

# Adult Social Care and Health

## Operational Guidance- Tenancy Agreement/Termination for a Person Who Lacks Capacity

(Includes actions about belongings when tenancy ends).

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Version control	Date	Summary	Reviewed by
6	05/12/22	The tenancy agreement must <u>not</u> be signed by a practitioner on behalf of the person <u>unless</u> a court order has given KCC the express authority. Section Sections 1a and 2.2 updated  Reference to “adult” replaced with ”person”	Jean Wells
5	23/9/22	Section 2.4 updated. “When is it necessary to apply to the Court of Protection (“court”)? A referral to CFS would only be appropriate if the person fully meets the criteria for the ongoing support in the management of their finances by the Financial Affairs Team and that there is a need for CFS to undertake this responsibility. Otherwise, the practitioner to make the application to the court.	Jean Wells
4	18/7/22	Review dated amended. Replaces all previous versions. Reference to KNet replaced with Tri-X links	Jean Wells
3	8/3/19	New Appendix 1: <i>Tenants belongings left behind when tenancy is going to end (or has ended)</i> : Updated with information about what can/cannot happen to a tenant’s belongings left behind when KCC has taken on responsibility of a tenant’s moveable property under “Protection of Property (including care of pets) Policy including a landlord’s legislative responsibility in relation to a tenant’s belongings when tenant away or tenancy ended by landlord.	Jean Wells.

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### Appendix 1

Tenant’s belongings left behind when tenancy is going to end (or has ended)

# **Guidance - Tenancy agreements/terminations for people who lack mental capacity.**

## **Introduction**

The guidance has been updated and is intended to assist practitioners who are supporting with an application in relation to signing or terminating tenancy agreement on behalf of a person who lacks the mental capacity to understand or sign the agreement for themselves.

It has been updated with information about what can/cannot happen to a tenant's belongings left behind when KCC has taken on responsibility of a tenant's moveable property under "Protection of Property (including care of pets) Policy (on [Tri-X](#)) including a landlords' legislative responsibility in relation to a tenant's belongings when tenant away or tenancy ended by the landlord. See Appendix 1 for details.

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.

This guidance replaces "Application to the Court of Protection in relation to tenancy agreements issued February 2012 by HM Courts & Tribunals Service and FSC v1.0 operational guidance. The court no longer accepts a single application for multiple tenancy agreements/terminations.

In applying the guidance, the 5 statutory principles of the Mental Capacity Act 2005 ("MCA") need to be adhered to.

## **1. Best Interests Meeting- some factors to consider.**

- a) **Is there already someone who can sign/end the tenancy agreement?**  
See section 2 below for details about who can legally sign/end a tenancy. The tenancy must not be signed by an adult social care practitioner/manager on behalf of the person unless a court order has given KCC the express authority. In practice when the court order has given KCC the express authority, the practitioner or their line manager can sign the Tenancy Agreement.
- b) **Does the agreement need to be signed?**  
Consider what risks, if any, of leaving the tenancy agreement unsigned. If the landlord agrees and there are no perceived risks to the person, then the tenancy agreement may be left unsigned. The circumstances of each case need to be considered carefully and if there is doubt then an application should be made to the court.
- c) **Does an application need to be made to the court<sup>1</sup>?**  
If there are risks (for example the possibility of eviction or deposits not being repaid) or matters of contention or if a signed agreement is required and nobody is authorised to sign, then an application will need to be made to the Court of Protection. See section 2 and 6 below for details.

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<sup>1</sup> The Court of Protection makes decisions and appoints deputies to make decisions in the best interests of those who lack capacity.

- d) If an application is to be made to the court, what type of order is required?**  
If the sole purpose of the application is to sign or end the tenancy, then the application should be for an order that specifically deals with the tenancy matter. If, however, the person lacks capacity to manage other aspects of their property and affairs, then it will usually be necessary to ask the court to appoint a deputy to deal with all these decisions.
- e) Do I need to obtain legal advice?**  
It should not be necessary to obtain legal advice and support for every application to the court, but if the case is contentious or if it is likely that there could be a dispute, then it may be advisable to obtain legal advice. This should be obtained from Invicta Law.

Following decisions at the best interests meeting, the key worker involved (e.g. practitioner/ social worker) should inform their line manager of the outcome and actions proposed.

