

SUCCEEDING IN SUCCESSION CASES

HLPA 19TH JULY 2023

1. AN OVERVIEW OF THE LAW

The Housing Acts 1985 and 1988 set out provisions for statutory succession for secure and assured tenancies.

The provisions were amended by the Localism Act 2011, which took effect from 01 April 2012. The amendments do not apply retrospectively so the position is slightly different for tenancies commencing before and after 1st April 2012. So it is important to check start date of the relevant tenancy agreement to understand which framework is applicable.

1.1 Secure Tenancies

Secure Tenancies Pre-1st April 2012

For secure tenancies created before 1 April 2012, the right to succeed may be claimed by the deceased tenant's spouse/civil partner or potentially a member of the deceased tenant's family, subject to certain criteria as set out below.

The rights of existing secure tenants as at 1 April 2012 are governed by sections 86A-89 of the Housing Act 1985. One statutory succession is allowed to a surviving spouse/civil partner or a member of the deceased tenant's family. Where a tenancy was originally a joint tenancy and one of the joint tenants dies, or surrenders their interest, this counts as a succession and no further statutory successions will be allowed.

S89 HA 1985 - Succession to periodic tenancy

(1) This section applies where a secure tenant dies and the tenancy is a periodic tenancy.

(1A) Where there is a person qualified to succeed the tenant under section 86A, the tenancy vests by virtue of this section—

(a) in that person, or

(b) if there is more than one such person, in such one of them as may be agreed between them or as may, where there is no agreement, be selected by the landlord.



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(2) Where there is a person qualified to succeed the tenant (under section 87), the tenancy vests by virtue of this section in that person, or if there is more than one such person in the one to be preferred in accordance with the following rules—

(a) the tenant's spouse or civil partner is to be preferred to another member of the tenant's family;

(b) of two or more other members of the tenant's family such of them is to be preferred as may be agreed between them or as may, where there is no such agreement, be selected by the landlord.

(3) Where there is no person qualified to succeed the tenant, the tenancy ceases to be a secure tenancy—

(a) when it is vested or otherwise disposed of in the course of the administration of the tenant's estate, unless the vesting or other disposal is in pursuance of an order made under—

(i) section 24 of the Matrimonial Causes Act 1973 (property adjustment orders made in connection with matrimonial proceedings),

(ii) section 17(1) of the Matrimonial and Family Proceedings Act 1984 (property adjustment orders after overseas divorce, &c.),

(iii) paragraph 1 of Schedule 1 to the Children Act 1989 (orders for financial relief against parents) or

(iv) Part 2 of Schedule 5, or paragraph 9(2) or (3) of Schedule 7, to the Civil Partnership Act 2004 (property adjustment orders in connection with civil partnership proceedings or after overseas dissolution of civil partnership, etc.)

(b) when it is known that when the tenancy is so vested or disposed of it will not be in pursuance of such an order.

(4) A tenancy which ceases to be a secure tenancy by virtue of this section cannot subsequently become a secure tenancy.



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S87 HA 1985 - Persons qualified to succeed tenant (applies in Wales and pre 01/04/2012 in England)

A person is qualified to succeed the tenant under a secure tenancy if he occupies the dwelling-house as his only or principal home at the time of the tenant's death and either—

(a) he is the tenant's spouse [or civil partner], or

(b) he is another member of the tenant's family and has resided with the tenant throughout the period of twelve months ending with the tenant's death;

unless, in either case, the tenant was himself a successor (as defined in section 88 HA 1985).

Secure Tenancies Post-1st April 2012

The Localism Act 2011 amended the succession rights of people living with secure council tenants in England where the tenancy was created after 1 April 2012. In these cases, a statutory right to succeed is limited to the spouse/partner of the deceased tenant.

S86A HA 1985 - Persons qualified to succeed tenant: England

(1) A person ("P") is qualified to succeed the tenant under a secure tenancy of a dwelling-house in England if—

(a) P occupies the dwelling-house as P's only or principal home at the time of the tenant's death, and

(b) P is the tenant's spouse or civil partner.

(2) A person ("P") is qualified to succeed the tenant under a secure tenancy of a dwelling-house in England if—

(a) at the time of the tenant's death the dwelling-house is not occupied by a spouse or civil partner of the tenant as his or her only or principal home,

(b) an express term of the tenancy makes provision for a person other than such a spouse or civil partner of the tenant to succeed to the tenancy, and

(c) P's succession is in accordance with that term.



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(3) Subsection (1) or (2) does not apply if the tenant was a successor as defined in section 88.

