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Practice Guidance

Mental capacity: tenancy and licence agreements

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Learning points

- Why it's important to know the difference between a tenancy and licence agreement.
- The information that an individual needs to understand, retain, use or weigh and communicate to show they have the capacity to sign a tenancy or licence agreement.
- Who does and doesn't have authority to sign a tenancy or licence agreement on behalf of someone who lacks the mental capacity to do so.

Contents

Introduction

In this guide, we are going to focus on the word 'agreement'. People enter into agreements all the time. Sometimes they are recognised more formally, such as when a couple get married, and sometimes less formally, such as borrowing £5 from a friend with the promise it will be returned.

But, can there be a reliable agreement when the person asking you to, say, sign a contract, knows you have a condition of the mind or brain which causes you to be unable to understand, retain or weigh up (even with support) what the agreement is all about? In other words, where the person knows you lack the mental capacity to enter into the agreement.

In these circumstances, you (or those supporting you) could ask for the agreement to be cancelled even though you were not forced or pressurized into making the agreement. To use the legal jargon, the agreement is 'voidable'. For example, they may have put the agreement in front of you and said, "please sign this", knowing you do not have the mental capacity to decide whether you should do so. In this case, your compliance would not make a difference to the right to have the agreement cancelled *(Imperial Loan Co Ltd v Stone [1892]).*

The first point to note is that a tenancy is simply a type of contract. Around the country, some local authorities have presented their service users with tenancy agreements and asked them to sign even though they are aware the person does not have the mental capacity to enter into what is a contractual agreement.

Alternatively, some professionals have asked another person to sign on behalf of the individual lacking mental capacity, even though the other person has no authority to do so. In some cases, the managers of supported living placements have signed on behalf of a tenant who lacks mental capacity, again without authority.

Another significant issue is that local authorities have failed to recognise the difference between service users who hold a 'licence' to occupy a property and those that hold a tenancy. This means they sometimes provide the proposed tenant with the wrong type of agreement and ask them to sign. As well as being misleading, this could have serious legal consequences for the local authority if it ever needed to try to enforce the terms of the agreement or a tenant brought a challenge.

In most cases, a tenancy agreement does not have to be in writing and signed to be valid. The main exception concerns tenancies for a term of more than three years (section 54, Law of Property Act 1925). This does not mean that a tenant who has occupied accommodation for more than three years requires a written agreement. Most tenancies are for a term of six or 12 months and are automatically renewed if the tenant remains in occupation. Since the term of the tenancy is for less than three years (six or 12 months), section 54 of the Law of Property Act 1925 does not apply.

We can, for example, enter into agreements through a conversation (an oral agreement). However, a written, signed agreement is crucial evidence and sets out the detailed terms clearly.

In order for a person to have contractual capacity, the person must be able to understand the nature of the agreement in question. A long time ago, the law took the view that a 'contract' entered into by a person of 'unsound mind' was void (totally invalid). Over time, however, the law changed. The present position is that an agreement entered into with a person (Person A) lacking contractual capacity is not void. However, Person A is entitled to disclaim a contract made with Person B if they show that Person B either (a) knew Person A lacked contractual capacity when the agreement was made, or (b) a reasonable person would have realised that Person A lacked capacity (*York Glass Co Ltd v Jubb* (1925)). This is why the law refers to such contracts as voidable rather than void.

Please note that nothing in this guide is intended to be or should be relied on as legal advice – it is for general guidance purposes only and legal advice should always be taken on individual cases.

Common mistakes

Below are some common mistakes made by local authorities (and others):

1. Not assessing and recording whether a person has contractual capacity to enter into a tenancy agreement, even if there are doubts about their ability to understand the agreement.

2. Housing officers mistakenly believing a capacity assessment has already been carried out by another professional such as a social worker or a doctor. Mental capacity is decision specific. These other professionals may have assessed mental capacity but it could be for a different decision such as medical treatment or residence and not necessarily about the terms of the contract (the tenancy or licence) and its pros and cons.

3. Asking a proposed tenant to sign a tenancy or licence when they know the person does not have the mental capacity to do so.

4. Asking another person to sign on their behalf even though they don't have the authority to sign, for example, someone who is noted in the records as next of kin but does not have any official authority to sign. The term 'next of kin' does not indicate the person has any legal authority.

