

HOUSING TENANCIES: tenancy, agreements and legal capacity, the application of the Care Standards Act, succeeding to a tenancy and subletting
Maurice Harker and Nigel King

Supporting independence

In December 1998 the Government published a White Paper, "Modernising Social Services and a Consultation Paper "Supporting People" which reinforce a commitment to supporting independence for older and disabled people, providing choices, including living in their own home. The philosophy spelt out includes these objectives:

- to promote the independence of those needing social care support
- to enable them to live as safe, full and as normal a life as possible, in their own home wherever feasible
- to ensure that people can remain in or return to employment to involve users and carers in planning services and packages of care
- to maximise the benefits, effectiveness and value for money, to allow for choice, needs and circumstances

The proposals being implemented by the Department of Environment "*Supporting People*" will lead to local authorities administering a new grant for support services and arrangements have already been introduced to enable local authorities to make *direct payments* to residents for their care and support costs.

The Housing Green Paper, published in April 2000, set out the agenda for improving the quality and choice of housing available to all, including people with learning disabilities. Local housing authorities have a key role to play through their work to develop and implement local housing strategies to address the full range of housing needs in their areas, and by providing housing advice and assistance to enable people with learning disabilities to access housing. The Housing Act 1996 requires housing authorities to give preference to people with learning disabilities and others with medical and welfare needs in allocating social housing.

Families or individuals may approach the housing department directly for advice or through the process of a community care assessment where there is a duty to take account of an individual's housing needs as part of that assessment.

Support options

As an alternative to residential care more varied ways of supporting people with learning disabilities have been tried and tested. A common feature is that they allow and promote a greater degree of independence. They may also meet the criteria of matching resources more precisely to individual needs. Recent developments include:

- more domiciliary care services and providers in the private sector and social landlords acting as service providers
- introduction of "floating support" and other visiting, peripatetic support possibilities some of which can be funded through the Housing Corporation or the

Welsh Office so disabled people are better able to maintain tenancies

- creation of network based models which combine a mix of professional, paid support and care with an element of mutual support
- the implementation of the Direct Payments Act and the opportunity for more individuals and families to arrange and manage their own care packages

Self-contained Independent Housing

Ordinary. “street properties” may be rented from a local authority, housing association or private landlord. People receive support in their own, self-contained property so they can live a more “ordinary life”. In addition to the gains in quality of care when a person moves from a more institutional setting they may be:

- entitled to financial help of up to £375 per week from the Independent Living Fund - if they get the higher rate of the DLA Care Component
- able to receive Direct Payments under the 1996 Direct Payments Act
- able to get a range of benefits in their own right - including Housing Benefit to pay rent

These financial options may further increase the individual’s control over their own lives and make more choices possible. These are some of the characteristics of self-contained rented housing.

- Individuals may live alone or share
- Maintenance costs are usually met by the landlord
- If the individual qualifies, housing benefit will meet some or all of the rent
- The landlord may be the local authority, a housing association - now known as a registered social landlord (RSL), a charity, or a private individual or company.
- Security of tenure and quality of accommodation may be lower in the private sector than with a local authority or housing association
- RSLs or local authorities may provide a higher level of intensive housing management.
- Local authorities have nomination rights to a proportion of RSL lettings
- A Supporting People revenue grant may be available to meet the cost of housing management support.

Rent Officers regulate rents eligible for Housing Benefit in the private sector and can, if asked by a local authority, set the rent on an RSL property. One result can be that for single people in particular Housing Benefit may not meet the full rent

Tenancy agreements and legal capacity

One of the first obstacles encountered may be questions about an individual's capacity to take a tenancy. This applies to both tenancies and licences. Some people with

learning disabilities may not fully understand the obligations and implications of taking up a tenancy. A tenancy is a contract and therefore some “legal capacity” is required otherwise the contract is void i.e. not valid and the parties are not bound by the terms of the contract.

Our opinion is that the law is unsatisfactory - this is widely recognised but in practice the reasons for not granting a tenancy are weak. This is always a difficult topic but if the legal complexity of the matter is disentangled from the practical issues it is possible to achieve sensible solutions. What are the questions which cause a problem and how can they be overcome.