(4) In such a case, a person (“P”) is qualified to succeed the tenant if—

(a) an express term of the tenancy makes provision for a person to succeed a successor to the tenancy, and

(b) P's succession is in accordance with that term.

(5) For the purposes of this section, a person who was living with the tenant as if they were a married couple or civil partners is to be treated as the tenant's spouse or civil partner.

(6) Subsection (7) applies if, on the death of the tenant, there is by virtue of subsection

(5) more than one person who fulfils the condition in subsection (1)(b).

(7) Such one of those persons as may be agreed between them or as may, where there is no such agreement, be selected by the landlord is for the purpose of this section to be treated as the tenant's spouse or civil partner

In summary, pre-01/04/2012 – a spouse or civil partner succeed if they have been occupying the property as their only or principal home. A cohabitee or other family member may succeed if occupying the property as their only or principal home and have been residing with the tenant for at least 12 months prior to the death of the tenant.

Post 01/04/12 – a spouse or civil partner succeed if they have been occupying the property as their only or principal home. This includes a person living with the tenant as his or her spouse/civil partner. Where no such person, another person may succeed to the tenancy only if an express term of the tenancy makes provision for such other person.



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1.2 Assured Tenancies

For assured tenancies, the right to a statutory succeed may only be claimed by the deceased tenant's spouse/civil partner or someone who has been living with them as such.

Succession to any other person, such as a family member can only occur if there is an express term in the tenancy agreement allowing for it.

The deceased tenant's spouse/civil partner or cohabitee can only succeed to the tenancy if they were occupying the dwelling as their 'only or principal home' at the time of the tenant's death. Where there is more than one spouse/civil partner/cohabitee entitled to succeed, they must either agree as to who will succeed to the tenancy, otherwise the County Court will decide.

S17 HA 1988 Succession to assured tenancy.

(1) Subject to subsection (1D), In any case where—

(a) the sole tenant under an assured periodic tenancy dies, and

(b) immediately before the death, the tenant's spouse/civil partner was occupying the dwelling-house as his or her only or principal home, and

(c).....

then, on the death, the tenancy vests by virtue of this section in the spouse/civil partner (and, accordingly, does not devolve under the tenant's will or intestacy).

(1A) Subject to subsection (1D), in any case where—

(a) there is an assured periodic tenancy of a dwelling-house in England under which—

(i) the landlord is a private registered provider of social housing, and

(ii) the tenant is a sole tenant,

(b) the tenant under the tenancy dies,

(c) immediately before the death, the dwelling-house was not occupied by a spouse or civil partner of the tenant as his or her only or principal home,

(d) an express term of the tenancy makes provision for a person other than such a spouse or civil partner of the tenant to succeed to the tenancy, and

(e) there is a person whose succession is in accordance with that term,



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then, on the death, the tenancy vests by virtue of this section in that person (and, accordingly, does not devolve under the tenant's will or intestacy).

(1B) Subject to subsection (1D), in any case where—

(a) there is an assured tenancy of a dwelling-house in England for a fixed term of not less than two years under which—

(i) the landlord is a private registered provider of social housing, and

(ii) the tenant is a sole tenant,

(b) the tenant under the tenancy dies, and

(c) immediately before the death, the tenant's spouse or civil partner was occupying the dwelling-house as his or her only or principal home,

then, on the death, the tenancy vests by virtue of this section in the spouse or civil partner (and, accordingly, does not devolve under the tenant's will or intestacy).

(1C) Subject to subsection (1D), in any case where—

(a) there is an assured tenancy of a dwelling-house in England for a fixed term of not less than two years under which—

(i) the landlord is a private registered provider of social housing, and

(ii) the tenant is a sole tenant,

(b) the tenant under the tenancy dies,

(c) immediately before the death, the dwelling-house was not occupied by a spouse or civil partner of the tenant as his or her only or principal home,

(d) an express term of the tenancy makes provision for a person other than such a spouse or civil partner of the tenant to succeed to the tenancy, and

(e) there is a person whose succession is in accordance with that term,

then, on the death, the tenancy vests by virtue of this section in that person (and accordingly does not devolve under the tenant's will or intestacy).

(1D) Subsection (1), (1A), (1B) or (1C) does not apply if the tenant was himself a successor as defined in subsection (2) or subsection (3).



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For assured tenancies created before 1st April 2012

Where the tenancy agreement allows for succession to other family members, this is not a statutory succession but rather is a contractual obligation on the part of the landlord to grant a new tenancy. The new tenancy will therefore have a further right of succession on the death of the new tenant.