5. Housing officers or managers of supported living placements signing the agreement themselves on behalf of the tenant.

6. Providing the client with a document which states "tenancy agreement" when the person's actual living arrangements means it is more likely in law to be a licence agreement not a tenancy agreement.

This guide will explore these common mistakes in more detail and consider the potential solutions.

Tenancy or licence agreement?

Before staff assess whether a person has the necessary mental capacity to sign an agreement, they need to consider whether they have actually handed them the correct document. Is the person really subject to a tenancy or is it in fact a licence to occupy property? This can be an issue regardless of whether someone has mental capacity or not. When documents are handed to clients by local authority staff, there is a responsibility to

ensure that any document the person has been asked to sign is an accurate reflection of their legal rights.

A licence agreement is a type of agreement indicating that the person does not have 'exclusive occupation' of the property. This could be a single room, but it could also be a whole flat or house. Exclusive occupation means that you are allowed to refuse entry to others and have exclusive control of your premises (except in an emergency).

Why might a licence agreement exist rather than a tenancy?

The leading case on this issue is *Street v Mountford [1985]* UKHL 4. The court decided that in order for a tenancy to exist, three features have to be present: exclusive occupation, at a rent, for a term.

Further, what is on the paperwork is not as important as the factual arrangement between the landlord and tenant (or licensor and licensee).

So, local authorities have to ask themselves whether the clients they ask to sign tenancy agreements really enjoy exclusive occupation of their accommodation. If they do not, it may be that local authorities should be asking them to sign (if they have mental capacity) licence agreements instead.

Examples of situations which are more likely to be a licence include where staff provide meals; help take out rubbish; provide personal care; or perhaps change bed linen; or other control is exercised over the person, such as moving someone around a property (for example, to another room) or having controlled visiting hours.

Some cases might be difficult to categorise and housing officers and social work staff may need to look at the specifics of the case in front of them and take legal advice accordingly. However, there are a couple of examples below from case law:

In the case of *Abbeyfield (Harpenden) Society Ltd v Woods [1968],* the accommodation was described as a home for older people. Mr Woods, 85, paid rent for one of the rooms. The court decided that the home had granted Mr Woods a licence agreement and not a tenancy agreement. This was because although he had exclusive occupation of his room, he was given meals and benefited from the services of the housekeeper. The court stated that what the parties had written on the paperwork was irrelevant:

"...cases show that a man may be a licensee even though he has exclusive possession, even though the word 'rent' is used, and even though the word 'tenancy' is used. The court must look at the agreement as a whole and see whether a tenancy really was intended. In this case there is, besides the one room, the provision of services, meals, a resident housekeeper, and such like. The whole arrangement was so personal in nature that the proper inference is that he was a licensee."

In another case, *Westminster City Council v Clarke [1992] 2 AC 288,* Mr Clarke lived in a hostel for men with personality disorders and physical disabilities. There was a resident warden and a team of social workers providing support and rehabilitation. Here, no meals were provided but Mr Clarke was not allowed to have visitors after 11pm. He could be required to share a room with others and could be moved into another room. The staff could enter his room if they needed to check on him. The local authority wanted to evict Mr Clarke and again the question arose as to whether he was a tenant (and therefore had greater legal protection) or whether he was simply a licensee.

He was judged not have exclusive occupation (and therefore no tenancy could exist) partly because the council could move Mr Clarke from one room to another in case of problems with other occupants. Mr Clarke was not entitled to any particular room and he could be required to share with another person if decided by Westminster Council.

The court said: "The conditions of occupancy support the view that Mr Clarke was not in exclusive occupation of Room E. He was expressly limited in his enjoyment of any accommodation provided for him. He was forbidden to entertain visitors without the approval of the council staff and was bound to comply with the council's warden or other staff in charge of the hostel. These limitations confirmed that the council retained possession of all the rooms of the hostel in order to supervise and control the activities of the occupiers, including Mr Clarke. Although Mr Clarke physically occupied Room E he did not enjoy possession exclusively of the council."