Issues of concern

The questions raised cover a range of subjects:

- The capacity of an individual to enter into contracts
- The enforcement of a contract
- Individual’s rights and protection
- Treating people with learning disabilities with respect and fairness
- Ensuring responsibilities under a contract are met
- Tenancy or licence to occupy ?
- Registration of homes under the Care Standards Act 2000
- Whether registration is compatible with holding a tenancy
- Separating housing and care services contracts

We deal with each below.

Capacity

Capacity is important first of all because the legal arguments can be used to enhance or frustrate the proper and respectful recognition of an individual’s wishes. Generally the law on capacity seeks to protect a vulnerable person rather than inhibit self determination.

Taking on a tenancy or a licence means entering a contract. This requires legal capacity. In lay terms legal capacity means three things:

- being able to make a decision
- understanding there is a choice and wanting to enter a contract
- understanding the obligations of the contract e.g. to pay rent, keep the terms of the tenancy

Generally there is a legal presumption that a person is capable until proved otherwise. The test of capacity should be functional i.e. take account of the particular activity and the complexity of the elements of the contract not a blanket test that a person is incapable of understanding; buying a bus ticket or a house is not the same. This would look at the information available and its form. A contract will also still be binding if the landlord believed the tenant was capable of making it.

The Official Solicitor has confirmed in advice to a local authority that the grant of a tenancy would be proper even though capacity may be limited. The landlord would be bound by the Agreement and a claim could be pursued by a 'Next Friend' even though its provisions might be unenforceable against the tenant.

Enforcement

In practice does it matter whether someone is thought to have capacity to make an agreement? A general rule is that a contract made by someone without capacity is voidable but it is binding until contested. If it is fair and in the residents interest it is unlikely to be challenged.

There is a legal concept described as "the doctrine of necessities". The law considers that someone should be able to contract for life's essentials and it can be argued that housing, care and support are among these. The link of consent may be made by reference to a friend or carer assisting with the purchase of goods or services. The landlord could be seen in this way in the case of housing and community care services where they ensure that a needed service is provided. It could be argued that if someone was thought not to have capacity to make an agreement themselves, a contract would be created by the local authority following their assessment and placement of the person.

If a housing organisation gives someone a contract for which they expect payment it is probably enforceable regardless of incapacity or necessities. Demonstrating that a contract exists may not matter where the other principals, the local authority and the housing provider, are clear about what they intend to offer. It is only an issue when an organisation needs to enforce an agreement with an individual or in questions about entitlement to benefits. More is said about this below.

Making the contract intelligible

If, as we say above, the test of capacity takes account of the understanding of a particular situation, obvious, simple, practical measures can be taken to make sure this is possible and it is a civilised thing to do regardless of the requirements for a contract for example:

- give information simply
- with suitable language or non verbal means
- audio or video aid
- with the help of a carer or advocate familiar with someone to assist communication
- rehearsing information

The Law Commission in 1995 said that people should be enabled and encouraged to take for themselves those decisions which they are able to take. The Lord Chancellor's Office 1997 Consultation Paper "Who Decides?" repeats this message,

and discusses how capacity/incapacity is to be established in the creation or confirmation of alternative decision making arrangements.

Appointees for financial affairs

Some organisations have looked to appointing another to act for someone in an agreement. In the case of tenancies or licences this is probably superfluous for the reasons given above but in the case of loans for house purchase it may be an alternative.

In order to receive welfare benefits someone else can be nominated to cash benefits as 'agent'. Where someone is unable to act in the claiming of benefits an appointee can be arranged.

It is possible for someone who is capable of understanding what they are doing to appoint another to act on their behalf permanently. Someone with learning disabilities or mental health problems may be judged to be able to give someone this power even if they do not have sufficient capacity to manage their own financial affairs. The relevant legislation is the Enduring Power of Attorney Act 1985 and the person granting the power needs to understand the extent of the powers they are giving by this means. This could probably be used for a tenancy but we have suggested, unnecessary.

Tenancy or licence to occupy

A tenancy grants more rights and security to a resident than the lesser right to occupy conveyed by a licence. The requirement to register homes providing care has been applied to both tenancies and licences but it is argued below that where someone has a tenancy of their own home this should not be registered as a care home whether or not the accommodation is shared with others.