For assured tenancies created after 1st April 2012

Where the tenancy agreement expressly allows for succession to another person as per s17(1A) above this will take effect as a statutory succession and there will be no further rights to succeed.

2. KEY PRINCIPLES

2.1 Only One Succession

This is common to both secure and assured tenancies. There can be no further succession if there has already been a succession, an assignment or where a joint tenancy has become a sole tenancy.

S88 HA 1985

(1) *The tenant is himself a successor if—*

(a) *the tenancy vested in him by virtue of section 89 (succession to a periodic tenancy), or*

(b) *he was a joint tenant and has become the sole tenant, or*

(c) *the tenancy arose by virtue of section 86 (periodic tenancy arising on ending of term certain) and the first tenancy there mentioned was granted to another person or jointly to him and another person, or*

(d) *he became the tenant on the tenancy being assigned to him, or*

(e) *he became the tenant on the tenancy being vested in him on the death of the previous tenant*

(f) *the tenancy was previously an introductory tenancy and he was a successor to the introductory tenancy.*



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S17 HA 1988

S17(1D) Subsection (1), (1A), (1B) or (1C) does not apply if the tenant was himself a successor as defined in subsection (2) or subsection (3).

(2) For the purposes of this section, a tenant is a successor in relation to a tenancy if—

(a) the tenancy became vested in him either by virtue of this section or under the will or intestacy of a previous tenant; or

(b) at some time before the tenant's death the tenancy was a joint tenancy held by himself and one or more other persons and, prior to his death, he became the sole tenant by survivorship; or

(c) he became entitled to the tenancy as mentioned in section 39(5) below.

(3) For the purposes of this section, a tenant is also a successor in relation to a tenancy (in this subsection referred to as "the new tenancy") which was granted to him (alone or jointly with others) if—

(a) at some time before the grant of the new tenancy, he was, by virtue of subsection (2) above, a successor in relation to an earlier tenancy of the same or substantially the same dwelling-house as is let under the new tenancy; and

(b) at all times since he became such a successor he has been a tenant (alone or jointly with others) of the dwelling-house which is let under the new tenancy or of a dwelling-house which is substantially the same as that dwelling-house.

2.2 Residing With

For both secure and assured tenancies, any would be successor must have been residing with the deceased tenant.

This is generally in the property that is the subject of the dispute however it can be in another property, as long as they are residing with the tenant.

Waltham Forest LBC v Thomas [1992] 2 All ER 244, (1992) 24 HLR 622, HL

Mr T moved in with his brother and lived with him for about 2 ½ years. They moved to another property and shortly afterwards the tenant died. The local authority argued that Mr T could not succeed to his brother's tenancy as he had not resided at the property for 12 months. It was held that s87 does not stipulate that the successor must have



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resided at a particular house for 12 months but only that he should have resided with the deceased tenant for that period.

A temporary absence does not prevent this from being satisfied.

Camden LBC v Goldenberg (1996) 28 HLR 727, CA

Mr G lived with his grandmother for some years. He then got married and moved with his wife into a house owned by friends for 3 months. The majority of his belongings remained at his grandmother's home. During this time he was unable to find accommodation for himself and his wife and so he moved back in with his grandmother. His grandmother passed away shortly afterwards and he sought to succeed to the tenancy. Camden argued that he had ceased to reside at the property. They were successful and a possession order was made however on appeal the possession order was set aside. It was held that a tenancy succession right was not lost by a temporary and conditional move away.

2.3 Only or principal home

This is essentially the 'tenant condition as per s81 HA 1985. There are two parts that need to be satisfied.

Firstly that the would be successor must be 'occupying' the dwelling and secondly that the dwelling was his or her only or principal home. This is a question of fact and degree.

The following is not a case involving succession however it sets out the Court's approach to 'occupation' and 'only or principal home'.

London Borough of Islington v Boyle & Anor [2011] EWCA Civ 1450

Ms B was a secure tenant and lived with her partner and their 3 children. Her partner bought a house in Suffolk. Ms B's son, the eldest child, was autistic and it became difficult for the younger daughters as his behaviour grew increasingly aggressive towards them. Ms B moved with her daughters to the house in Suffolk whilst her partner remained in the flat with their son, who attended a special needs school locally. Islington eventually became aware of this and served a Notice to Quit on Ms B and issued possession proceedings on the basis that Ms B had lost security of tenure as she had ceased to occupy the property as her only or principle home. Ms B returned to the flat and defended the proceedings on the basis that she had not ceased to



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occupy, her absence was temporary, she had an intention to return, she wished to return and was only prevented from doing so due to her son's behaviour, many of her belongings remained in the flat, her extended family were in Islington. The first instance Judge found for Ms B however Islington appealed on the basis that the Judge focused on whether Ms B remained in occupation but did not consider the other limb – 'only or principal home'.

