

Aging Tenants and Diminished Capacity

Lauren Blumas, Iler Campbell LLP

lblumas@ilercampbell.com

Session #504, Assisting Seniors in Housing

November 15, 2014 - 1:30 pm

Why Should You Care?

1. Housing Providers are grappling with aging tenant populations with increasing care needs
2. Some tenants plan for future care – Great!
3. Some tenants will not
4. What happens when tenants can't or won't make a decision when their needs have changed? Where does this leave the housing provider?

An example from our practice

- Long-term tenant
- Substantial physical and mental deterioration over a number of months
- Tenant falling in unit and unable to get up, having difficulty with toileting, difficulty getting in and out of bed
- Repeated calls to security for assistance with above
- Tenant determined to stay in-unit and resistant to discussion about supports
- Concerns about mental capacity

First Things First - Privacy

- Records of incidents likely go into tenant file
- *Personal Information Protection and Electronic Documents Act (PIPEDA)* likely applies
 - Personal health information includes “information concerning the physical or mental health of the individual”
 - Obligation to protect the personal information of tenants
 - Knowledge and consent of individual usually required for disclosure
 - May disclose in circumstances where life, health or security of individual is threatened OR where required to by law

Decision Making 101

1. Governed by *Health Care Consent Act, Substitute Decisions Act* and *Mental Health Act*
2. Two broad categories – Personal Care and Property
3. Autonomy is overriding principle
 - Right to make decisions for yourself, as long as you are **mentally capable** of making decision
 - everyone presumed to mentally capable of making decisions
4. Mental Capacity (or lack of) determined in different ways, but NEVER by housing provider
5. Capacity is decision-specific

Power of Attorney

- Two types
 - Continuing Power of Attorney for Property
 - Power of Attorney for Personal Care (PAPC)
- POA – Property
 - Restricted to financial decisions
- PAPC
 - Decisions regarding health treatment, shelter, clothing, nutrition, hygiene and safety

Health Care Decisions

- Health decisions include treatment decisions, admission to long-term care facilities, and personal assistance services
- Hierarchy of substitute decision makers means there is *always* someone that can make health care decision

Hierarchy of Substitute Decision Makers

1. Power of Attorney for Personal Care
2. Guardian of the Person
3. Someone appointed by Consent and Capacity Board
4. Spouse
5. Child/Parent
6. Brother/Sister
7. Other Relative
8. Public Guardian and Trustee

Considerations for Substitute Decision Makers

- Must make decision in best interests of incapable person
 - Includes the wishes of incapable person
- Must choose least intrusive option

So, a decision has been made, now what????

- Remember your obligations under the *Human Rights Code*
 - Prohibits discrimination on the basis of age and disability
 - Must accommodate up to the point of *undue hardship*
 - DOES NOT MEAN housing providers = long-term care provider
 - DOES MEAN housing providers must carefully consider health and safety of tenants and cost of accommodations requested

Tips on Best Practices

- Get emergency contact information when tenants move in
- Encourage tenants to consider advance care planning
 - May refer all tenants to webinar on Advance Care Planning:
<http://yourlegalrights.on.ca/webinar/Advance-Care-Planning>
- Implement (if not already) Accommodation Policy
- Document, document, document
- Consult your lawyer

Resources



- Advocacy Centre for the Elderly (ACE)
<http://www.advocacycentreelderly.org/>
- National Initiative for Care of the Elderly (NICE)
<http://www.nicenet.ca/>
- *Health Care Consent Act*
http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_96h02_e.htm
- *Substitute Decisions Act*
http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_92s30_e.htm

Good luck!

It's a delicate balance.