## **2. When is it necessary to apply to the Court of Protection (“court”)?**

**2.1** If a person lacks the mental capacity to make his or her own informed decision about whether to accept a tenancy offer (or end), then an appropriate person can make the decision to apply to the court through the best interest process outlined in the MCA.

**2.2** Although the MCA 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 (or end) a tenancy agreement on the person’s behalf if they are:

- an attorney under a registered lasting power of attorney (LPA -property and affairs) or enduring power of attorney (EPA- property and affairs);
- a deputy (property and affairs) appointed by the court; or
- someone else authorised to sign by the court, (includes authority given to KCC through a court order).

**2.3** If there is a registered enduring or lasting power of attorney in place for property and affairs; or a deputy for property and affairs has already been appointed, then the attorney or deputy would usually make that decision.

**2.4** If a deputy is to be appointed, and there is not another suitable person such as a family member or a solicitor to make the application to the court, when there is a requirement for ongoing support in the management of a person’s finances, a referral should be made to KCC Client Financial Services (CFS) for the completion of a Deputyship application for the signing/ending of a tenancy.

If there is no requirement for ongoing support in the management of a person’s finances, no referral should be made to CFS, the practitioner will make the application to the court for an order that specifically deals with the tenancy matter.

## **3. Can a deputy or attorney sign or end 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 end or enter into a tenancy agreement without further authorisation from the court.

Please note, that deputies acting under an old-style short order or receivership order made before the MCA came into force, may not have enough authority to sign the agreement, and it may be necessary to apply for 'reappointment' with the full powers of a deputy.

#### **4. Does a deputy need to be appointed in all circumstances?**

No, if the sole purpose of the application is to sign or end the tenancy, then the application should be for an order that specifically deals with the tenancy matter. If the person 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.

#### **5. What if the person lacking capacity is under 18 years of age?**

Section 18(3) MCA 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 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.

### **6. Making the Application to the Court of Protection ("court")**

#### **6.1 Accessing the correct forms**

If the sole purpose of the application is to sign or end a tenancy agreement, then the application should be for an order that specifically deals with the tenancy matter (one-off decision for the court). The application form should request the court to make a single order or declaration that it is in the persons best interests for the tenancy agreement to be signed or end on their behalf. A deputy does not need to be appointed if the only issue is the tenancy agreement.

The court will require:

- A **COP 1** Application Form setting out what order or declaration require (including a one-off decision);
- A **COP1 A** -Supporting information for property and finance applications when submitting COP1;
- A **COP 3** Assessment of capacity form. The assessment should deal with the persons capacity to sign or end the agreement;

- A **COP 24** witness statement setting out the circumstances and confirming that the best interest's decision-making process has been followed including consultation with close family members, or people in close contact with the person, where applicable;
- **COP 44** the court fee; or
- **COP 44A** for help with fees
- If the case requires a more urgent decision, then form **COP 9** needs to be submitted as set out above. COP 9 'application notice' tells the court that you're going to apply for a court order.

These forms are available at the following [www.gov.uk](http://www.gov.uk) link [click here](#)

## 6. 2 Application Costs

An application fee is payable when you make an application. As of September 2021, the fee is £371 which is payable on making the application ([check here for up-to-date fee](#)). However, there are cases where reductions or exemptions apply. Exemption is based on the receipt of benefits. Partial reduction is based on gross annual income. It is expected that most applicants where ASCH is involved will be exempt or entitled to a reduction.

For applications concerning property and financial affairs, ASCH can recover the fee from the assets of the person who lacks capacity after a deputy is appointed.

To apply for a fee exemption or reduction, you will need to complete the “Apply for help with Court of Protection fees” (**COP44A** [click here](#)) and submit it with the application.

## 6.3 What the court will do?

Once all the paperwork has been received by the court, they will return a stamped issue date version of the COP1 application, and the process will commence. They will ask that the person is served with a notice of the application and evidence is given to the court that this has been done – the covering letter from the court should explain exactly what to do. If the court receives an objection to the application (within 21 days of the application), it will deal with it in accordance with usual procedures. Once the 21 days' time limit expires, the court will issue single order that deals with the tenancy matter.

## 6.4 Keeping a record.

It is important that a record of the court's decision is retained on the persons file and that the decision is communicated to those who need to know.

Further help and information.