In the case of *G v E & Ors [2010]* EWHC 621, the document produced was titled 'tenancy agreement' but the judge said that the way in which E was looked after at the supported living placement meant that he could not hold a tenancy. He said: "... the circumstances of E's occupation preclude any tenancy ever being granted, since staff have unrestricted access to his room and provide necessary services, so that there has not been, and cannot be, any grant of exclusive possession: *Street v Mountford [1985] 1 AC 809."*

For further guidance on establishing the difference between a tenancy and a licence agreement, please see *The Real Tenancy Test – Tenancy Rights in Supported Accommodation,* created by the National Development Team for Inclusion.

Tenant or licensee: why does it matter?

The rights a person is entitled to under housing law may differ according to whether the person has a licence or a tenancy agreement. It would be outside the scope of this article to explore the detailed housing law implications brought about by these differences.

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However, in broad terms, it may be easier (in terms of legal process) to gain possession of a property for which the person only holds a licence instead of a tenancy. For example, the notice period to evict a licensee can be much shorter and there is no requirement for the landlord to establish a statutory ground for possession. Although it is not suggested that local authorities will intentionally act unreasonably or unfairly towards service users, documents produced by public bodies must be valid and a true reflection of the nature of the agreement.

Using a document which states the person has a tenancy instead of a licence would inadvertently mislead the service user as to their rights in law.

Mental capacity to sign a tenancy agreement

In order to agree to something you need the mental capacity to understand what you are agreeing to. Some of us might sign an agreement to purchase a new car even though we have a niggling doubt about whether we can afford the repayments. This doesn't mean we didn't understand or process what the consequences were, it is just that we thought the purchase of the car outweighed the negative aspects of the agreement and the risks of default.

Crucially we *understood* what the risks were and weighed them up in our mind but just chose to give them less weight than the pleasure of driving a new car. Alternatively, we may have just decided not to think through the implications of entering into the agreement. This does not mean we lacked the mental capacity to enter into the agreement; we were able to understand the agreement but decided not to give it our full attention.

Now imagine if you are renting a new property. You might feel you are not able to afford the property. Perhaps you have started a new job and are on a probationary period. You go ahead anyway because although there is a risk of eviction, you are optimistic it won't happen. Again, you understood what the consequences were and just chose to give them less weight.

Take the same example, but this time add in an additional piece of information: you also have learning disabilities. The agreement is placed in front of you but the level of your learning disability means you cannot *understand* what eviction means. The learning disability is not evidence of incapacity in itself but what is relevant is your inability to understand key information about this particular decision *because of* the learning disability.

You simply cannot understand the concept of a tenancy agreement. You sign the agreement because someone puts it in front of you and you are all too happy to please them.

All the relevant terms are still in the agreement and no one physically forced you to sign. But your ability to understand what was in the agreement was absent or impaired because of your learning disability and the housing officer knew this. So, can the housing officer be confident of being able to rely on this agreement? The answer is 'not necessarily'. In law, this agreement could easily be cancelled (known as a voidable contract), although, until then, it can be relied on.

What if the agreement is not signed by you, but by others on your behalf? The starting point is relatively simple:

- Either you have the mental capacity to understand what you are signing and therefore can sign (or refuse to sign) yourself; or
- someone else with *authority* can sign for you.

Who has authority to sign on someone else's behalf

Anyone with mental capacity to authorise another to act on their behalf may appoint them as their agent and, for example, enter into a tenancy agreement on their behalf. If, however, a person (a) lacks capacity to authorise another to sign/enter into a tenancy agreement, and (b) lacks the capacity to enter into the agreement themselves, it can only be entered into on their behalf by a person who has legal authority to do so.

The MCA does not confer any general authority to enter into agreements on behalf of a person lacking capacity to do so themselves. The general authority to act, in section 5 of the

MCA, is only concerned with care and treatment. Any attempt by a person to enter into an agreement on behalf of an individual who lacks capacity is of no effect unless the person has authority to act on behalf of the individual. So, a tenancy signed on behalf of a person lacking capacity would not result in the person becoming a tenant (and becoming liable to pay rent) unless the necessary authority to act was in place.

The senior judge of the Court of Protection has issued guidance that a person can only sign a tenancy agreement on behalf of the person lacking mental capacity if they have any of the following powers:

- A lasting power of attorney (LPA) for property and affairs that confers sufficient authority.
- Enduring power of attorney (EPA) that confers sufficient authority.
- Deputyship (property and affairs) that confers sufficient authority.
- A Court of Protection order authorising them to sign the tenancy.

(For more information see Court of Protection guidance on tenancy agreements).

