

Hawkinge House Limited

Care Suites Tenancy Agreements Policy

1. Background

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

2. The Law

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

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

3. Assessing capacity

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

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

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

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

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

4. Best interests decisions

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

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

5. Procedure

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

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

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

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

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

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

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

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