Court of Protection [courtofprotectionenquiries@justice.gov.uk](mailto:courtofprotectionenquiries@justice.gov.uk)

Telephone: 0300 456 4600

Court of Protection website: <https://www.gov.uk/courts-tribunals/court-of-protection>

## Appendix 1

### Tenant's belongings left behind when tenancy is going to end (or has ended)

This guidance provides some information for adult social care practitioners about what can/cannot happen to a tenant's belongings when KCC has taken on responsibility of a tenant's moveable property under s47<sup>2</sup> of the Care Act when away from home.

It also provides a helpful overview of Tenancy Agreements and what a landlord can/cannot do in relation to a tenant's belongings when tenant away.

In terms of belongings, section 5 provides practitioners actions and notes if the landlord or tenant ends the tenancy.

For information, when practitioners are supporting with an application in relation to signing or terminating a Tenancy Agreement on behalf of a person who lacks capacity you must refer to "Operational Guidance-Tenancy Agreements/Terminations for a person who lacks capacity" on Adult Social Care policies, documents and templates area on [Tri-x](#)

Remember, if a person does not have the capacity to understand a Tenancy Agreement i.e. do not have "contractual capacity" then an application to the Court of Protection is required.

#### 1. Overview of a Tenancy Agreement.

**1.1** A Tenancy Agreement is a contract between the tenant and the landlord. It lets the tenant live in the property if the rent is paid and follow the rules. It also sets out the legal terms and conditions of the tenancy. Both the tenant and the landlord have certain rights and responsibilities.

**1.2** The landlord must get the tenants agreement if they want to make changes to the terms of the Tenancy Agreement.

**1.3** A Tenancy Agreement should say how much notice the tenant needs to give the landlord before the tenant leaves the property.

**1.4** If the landlord wants to end the tenancy, they must give the tenant notice in a particular way giving the tenant information and warnings. This will depend on the type of Tenancy Agreement and its terms.

**1.5** If the tenant lacks capacity to understand letters or documents in relation to an eviction, the proceedings must cease until a court appointed Deputy manages the tenants financial and property affairs (when the tenant has not granted a Lasting Power of Attorney).

**1.6** A tenancy does not automatically end when a tenant dies. It will become the responsibility of the executor of the deceased tenant to continue paying the rent until they can surrender the tenancy, including clearing the property and making sure utility bills are paid.

#### 2. Does the Tenancy Agreement cover the belongings?

**2.1** Tenancy Agreements will often include an express obligation requiring the tenant to remove their belongings from the premises at the end of the term. In addition, the Tenancy

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<sup>2</sup> Full details in ASCH Protection of Property (including care of pets) Policy on Tri-x

Agreement will sometimes go on to explain what the landlord can do with such belongings that are left at the property at the end of a tenancy

**2.2** Any belongings left at the property still belong to the tenant and are protected by Torts (Interference with Goods) Act 1977 ("[the Act](#)").

**2.3** There is a legal duty on the landlord to take reasonable care of the belongings until they are either returned to their owner or disposed of legitimately.

### **3. If the Tenancy Agreement does not cover belongings**

**3.3** If there is nothing covering belongings in the Tenancy Agreement, the landlord cannot simply deal with or dispose of the belongings despite being in possession of the items without their consent.

**3.4** This means they cannot deliberately or recklessly damage or destroy the belongings, including the sale of the goods knowing they are not theirs. The landlord must try to return the belongings to the owner.

**3.5** If the landlord throws away property belonging to the tenant, without the tenants written consent (or consent from Deputy specifically authorised by order of the Court of Protection<sup>3</sup>), which subsequently turns out to be of value, the landlord may be subject to a claim from the tenant for damages.

**3.6** The landlord if trying to return the belongings to their owner through a third party, they must ensure that the third party has the owner permissions to receive them.

### **4. If the landlord believes belongings have been "abandoned"**

**4.1** The landlord may assume the belongings are "*abandoned*" if a tenant has vacated their property however, the onus is on them (*the involuntary Bailee*<sup>4</sup>) to establish this fact.

**4.2** The landlord must check that the tenant has indeed vacated the property. Abandonment is very rare. If a tenant is not at the property but has left belongings it is arguable that the tenant intends to return to the property and had not actually been abandoned.

**4.3** The landlord must take reasonable steps to locate the former tenant and follow the procedure under "the Act" Notice should be served in accordance with Schedule 1 of "the Act", requiring the tenant (or the true owner of the belongings) to come and collect them.