As can be seen, an application to the Court of Protection can be avoided if there is someone with authority to sign the agreement on behalf of the person lacking mental capacity.

Lasting power of attorney (LPA)

A person can appoint someone of their choice (commonly known as an attorney) to make health and social care and/or financial decisions for them in case they lack the mental capacity to make those decisions for themselves in future.

The person must be at least 18 and have the mental capacity to appoint an attorney. The person appointing them decides which decisions the attorney can make for them so it would be important to check their form to ensure the power to sign tenancy or licence agreements had not specifically been excluded.

There are two separate types of LPA. One for health and social care decisions (known as personal welfare) and one for finance and property decisions (known as property and affairs). It is this second type of attorney who can sign the tenancy agreement on the person's behalf. They must be registered before they can be used. See here for more information and the LPA forms.

Enduring power of attorney (EPA)

These are the older type of powers (before LPAs became law). New EPAs cannot be made but many (made before the MCA came into force) still exist. They only relate to property and affairs and must be registered before they can be used for someone lacking mental capacity. Unlike LPAs, EPAs can only be registered once the person has lost mental capacity.

However, as with LPAs, the person appointing the attorney (under an EPA) could limit the scope of their powers so it would be important to check their paperwork.

Deputies

A deputy is a person who can be appointed by the Court of Protection to make decisions on behalf of those who lack mental capacity. This could be someone known to the individual (such as a family member) or a professional such as a solicitor. A deputy could be appointed to make property and financial decisions which can include signing a tenancy agreement. An order appointing a deputy must be stamped to prove it is valid. A sample order is shown here.

How can you check an EPA, LPA or deputy's authority?

Professionals need to ask for the person's paperwork. Depending on whether it is an EPA or LPA and when it was made, the paperwork could look very different and be of varying lengths. The current version of the LPA form is 24 pages.

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Staff should check what the person's powers relate to. It may be that they are only appointed for personal welfare matters (health and social care) and not authorised to sign financial legal documents on behalf of the person relating to finance and property.

An LPA or EPA must also be stamped to show it is registered and that the person can sign on behalf of the person lacking mental capacity.

A free check of the Office of the Public Guardian' register may be made by using form OPG100 which can be downloaded from this site.

Bulk applications: Court of Protection guidance withdrawn

Court of Protection guidance issued in 2012 set out the process to make bulk applications to enter or end a tenancy agreement for a number of people lacking mental capacity. That guidance has now been withdrawn. Applications can still be made for individuals and local authorities should take advice from their own lawyers before making these applications. All Court of Protection forms are available here, or you can email: courtofprotectionenquiries@hmcts.gsi.gov.ukor call: 0300 456 4600.

Signing without authority

The case of *G v E & Ors [2010]* EWHC 621, discussed earlier, is an example of an unlawful practice involving a supported living provider that signed a tenancy agreement without legal authority to do so.

E lacked the mental capacity to sign a tenancy agreement for his supported living placement and had not been asked to sign one. Instead, the manager Mr Y signed it for him and his assistant manager signed on behalf of the supported living placement. They then witnessed each other's signatures.

To be clear, neither of them had any legal authority to sign on E's behalf. So, this meant the case did not fall into either of the two circumstances set out above: E did not have the mental capacity to agree and the person signing for him had no authority to sign on his behalf. The judge said: "A document purporting to be a tenancy agreement was indeed produced. However…the purported 'tenancy' granted by X Ltd to E is a nullity. The copy is difficult to read, but those parts that are legible give rise for some concern.

"The parties are said to be X Ltd and the three residents, including E. The agreement contains a number of standard terms. It is dated 1 February 2009, ie several months before E moved into the property. The document is signed by Mr Y's assistant on behalf of X Ltd and by Mr Y himself on behalf of E.

Mr Y has witnessed his assistant's signature and she has witnessed his.

"Having heard evidence from Mr Y, it seems likely that E does not in fact hold a tenancy of Z Road, or any part of the premises. E had no capacity to enter into any agreement, and…Mr Y purported to enter into this contract on behalf of E without any proper authority to do so…"

So, in this case, there was no valid tenancy agreement at all. As the judge explained, one of the proposed parties to the agreement (E) had *no mental capacity* to agree and the person who did sign the agreement (Mr Y) *had no authority* to sign it on his behalf.