A tenancy grants 'an interest in land', established by the payment of rent and the contract conveying usual rights and responsibilities which derive from centuries of law and statute. Your home, within agreed limits, is your castle. Occupying under a licence is a lesser right and is more like buying a bus ticket than having a home of your own. You have the seat on the bus or the room in a house.

The Abbeyfield case in the House of Lords (Street and Mountford) describes things very well and is now most often referred to for recent guidance. First the reality of the arrangement is more important than what it's called. This is like earlier cases where 'sham' licences were thrown out by the courts deciding tenancies had been created. In the Abbeyfield case, although the occupier had exclusive use of a room, there was a housekeeper and the extent of services and board were such as to suggest the occupier was a licensee or lodger. The level of attendance or services were such as to require that the landlord had unrestricted access through the house, and the arrangement was so personal in nature. It was deemed to be a licence.

The following extracts give further illustration of the difference between the status of tenant and licensee.

Lodger or tenant?

“In the case of residential accommodation there is no difficulty in deciding whether the grant confers exclusive possession. An occupier of residential accommodation at a rent for a term is either a lodger or a tenant. The occupier is a lodger if the landlord provides attendance or services which require the landlord or his servants to exercise unrestricted access to and use of the premises. A lodger is entitled to live in the premises but cannot call the place his own... Such attendances or services might include daily room-cleaning, emptying of rubbish, changing sheets periodically, the provision of meals or other “housekeeping-type” activities (*Huwylar v. Ruddy, 1995*).

If on the other hand residential accommodation is granted for a term at a rent with exclusive possession, the landlord providing neither attendance nor services, the grant is a tenancy; any express reservation to the landlord of limited rights to enter and view the state of the premises and to repair and maintain the premises only serves to emphasize the fact that the grantee is entitled to exclusive possession and is a tenant... **There can be no tenancy unless the occupier enjoys exclusive possession”.**

(*Extract from Manual of Housing Law - A Arden and C Hunter, 1997.*)

Registration of care homes

Residential accommodation providing personal care has to register under the Care Standards Act 2000 which replaces the Registered Homes Act 1984. The poor conditions of some care institutions and lodgings and the risks of abuse or poor treatment of residents led to the precautions of the Registered Homes Act 1984 and law on environmental health, health and safety and fire prevention.

Guidance and published standards has provided for the proper provision of welfare, care and supervision, including arrangements for staffing, furnishing, equipment, facilities, repair, fire precautions, risk of accidents, environmental health, record keeping, recreation and occupation.

'An establishment is a care home if it provides accommodation together with nursing or personal care.' [Section 3] 'An establishment is not a care home unless the care which it provides includes assistance with bodily functions where such assistance is required'. [Section 121 (9)] The reasons that a decision about registration is important are that:

- there are wide and enforceable responsibilities for the care, welfare and supervision of residents
- residents' personal income is limited and housing benefit is not payable
- the level of management responsibility and supervision is not consistent with a tenancy.

The Sweet and Maxwell Guide to the law is of the opinion that a tenancy with care does not fall under the Act and at least one local authority has taken the view that if a tenancy has been issued then the premises should not be registered as it would interfere with tenancy rights.

A government minister's advice reflects this too. 'Where care is provided to people in their own home - whether as owner occupier or tenant - that home will not be registrable as a care home' and 'it is immaterial whether the person is living alone or with others.' In such cases if personal care is provided by a domiciliary care agency, the agency should be registered.

Providing 'accommodation together with personal care' suggests the two come as part of a package and there is an argument that housing is better separated contractually from care or support provided it is properly supervised and if need be regulated as domiciliary care. It allows for an individual's tenancy rights, more non-institutional arrangements and for more independence. The new Care Standards Act provides for the registration and supervision of domiciliary care so the safeguards for residents needing care and support are extended to housing tenancies.

For the housing organisations it is important that they are clear about their intention towards residents, what rights and responsibilities are set out in an agreement. They need to be clear whether they are only a landlord or whether they take a greater responsibility for a resident's welfare and care. Where these are the responsibility of a third party, the separation and interdependence of agreements needs thought. What are the safeguards for a resident if the welfare part of a package fails, is the tenancy sustainable? It is desirable that residents have rights that accord with what the rest of us would expect.