**4.4** Under "the Act", a letter needs to be sent to the former tenant stating their intention to sell/dispose of the belongings and giving the following written information: landlord name and address; details of items held; place where they are held; the date which they intend to sell/dispose-giving the former tenant a reasonable amount of time to collect the belongings (e.g. 2-4 weeks).

**4.5** If after serving notice under "the Act", the former tenant has not collected their belongings within the stated period, the landlord is likely to assume the belongings have been abandoned and free to deal with them as they see fit. If the landlord decides to sell

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<sup>3</sup> or someone who holds a Property and Affairs Deputyship with specific authority or are an Attorney by virtue of a registered Enduring Power of Attorney (EPA) or Property and Affairs Lasting Power of Attorney (LPA).

<sup>4</sup> The landlord becomes an 'involuntary Bailee', having acquired goods left at the property which belong to another. An involuntary Bailee is not allowed to profit from the sale of any items they are looking after. There is a legal obligation to account to the owner with the proceeds of the sale (less any costs of sale/auction fees).



the “abandoned” belongings, the proceeds of sale (deducting any storage/sale costs) belong to the owner of the belongings.

### 5. Belongings of a tenant being cared for away from home under s47 of the Care Act 2014

When KCC is undertaking the protection of property duty when a person with care and support needs is being cared for away from home in a hospital or care home staff must refer to the “Protection of Property (including care of pets) Policy” in Adult Social Care policies, documents and templates area on [Tri-x](#)

**5.1** A tenant with care and support needs who is being cared for away from home in a hospital or care home, is still obligated by the terms of their Tenancy Agreement.

**5.2** In terms of belongings left at home, below is a summary of actions when a tenant is being cared for away from home and KCC has taken on responsibility for the moveable property under the s47 of the Care Act.

Situation	Practitioners Action	Note
<p>Tenant admitted to hospital or residential care on a temporary basis</p>	<p>Inform landlord tenant away from home.</p> <p>Subject to the tenants written consent (or MCA Best Interest decision) under s47 of the Care Act, the property will be visited regularly by KCC representatives.</p>	<p>This will alert landlord that the tenant has not “abandoned” their belongings and expected to return.</p> <p>Rent will still need be paid</p> <p>The tenant must report to DWP changes in their circumstances which might affect their entitlement to Housing Benefit.</p> <p>Tenant continues to receive Housing Benefit for up to 52 weeks when the tenant intends to return home. If the tenant will not be returning home (i.e. now needing permanent residential care), Housing Benefit will cease after 4 weeks when placement becomes permanent.</p>
<p>The tenant does not/will not return home and some belongings remain in their home</p>	<p>Discuss with the tenant the formal arrangements required to end their tenancy. Notice periods required. Does tenant want KCC to inform the landlord on their behalf?</p> <p>What does the tenant want to do with their remaining belongings e.g. friends/ family look after the belongings, tenant wants to keep some/all belongings, dispose some or all?</p> <p>If lacking capacity to end the tenancy, application to the Court of Protection for order to end tenancy (and if necessary, disposal of tenant’s belongings)</p>	<p>Landlord return applicable tenancy deposit when tenancy ended.</p>

	Inform the landlord the tenant not returning-notice period requirement as determined in the Tenancy Agreement.	
<b>Situation</b>	<b>Practitioners Action</b>	<b>Note</b>
While tenant away, the landlord intends to end the tenancy and wants all belongings at the property cleared	<p>Inform the tenant- find out what they want to happen to their belongings.</p> <p>If required (because family/friends unable to help store the belongings) make the arrangements for temporary storage of belongings (ensuring appropriate ASCH senior management approval if initial storage costs to be incurred by KCC)</p> <p>When tenant lacks capacity to decide about disposing of their belongings and a decision made on their behalf is in their best Interest to apply to the Court of Protection for an order to dispose of tenant's belongings, KCC will make the application.</p> <p>If the tenant lacks capacity to understand letters or documents in relation to an eviction, the proceedings must cease until a court appointed Deputy manages the tenants financial and property affairs (when the tenant has not granted a Lasting Power of Attorney).</p>	<p>The landlord must give notice in a particular way to the tenant, including certain information and warnings.</p> <p>If there are no suitable relatives able and willing to act, applications to the Court of Protection will be dealt with by the practitioner for the appointment of a Property and Affairs Deputy.</p> <p>The landlord cannot legally dispose of the tenant's belongings without the tenant's consent or opportunity to collect (see paragraphs 3 and 4 above).</p>