And note that the judge also said that in any event, E should have held a licence and not a tenancy, because of the circumstances of his residence in this placement.

If a person needs to have mental capacity before they can sign an agreement, we need to know more about assessing that person's mental capacity before handing them the tenancy or licence agreement and asking them to sign. This evidence would be crucial in case of any suggestion that the agreement should be voided.

Not everyone needs to have a mental capacity assessment, so this issue should not concern the majority of landlords. Even if the person has a condition of the mind or brain, they may have full mental capacity to sign. Some people might be depressed, for example, but it could be mild and not affect their mental capacity to make a decision at all. A mental capacity assessment is only required if there are realistic concerns after speaking to the person. The first principle of the Mental Capacity Act 2005 states that a person is assumed to have mental capacity. However, professionals should ensure that the assumption of capacity is not relied on as a way of avoiding the assessment where there are genuine doubts.

Mental capacity is decision specific so this guide will focus on the decision to enter into a tenancy agreement. Other decisions such as medical treatment or selling property would need to be assessed separately. Many people have mental capacity to make basic decisions such as what to wear, what to eat and the activities they do but may not have the mental capacity to decide on more complicated matters such as deciding where to live, selling their property or signing a tenancy agreement.

Before we can look at the mental capacity assessment, we must start at the beginning of the Mental Capacity Act 2005 (MCA) and consider section 1. This contains the statutory principles and requires people to consider some fundamental rules when assessing mental capacity. These are:

1. A person must be assumed to have capacity UNLESS it is proved otherwise.
2. Until all practicable steps have been taken to help someone make a decision without success they cannot be treated as lacking mental capacity.
3. An unwise decision does NOT in itself indicate a lack of mental capacity.

Principle 1: reminds us not to make any statements or judgments that a person lacks mental capacity until we have assessed this in accordance with the law. This means that the person *has* mental capacity until the assessment is done and there is evidence that they do not. Anyone that wishes to state that a person lacks mental capacity has to prove it.

Principle 2: until all practicable steps have been taken to help someone make a decision without success they cannot be treated as lacking mental capacity. This is a positive legal obligation on those assessing a person's capacity to help and support them during the assessment process. The aim of this is to assist the person to pass the assessment so, wherever possible, they can make their own decisions. Evidence of providing help and support will need to be recorded.

What constitutes a practicable step will depend on the circumstances of each case. An example might be providing the person with an easy read tenancy agreement; using Makaton to assist their understanding, or just checking they have their glasses. The person will need to understand some key features such as the risk of eviction. Consider how you could help them to understand this. Perhaps they were evicted before; reminding them of that time (gently) might help them to understand more easily than simply using the terminology.

Principle 3: an unwise decision does not in itself indicate a lack of mental capacity. The act enforces the established legal principle that adults with mental capacity are entitled to make what others may view as irrational or eccentric decisions. For example, a person with mental capacity may make a decision to sleep on the streets of London because they value their independence more than the rules of living in a hostel. The key issue is whether the person has the mental capacity to make that decision (which includes an understanding and acceptance of the positive and negative consequences of their decision) determined by the mental capacity assessment in the legislation.

The mental capacity assessment for tenancy agreements

The assessment is a 'functional' four-part legal assessment (not psychiatric, psychological or a mini mental state exam (MMSE)) which looks at the decision-making process rather than the outcome (the decision itself). The assessment must be time and decision specific, so the assessor should apply the assessment and then decide whether the person has the mental capacity to make a particular decision at that particular time.

Some people may have fluctuating mental capacity, such as a person who is intoxicated, and it would not be the best time to assess them. The assessor should return at another time (unless it is an urgent treatment decision that cannot wait).

To have mental capacity to make a decision a person must be able to:

1. Understand the information relevant to the decision (including the reasonably foreseeable consequences of making or not making the decision).
2. Retain that information (long enough to make the decision).
3. Use or weigh the information (as part of the decision-making process).
4. Communicate the decision *(in any recognisable way).*

If the assessor has evidence (in their record keeping) that the person being assessed cannot do any one of the four parts above, they will lack mental capacity to make the specific decision in question at the particular time the decision needs to be made.