Renting from parents or succeeding to a tenancy

Sometimes parents (or other relatives) may be in a position to acquire a property for a son or daughter. Occasionally adult children will have the chance to succeed to a parents tenancy on death or when they move to different accommodation such as sheltered housing.

Parents renting to children

- Parents **cannot** usually rent a room in their own home to a member of the family on the basis that the son or daughter will claim Housing Benefit to meet the rent. (Exceptionally where another member of the family shares the house to a very limited degree only e.g. shared front door and stairs but otherwise lives separately this may be possible.)
- What is **possible** is for parents to acquire a separate, self-contained property and then rent to a relative. Housing Benefit can be claimed - if the disabled person qualifies and if the relationship between the two parties is a commercial one and not contrived to exploit the benefit system.
- One problem when parents are borrowing to fund the purchase, because the eligible rent for Housing Benefit purposes will be determined by the Rent Officer, is that the eligible rent may be too little to service the mortgage repayments.

- In this event the arrangement is still possible, but the shortfall will have to be made up. This is usually by parents making up the difference between income from rent and the mortgage payment or borrowing less with parents putting in a capital sum
- Not all Housing Benefit staff know the regulations allow this. They may refuse to pay Housing Benefit on the grounds that the liability to pay rent was created to take advantage of the Housing Benefit scheme (Regulation 7(1)(C)). Housing Benefit officers are required to take all the circumstances into account and if a claim is refused unreasonably on this basis it is possible to appeal and have the decision reversed.

Succession

- A learning disabled son or daughter living in the family home may be able to take over their parents' tenancy of a local authority, RSL or private rented property.
- Strictly speaking as a new tenancy (a contract) will be granted. In order to succeed the individual should have legal capacity.
- The rules of rights to succession are complex but in essence, under the Housing Act 1985, there can be one statutory succession to a local authority secure tenancy by a surviving partner or a member of the deceased person's family. If the tenancy was a joint tenancy and the deceased became a tenant on the death of the joint tenant there is no further right of succession.
- There is not the same right by a son or daughter to succeed to an RSL assured tenancy under the Housing Act 1988.
- Although there may not be a right to succeed, a new tenancy can of course always be granted by the landlord in any event. Performance Standards for housing associations published by the Housing Corporation say another member of a deceased tenant's household should be granted a tenancy if they request it and have a priority need and have lived in the property for two years.
- It may be possible for one tenant to assign the tenancy to another member of the family but this is seldom straightforward.. S 15 of the Housing Act 1988 prohibits assignment of an assured tenancy without landlord's consent and most agreements prohibit assignment.

Subletting and lodgers

A disabled owner or tenant may (if their own tenancy agreement permits and/or the landlord agrees) sub-let to another person. The person let to may be another disabled person or alternatively someone who is not disabled like a "support tenant". Whether the person occupies as a tenant with some security and rights or a lodger (technically a licensee) is a matter of law and the precise arrangements and usage of building. Characteristics are:

- shared living but with one party - the owner or tenant - being in more control, having greater security of tenure than the sub-tenant or lodger
- if consent to occupy is given by an individual who occupies part of the same building as their own home then the person moving in will have little security of

tenure

- normally the person moving in will not have exclusive possession of the property but will share all facilities (and the landlord can come and go as he or she wishes) thus they will probably be a lodger and have no security
- in the case of a “support tenant” lack of security may be reasonable - if relationships broke down it is right for the more able to have to move out. In the case of another disabled person sharing the arrangements are less satisfactory
- the lodger will usually pay a rent so reducing costs to the tenant/owner
- it may be an arrangement to counteract loneliness or make it more economical for the authority to provide services. In addition it makes better use of the housing stock

There are three potential permutations:

- two (or more) disabled people share a property
- a support tenant shares
- a disabled person shares with a non-disabled person but without expectations of support

References

Care Standards Act 2000

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Please note that fact sheets and briefs on many areas of supported housing are available free via the Housing Options web site (see links)