Regarding occupation the CofA held:

The tenant's absence may be sufficiently continuous or lengthy or combined with other circumstances as to compel the inference that, on the face of it, the tenant has ceased to occupy the dwelling as his or her home. In every case, the question is one of fact and degree.

Assuming the circumstances of absence are such as to give rise to that inference:

1) the onus is on the tenant to rebut the presumption that his or her occupation of the dwelling as a home has ceased;

(2) in order to rebut the presumption the tenant must have an intention to return;

(3) while there is no set limit to the length of absence and no requirement that the intention must be to return by a specific date or within a finite period, the tenant must be able to demonstrate a 'practical possibility' or 'a real possibility' of the fulfilment of the intention to return within a reasonable time;

(4) the tenant must also show that his or her inward intention is accompanied by some formal, outward and visible sign of the intention to return, which sign must be sufficiently substantial and permanent and otherwise such that in all the circumstances it is adequate to rebut the presumption that the tenant, by being physically absent from the premises, has ceased to be in occupation of it.

Two homes cases must be viewed with particular care in order to assess whether the tenant has ceased to occupy as a home the place where he or she formerly lived.

Whether or not a tenant has ceased to occupy premises as his or her home is a question of fact. In the absence of an error of law, the trial Judge's findings of primary fact cannot be overturned on appeal unless they were perverse, in the sense that they exceeded the generous ambit within which reasonable disagreement about the



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conclusions to be drawn from the evidence is possible; but the appeal court may in an appropriate case substitute its own inferences drawn from those primary facts.

Regarding only or principal home

First, the length or other circumstances of the tenant's absence may raise the inference that the dwelling which is the subject of the proceedings ceased to be the tenant's principal home so as to cast on the tenant the burden of proving the contrary.

Secondly, in order to rebut that presumption, it is not sufficient for the tenant to prove that at the material time it was his or her subjective intention and belief that the dwelling remained the principal home. The objective facts must bear out the reality of that belief and intention both in the sense that the intention and belief are or were genuinely held and also that the intention and belief themselves reflect reality. The reason for the absence, the length and other circumstances of the absence and (where relevant) the anticipated future duration of the absence, as well as statements and conduct of the tenant, will all be relevant to that objective assessment.

Thirdly, the court's focus is on the enduring intention of the tenant, which, depending on the circumstances, may not be displaced by fleeting changes of mind.

Fourthly, the issue is one of fact to be determined in the light of the evidence as a whole, and in respect of which the trial judge's findings of primary fact can only be overturned on appeal if they were perverse in the sense that I have mentioned earlier; but the appeal court may in an appropriate case substitute its own inferences drawn from those primary facts

Physical presence in the property is generally strong evidence to support a claim however it is not always enough.

Freeman v London Borough of Islington [2009] EWCA Civ 536

Ms Freeman had a flat of her own where she sometimes stayed and sometimes let friends stay. She started staying with her father 3 days a week to care for him as his health deteriorated. She then stayed with him full time in the year before his death. The utility bills for her own flat remained in her name. Some of her belongings also remained in her name. Her father's housing benefit application also stated that he was a sole occupant. Ms Freeman argued that she had lived with her father 7 days a week



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in the year before his death. It was held that 'residing' with carries with it the intention of 'making their home there'.

2.4 Spouse/civil partner

The relationship of spouse or civil partner is generally easy to establish. A marriage ceremony that took place in the UK must have been entered in the marriage register for the district. A civil partnership must also similarly be registered as such.

Some religious ceremonies (eg Islamic marriages) are not currently legally recognised as a marriage and would require a separate civil ceremony unless the Priest/Minister from that religion obtains a license from the local registrar. If eg purely Islamic marriage, this will not be treated as spouse/civil partner for the purpose of succession. They will be treated as cohabitee/other family member.

If the marriage ceremony was performed abroad, it must have been performed in accordance with the laws governing the country in which it took place and must be in a form allowed within the UK (eg age restrictions, polygamy).

2.5 Living together as such

It may be harder to establish that the would be successor was living in a relationship similar to that of a spouse/civil partner. It will be a question of fact in each case.