The assessor only has to have a reasonable belief about the outcome of the assessment, on the balance of probabilities. In other words, the assessor has to consider whether the person is more likely to have mental capacity or not, depending on the weight of evidence. They do not have to be 100% sure. It is not a scientific test and is based on their judgment after applying the correct legal test.

So, if the first part of the assessment requires the individual to understand information relevant to the decision, what information is relevant to the decision to sign a tenancy agreement? This was considered by a judge in the Court of Protection case of *LB Islington v QR [2014]* EWCOP 26. This case was decided on specific facts and not all the information may be of relevance in other cases. However, as there are very few reported cases on this specific issue, it will offer some important general guidance.

The judge had to consider which information a woman (known as QR) had to understand, retain and use or weigh up to sign a tenancy agreement for supported living. She said as follows:

"...In relation to the decision to sign a tenancy agreement for supported living accommodation, in my judgment the relevant information that QR needs to understand, use and weigh is:

1. Her obligations as tenant to pay rent, occupy and maintain the flat.
2. The landlord's obligations to her under the contract.
3. The risk of eviction if she does not comply with her obligations.
4. The purpose of and terms of the tenancy which is to provide her with 24-hour support so that she takes her medication and can maintain her mental health.
5. The landlord/support staff's right to enter her flat without her permission in an emergency if there is serious physical danger or risk to her.
6. If she moves to supported living accommodation the [community treatment order] will be changed to require her to live there."

As observed earlier, the guidance from the judge was fact specific and related to the details of this particular case. However, some common or general points may be drawn out from it. In particular, points 1, 2, 3 and 5 are likely to be relevant when signing any tenancy agreement. Points 4 and 6 are for the purpose of the specific tenancy so will change for each case.

This means the person assessing mental capacity would have to talk to the individual about their obligations and those of the landlord; that if they do not comply there is a risk of

eviction and that if there was an emergency, the landlord (or staff) could enter. The person would have to understand what was being described (ie the concepts).

If they could understand this information, they would then have to be able to remember it long enough to think about it and accept it could apply to them. For example, if a person had a mental disorder and the delusional belief that they owned the property outright, although they would understand what was being described by the word 'eviction', they would not accept that there was any risk of eviction to *them*.

If, even after using support, perhaps using a person they trusted like a support worker to explain it to them again or giving the person more time, they did not accept there was a risk of eviction, they would lack the mental capacity to sign the agreement. This is because they cannot use or weigh up information (because of their mental disorder) relevant to this particular decision. With treatment for their mental disorder, it may be possible that in future they no longer have this delusional belief and regain their mental capacity.

Remember the person might have an impairment or disturbance of the mind or brain but just need some practical support to pass the mental capacity assessment. So, for example, even if the person has dementia and has difficulty hearing, they couldn't be judged to lack mental capacity just because they could not hear what was being said. Likewise, someone with learning disabilities shouldn't be judged to lack mental capacity just because they need an easy read tenancy agreement to assist them to understand the relevant information.

Some service users could weigh up what they are told successfully, but just give the information less weight than the assessor would like them to. This does not mean they lack mental capacity, they may simply be making what others view as an unwise decision.

Notice of surrender

In the case discussed earlier (*LB Islington v QR [2014]* EWCOP 26), the judge also considered the information that would be relevant for a person to understand, retain and use or weigh to give a notice to surrender a tenancy. The judge said that in relation to the decision to give up her secure council tenancy, the relevant information would be that:

- Surrendering her tenancy she loses the right to live or return there, and thus the opportunity to exchange that tenancy for another secure council tenancy.
- She cannot move to a less restrictive environment unless she gives up her tenancy.
- For the foreseeable future the terms of a community treatment order would not permit her to live in her flat.
- She needs 24-hour support in her accommodation in order to remain well.
- Giving up her tenancy does not preclude the grant of a council tenancy by London Borough of Islington in the future if she is well enough to live completely independently.

Again, this was clearly quite specific to the facts of the case but may offer some general guidance. Signing a notice to surrender a tenancy requires either mental capacity to do so or it being signed by someone on the service user's behalf with the authority to do so.

Record keeping

Any record of a mental capacity assessment for signing a tenancy agreement should indicate what has been discussed with the person, including any questions they asked and how answers were explained. If, for example, you believe the person lacks mental capacity because they cannot understand information relevant to the decision, instead of simply stating this, record *what* they could not understand.

