy Agreement and there is no Attorney or Deputy in place to sign this on their behalf, and no appropriate person to apply to the Court of Protection, the Landlord is willing to accept an unsigned Tenancy Agreement.

Although the Landlord is willing to accept unsigned Tenancy Agreements, in those circumstances, it will still be bound by the terms of the agreement and will still observe its obligations.

In order to protect the interests of a person who lacks capacity to decide where they want to live, a Mental Capacity Assessment and Best Interest Decision must be completed as soon as reasonably practicable. The Best Interest Decision must be made following a Best Interest Meeting which should be convened as follows:

- a. the meeting should involve anyone with an interest in the person's care. This may be family but also friends, carers and professionals;
- b. the presence of a medical professional should be considered although this is not necessary, particularly if the person's needs are limited to social care needs;
- c. if nursing care is provided, it is preferable to invite medical professionals;
- d. as a minimum, medical professionals should be asked for their views in advance of the meeting and/or be informed of the outcome of the meeting; and
- e. detailed records must be kept of the meeting, the persons in attendance and the outcome.

The Best Interest Meeting must allow the person to participate in the decision which is being made for him or her and decision takers should refer to the requirements of the MCA and the Code of Practice, which include a consideration of the person's past and present wishes, their beliefs and values, and the views of the people around them who have an interest in their care.

Upon the person moving into the Care Suite, Woodchurch House Limited will provide a copy of the Tenancy Agreement, signed by the Landlord, together with a covering letter confirming the Landlord's intention to abide by the terms of the agreement and the Landlord's willingness to accept an unsigned Tenancy Agreement.

If the pre-admission assessment indicates that the prospective Tenant displays or is likely to display challenging behaviour, it is possible action may be needed in the future by the Landlord to enforce the terms of the Tenancy. In those circumstances, the admission and granting of the tenancy should not take place until a family member or other appropriate person obtains an Order from the Court of Protection to sign the Tenancy Agreement on the Tenant's behalf and ensure its enforceability.

Applications to the Court of Protection in relation to tenancy agreements

Introduction

The Association of Public Authority Deputies (APAD), and other court users have asked the court to issue guidance about applications in relation to signing or terminating tenancy agreements on behalf of adults who lack the mental capacity to understand or sign the agreement themselves. Often this is where adults with learning disabilities are moved from hospital or care home settings into supported living arrangements in the community, that allow greater autonomy and independent decision making. Many of the adults will have the capacity to make certain decisions, such as dealing with social security benefit payments, but will lack the capacity deal with the tenancy arrangement.

This guidance has been drawn up with the approval of the senior judge of the Court of Protection, and sets out the circumstances when it may be necessary to make an application, and puts in place streamlined procedures for receiving applications relating to more than one person, thereby simplifying some parts of the court procedure.

When is it necessary to apply to the Court of Protection?

If a person lacks the mental capacity to make his or her own informed decision about whether or not to accept a tenancy offer, then an appropriate person can make the decision through the best interest process outlined in the Mental Capacity Act 2005.

Alternatively, if there is a registered enduring or lasting power of attorney in place; or a deputy for property and affairs has already been appointed, then the attorney or deputy would usually make that decision (see below).

Although the Mental Capacity Act 2005 enables the making of certain decisions without the need to obtain any formal authority to act, it does not extend to **signing** legal documents, such as tenancy agreements. Someone can only sign a tenancy agreement on the person's behalf if they are:

- An attorney under a registered lasting power of attorney (LPA) or enduring power of attorney (EPA);
- A deputy appointed by the Court of Protection; or
- Someone else authorised to sign by the Court of Protection.

In some circumstances, landlords may be willing to accept unsigned tenancies, but this guidance applies to the situation where the landlord wants the tenancy to be signed. Even if the landlord will accept an unsigned agreement, it would also be appropriate to make an application where there is a dispute or if it is not clear whether the tenancy offer is in the person's best interests.

Can a deputy or attorney sign or terminate the tenancy agreement?

If the person has a registered attorney under an EPA or LPA, or has a deputy appointed to make decisions on their behalf, then the deputy or attorney can terminate or enter into a tenancy agreement without further authorisation from the court. Please note, however that deputies acting under an old style short order or receivership order made before the Mental Capacity Act came into force, may not

have sufficient authority to sign the agreement, and it may be necessary to apply for 'reappointment' with the full powers of a deputy.

Does a deputy need to be appointed in all cases?

No, if the sole purpose of the application is to sign or terminate the tenancy, then the application should be for an order that specifically deals with the tenancy matter (see how to make an application, below). If, however, the adult lacks capacity to manage other aspects of their property and affairs and they have assets and income other than social security benefits then it will usually be necessary to appoint a deputy to deal with all these decisions.

What if the person lacking capacity is under 18 years of age?

Section 18(3) Mental Capacity Act enables the court to make decisions about a child's property or finances (or appoint a deputy to make these decisions) if the child lacks capacity to make such decisions and is likely to still lack capacity to make financial decisions when they reach the age of 18.

These provisions do not extend to tenancies because a person under 18 cannot legally enter into a contract, because in law, a child is deemed to lack capacity because of their age. In addition, a tenancy is a legal estate and a child cannot hold a legal estate.

As the tenant is under 18 and cannot legally sign a contract, the Court of Protection cannot appoint a deputy or authorise someone else to sign the agreement on behalf of the child. This is because the court could not authorise a transaction that would not be legal, even if the person had mental capacity. The only option here would be for someone with parental responsibility to sign, although this would have the effect of making the parent the tenant.

How to make an application

The court is prepared to deal with all of the adults required to sign the tenancy agreement(s) in a single application. This is on the understanding that the only order required from the court relates to the tenancy agreement and no further directions, for example the appointment of a deputy, are necessary.

The court will require:

- A single COP1 Application form setting out the order or declaration required with a list of all the adults required to sign the agreement annexed;
- A COP3 Assessment of capacity for **each** adult. The assessment should deal specifically with the adult's capacity to sign or terminate the agreement;
- A COP24 Witness statement for **each** person setting out the circumstances behind the moves and confirming that a best interests assessment has been carried out, including consultation with close family members, or people in close contact with the person, where applicable.
- An application fee.
- A covering letter clearly stating that the applications relates to tenancy agreements in respect of more than one person

The application form should request the court to make a single order or declaration that it is in all the adult service users' best interests for the tenancy arrangement to be signed or terminated on their behalf.

The procedure above can also be adapted for applications relating to individuals.

How will the court deal with the application?

When the court issues the application, the applicant will notify each adult personally using form COP14 and provide evidence that they have done on form COP20A. Once notified, the person will have 21 days to object or respond to the application.

If the court receives an objection to the application it will deal with it as a discrete issue, in accordance with the usual procedure.

Once the 21 day time limit expires, the court will issue a single order that deals with the tenancy matter for all the service users.

Will the court remit the fee?

No. The court is only charging a single fee for an application that relates to more than one person and will not remit fees in relation to bulk applications. The applicant is responsible for paying the fee, which must accompany the application.

If the application relates to a single individual only, then the usual policy on fee remissions and exemption will apply.

Further help and information

If you need any further help or information about making an application, please contact:

 courtofprotectionenquiries@hmcts.gsi.gov.uk

 0300 456 4600

Please note that while court staff can provide guidance about making an application, they cannot give legal advice. We recommend that you seek independent legal advice where appropriate.