

## Housing - The Rights and Capacity of a Person with a Learning Disability (*ref 11*)

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### **Introduction**

A person with a learning disability has the same rights to own or rent a home as the rest of the population which means subject to the same obligations. It is necessary for a person to enter into a contract to own or rent a property. To do this a person must have the capacity to agree and understand what are the consequences of entering into a contract.

### **Entering into a Contract**

Making a contract a person must be able to do three things:

- make decisions and stick to them
- understand that they have a choice and want to enter into a contract
- understand the obligations of the contract
- in the case of renting housing that they should understand they will have their own room/flat, will have to pay money (regularly) and will have to look after it

The issue of capacity arises in taking a tenancy, buying a property or taking out a mortgage. If the disabled person was incapable of understanding the nature of his obligations, and the other party knew this then the contract is voidable at the option of the disabled person. If the other party does not know the person has a severe learning disability that prevents them understanding the contract, it is valid.

### **Lasting Power of Attorney**

A lasting power of attorney allows someone to choose a person to assume control of his or her affairs and do anything that he or she could do with the property if he or she had the capacity. This enables the attorney to enter into legal commitments on behalf of that person. But this power is of more use to someone who is originally competent and then loses that competency e.g. through mental illness or ageing. A person with a learning disability must have the capacity to understand what an enduring power of attorney entails although it is suggested the level of comprehension required to give enduring power of attorney to another person is less than required to enter into a mortgage. Further Information >> Want to know more about this topic? See *Quick Brief Power of Attorney (ref 06)* - [www.housingoptions.org.uk/general\\_information/gi\\_quickbriefs/qb\\_06.pdf](http://www.housingoptions.org.uk/general_information/gi_quickbriefs/qb_06.pdf)

## **The Court of Protection**

An application may be made to the Court of Protection for a Deputy to be appointed for a person who does not have the legal capacity to deal with his or her property and affairs and does not have the capacity to make an enduring power of attorney. The property remains that of the person with a learning disability. There is a cost attached to this, and it can be a fairly cumbersome procedure. If it appears there is no other way to establish ownership or tenancy this is a final resort.

## **Mental Capacity Act 2005**

The Act deals again both with power of attorney and deputyship and creates two new public bodies to support the statutory framework, both of which are designed around the needs of those who lack capacity.

## **Tenancies**

For a person to be a tenant and enter into a tenancy agreement, he or she must have the capacity to understand the contract. The essentials are the occupation of your own accommodation, the payment of rent and looking after the home. The Mental Capacity Act states that a person should be considered capable unless proved otherwise. The test should be functional and take account of the complexity of the matter concerned. The elements of a tenancy are simple. The tenancy agreement does not need to contain complicated language. The use of plain English will make it easier for a person to enter a tenancy agreement when they have contractual capacity but limited reading or writing skills. Another option would be for a third party - an advocate or family member - to write to say that someone did understand the elements of the contract. The Code of Guidance to the Mental Capacity Act also gives suggestions on how to facilitate communication and help people with their decision-making.

Housing Options have produced materials and guidance published by the National Housing Federation, Easy Read Tenancy and Support Agreements which can be used with tenants to help explain a tenancy in simple words and pictures. It is based on the NHF form of assured tenancy and assured shorthold. For details visit [www.housing.org.uk](http://www.housing.org.uk).

## **Local Authority and Housing Association Housing and Succession**

Upon the death of the original tenant a relative may have the right to take over the tenancy. This is subject to the length of time the relative had lived in the property, if the relative has themselves succeeded to the tenancy and if that property had been the relative's main home. The person wishing to take over the tenancy must have contractual capacity in the same way as if they were entering a new tenancy agreement.

Even if the disabled person does not have an actual right to succeed to a tenancy there is nothing in principle to stop the landlord granting a new tenancy.

## **Home Ownership**

If a person inherits property this does not require them to enter a contract. They will however still need contractual capacity to manage the property. In this latter respect, Shared Ownership can be useful since the landlord, the owner of the other part of the equity and usually a Housing Association, will be responsible for managing the property and can be made responsible for maintenance under the lease granted.

## **Mortgages**

A person may not have the total amount of money needed to buy a property outright. However he or she may have enough income through benefits or other means to take out a mortgage. Although it is helpful if somebody can stand as guarantor, the building society or bank will still wish to be satisfied that the person has the contractual capacity to enter into a mortgage.

## Joint Ownership or Tenancy Agreements

Although for management purposes, such as to meet the requirements of a landlord or lender, it may be suggested that a carer or relative join in a contract to own or rent a property it is important to ensure the person with a learning disability either has contractual capacity or is represented by a Deputy or attorney or otherwise protected. Unless properly undertaken such courses of action can be problematic and have unforeseen consequences. Therefore competent legal advice is required. For example if the carer who had taken out the joint tenancy agreement dies the person with a learning disability could be left unprotected unless the agreement was legally binding having regard to his or her competence.

## Making a Trust

If a property is left in trust for a person with a learning disability, this avoids the problems associated with the question of his or her competence. The trustees can take on the responsibility for managing and maintaining the property. Ownership of the property can rest with the trust, since a trust manages assets and property can be one of these assets.

## General

The Mental Capacity Act 2005 gives the legal framework for defining what principles have to be used when deciding whether people are legally competent in particular areas of decision making. Those unfamiliar with people with learning disabilities tend to assume that people are incompetent, generally and in particular, without investigating. The law and the Code of Guidance which goes with it explain ways in which people with communication problems can be assisted to make decisions for themselves.

To obtain a copy of a simple tenancy agreement contact:

The National Housing Federation  
175 Gray's Inn Road,  
London WC1X 8UP  
[www.housing.org.uk](http://www.housing.org.uk)

We are grateful to Anthony Quinn, Solicitor, for help with preparing this *factsheet*.

If you require further information or have other queries contact Housing Options.

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