A verbatim record is not necessary but there should be enough detail to withstand any challenges in relation to the quality of the assessment. It may be helpful to ask a colleague who is unfamiliar with the case to read your assessment and see if it persuades them.

A record would be required whether you are asking the person to sign a tenancy agreement, a licence agreement or a notice to surrender a tenancy. The discussion the person had with the assessor could be disputed and a record may need to be produced in court (see the case of *Birmingham City Council v (1) Janet Beech (sued as Janet Howell) (2) Michael Beech [2014]* EWCA Civ 830 for an example of a record of a mental capacity assessment being shown to the court in relation to what was described as a notice to quit although it was in fact a form of notice used by a local authority for tenants to terminate their tenancies; technically a notice to quit is used by a landlord to terminate a tenancy).

Who should assess?

During the course of delivering training, I am frequently asked whether housing officers are 'allowed' to assess mental capacity. The answer is yes, as long as they know how to do it in a legally compliant way and, if necessary, seek professional advice. The MCA code of practice says that the person assessing should be linked to the decision:

"The person who assesses an individual's capacity to make a decision will usually be the person who is directly concerned with the individual at the time the decision needs to be made. This means that different people will be involved in assessing."

Housing staff are likely to know in more detail the terms of the tenancy and the risks of eviction and be able to explain this, in addition to answering any other relevant questions. Ultimately, it is for the local authority to decide which staff should be responsible. The most important thing is that they are carried out and recorded in a legally compliant way.

Placing someone without a tenancy agreement

So, what can you do if a person needs to be placed and they do not have the mental capacity to sign a tenancy agreement and no one has authority to sign for them? It can take some time to get authority from the Court of Protection, so in their best interests they may be placed before the tenancy agreement is signed if, that is, they do not resist the placement. The best interests decision itself does not give authority to enter into a tenancy or licence agreement on behalf of a person lacking mental capacity. However, following the MCA properly would provide a defence for the decision maker(s) and allow them to place the person lacking mental capacity in their best interests.

If there is a significant welfare dispute that cannot be resolved informally in relation to the move with either the person themselves or those close to them such as family, an application must be made to a judge in the Court of Protection to obtain authority to move the person (if the judge agrees the move is in their best interests). For examples of judicial criticism of local authorities moving people without such authority from the court, please see the cases of *LB Hillingdon v Steven Neary [2011]* EWHC 1377; *Milton Keynes Council v RR [2014]* EWCOP B19; and *Re: AG [2015]* EWCOP 78.

Deprivation of liberty?

If any placement or admission is likely to involve a deprivation of liberty it needs to be authorised via either the Deprivation of Liberty Safeguards (DoLS), if the placement is in a care home or hospital, or an order authorising the deprivation of liberty from the Court of Protection. Such authority should be obtained before the person is placed.

How do we make a legal best interests decision?

A best interests decision is an essential part of making a lawful decision on behalf of someone who lacks mental capacity. The decision must take into account a number of factors under the law. It is not necessarily the decision that carries the least risk and instead focuses heavily on the individual lacking mental capacity. There is a statutory checklist that is set out in section 4 of the MCA. Section 4 asks the decision maker (see paragraphs 5.8-5.9 MCA code of practice for guidance on who this should be) to make a best interests decision by taking into account the following factors:

1. All relevant circumstances.

2. The person's reasonably ascertainable past and present wishes/statements AND their beliefs and values AND other factors they would take into account.

3. The views of carers, care staff, relatives, attorneys, deputies and others named by the person, if practicable and appropriate to do so.

4. Whether the person will regain capacity sometime in the future in relation to the matters and if so, when?

5. Encouraging and permitting the person to participate in the decision-making process.

6. Not basing the best interests decision solely on age, appearance, behaviour or condition.

7. If the decision is about life-sustaining treatment, not being motivated by a desire to bring about the person's death (not relevant to tenancy decisions).

In addition, under the fifth principle of the MCA (in section 1(6), the decision maker should consider less restrictive options for achieving the purpose of the proposed decision.

This best interests assessment should be recorded by the person with responsibility over the decision such as a social work professional. It might be wise to discuss this type of big decision in a best interests meeting. Although there is no direct statutory basis for best interests meetings (it is not a requirement of the act), it is recommended as good practice in the code of practice (see paragraph 5.68).

A best interests decision must be a balanced decision which takes account of the negatives and positives of the potential placement options. For example, if the person is likely to be placed in a supported living placement (and moved from their own home), the positives and negatives of the home environment should be recorded as well as the positives and negatives of the supported living placement. Not approaching matters in a properly balanced way can lead to a legal challenge. It could appear that a decision was made first and the best interests assessment was used to support the decision already made. This can also lead to a negative costs order against the local authority (or other party) making an unbalanced best interests decision. See the case of *AH & Ors, Re (Costs) [2011]* EWCOP 3524.

Methodically working through the section 4 list will ensure compliance with the law. The list is not optional and so missing a relevant point can also lead to a successful challenge against the decision maker(s) in the Court of Protection or prevent the decision maker from taking advantage of the protection from liability in section 5 of the act. Even if a point is not relevant to a particular case (ie the person is highly unlikely to regain mental capacity) it should be recorded that this was still considered.

What about housing benefit?

Photo: BRAD/Fotolia

If a valid tenancy agreement is not in place, is the person lacking mental capacity still able to claim housing benefit to cover accommodation costs? This issue was raised in the Upper Tribunal case of *Wychavon District Council v EM (HB) [2012]* UKUT 12. It was about a young woman, EM, who the judge described as profoundly physically and mentally disabled. She lived in a specially built and adapted annex which belonged to her parents. They were the landlords and a tenancy agreement was produced in court. In place of her signature, her father had written that EM "is profoundly disabled and cannot communicate at all".

The Upper Tribunal decided that because EM was incapable of any relevant communication there could be no valid tenancy agreement, not even a voidable agreement of the type recognised by case law authorities where a landlord enters into an agreement with a person that the landlord knows does not possess contractual capacity. The Upper Tribunal said EM's inability to communicate meant a valid tenancy agreement was impossible "regardless of her capacity".

The Upper Tribunal went on to consider whether housing benefit could be claimed by EM to cover her rent. The housing benefit legislation required her to be under a liability to make payments for her accommodation. The Upper Tribunal decided there was such a liability, so that housing benefit was payable in the light of section 7(1) MCA, which says: "If necessary goods or services are supplied to a person who lacks capacity to contract for their supply, he must pay a reasonable price for them."

This section did not validate the agreement but it did mean there was some other authority under law which made EM responsible for making payments for occupation of her accommodation and, therefore, housing benefit was payable. The judge said that EM had received a 'necessary' service (the accommodation in the annex) and that she should therefore pay a reasonable price (the rent) for it. He said that even if accommodation was not considered necessary under the MCA, it would be under the common law (judge-made law).

This means those placed in their best interests may still be liable to make payments for their occupation of accommodation. Accordingly, this case may be useful in order to persuade a

landlord to accept a tenant lacking mental capacity, before a valid tenancy agreement is put in place.

A contrived tenancy?

Understandably some may suggest that EM's situation with her parents should be viewed as a 'contrived tenancy' and thus excluded from housing benefit. This issue was raised in the case but the judge disagreed with this view. In explaining why he rejected this argument, he said as follows:

"There seemed to me to have been good commercial reasons for the parents to let the claimant's home to her at a rent if they could, the dwelling was not the same dwelling as her parents, the tenancy, had there been one, would have been a proper one at a proper rent and I agreed with the tribunal that it was not contrived. The parents borrowed to build the annex on the reasonable understanding that a letting of it to their daughter would enable her to obtain housing benefit, and it appears to me that, following a decision taken on this basis to borrow, build and let, a reasonable letting would be commercial and would not be a contrivance to take advantage of the housing benefit scheme."

Tips for local authority staff

1. Staff that are asking for a signature from tenants need to ask themselves whether the person has the mental capacity to sign/enter into the agreement.
2. If they are not sure, they should go through the process set out above and record this assessment (not just the conclusion).
3. If the person cannot sign, they need to check whether there is someone with authority to sign for them such as an attorney or deputy with authority over property and affairs.
4. If there isn't, they may be able to place the person in their best interests (if the landlord is in agreement). This will not validate the tenancy agreement but the person lacking mental capacity may be liable to make payments and therefore eligible for housing benefit.
5. One of the methods above (EPA, LPA, deputy or court order) will be necessary to authorise someone to sign a tenancy agreement.

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