Amicus Horizon Ltd v Mabbott and Brand [2012] EWCA CIV 895

The assured tenant died. Mr B claimed he had lived with Ms M for 10 years as if he were her husband. Possession was sought on the basis that Mr B only stayed at the property some of the time. He spent part of each week at his mother's home. He also used his mother's address for his bank account. He and Ms M also separately claimed welfare benefits. It was held that there was a degree of separateness that demonstrated unwillingness to fully commit to a relationship. Mr B appealed. Appeal was dismissed.



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Nutting v Southern Housing Group Ltd [2004] EWHC 2982

The first instance Judge identified 4 questions which he felt were indicative of such a relationship

a) Have the parties openly set up home together?

(b) Is the relationship an emotional one of mutual lifetime commitment rather than simply one of convenience, friendship, companionship or the living together of lovers?

(c) Is the relationship one which has been presented to the outside world openly and unequivocally so that society considers it to be of permanent intent – the words "till death us do part" being apposite?

(d) Do the parties have a common life together, both domestically (in relation to the household) and externally (in relation to family and friends)?

On appeal this was accepted as an 'indicator' of such a relationship with the proviso that 'human relationships are complex and varied' and therefore the list of questions must not be viewed as comprehensive. The facts must be taken into account on a case by case basis.

2.6 Members of the Family

Other family members can only succeed to the tenancy if, at the time of the deceased tenant's death, the dwelling house is not occupied by a spouse or civil partner as their only or principal home and there is an express term in the tenancy allowing for succession eg to children, carers etc.

This is defined in s113 HA1985.

113 HA 1985 Members of a person's family.

(1) A person is a member of another's family within the meaning of this Part if—

(a) he is the spouse of that person, or he and that person live together as husband and wife, or

(b) he is that person's parent, grandparent, child, grand-child, brother, sister, uncle, aunt, nephew or niece.

(2) For the purpose of subsection (1)(b)—



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- (a) a relationship by marriage shall be treated as a relationship by blood,
- (b) a relationship of the half-blood shall be treated as a relationship of the whole blood,
- (c) the stepchild of a person shall be treated as his child, and
- (d) an illegitimate child shall be treated as the legitimate child of his mother and reputed father.

This is an exhaustive list. It does not recognise foster children or other members of extended family.

Sheffield CC v (1) The Personal Representatives of Wall (2) Wall (3) Ingham (4) Butler [2010] EWCA Civ 922

A foster child sought to succeed to his foster mother's tenancy. It was a long term placement and he had lived with the family for many years. It was held that the court could not apply a flexible approach to the definition of family member as such an interpretation was not permissible because the statute went on to specifically identify who would qualify as a family member at s113(1) and that Parliament intended to achieve certainty regarding which relatives would be included.

For a family member who is aged under 18, if they satisfy the criteria, they will succeed to the tenancy however an adult (either a family member or eg a social worker) must hold the tenancy on trust for them until they reach the age of 18. Provided the tenant condition remains fulfilled, the tenancy will continue to be secure/assured.

2.7 Joint tenants

When one joint tenant dies, the tenancy automatically passes to the surviving tenant, who becomes a sole tenant of the whole, through survivorship rules. This is not succession but is treated as such when considering any future potential succession.

If a joint tenant is not occupying the property at the time of the deceased tenant's death, the tenancy will cease to be secure as the tenant condition will not be met. However, provided they move back into the property before the expiry of the notice to quit, the security of tenure can be revived.



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If there is a situation where JT parents have separated and one has moved out and then the remaining parent dies, a child that had been living with the deceased parent cannot succeed to the tenancy as, by virtue of survivorship, the tenancy vests in the surviving JT. As the surviving JT no longer occupies the dwelling, the tenancy loses its security and can be terminated by service of a notice to quit.

Solihull Metropolitan Borough Council v Hickin [2010] EWCA Civ 868

Mr and Mrs H were joint tenants. Mr H moved out. Mrs H remained in the property with their daughter. Some years later Mrs H died. SMBC served notice to quit and commenced possession proceedings. Possession order was made. Ms H appealed and Circuit Judge accepted Ms H's arguments. SMBC appealed to CofA. Their argument was that Mr H remained a tenant. As survivorship applied, he was the sole tenant. He did not meet the residence requirement and therefore the tenancy was no longer secure and so was terminable by way of notice to quit. Appeal was allowed and possession order restored.

2.8 More than one potential successor

Where there is no spouse/partner and there is more than one potential successor, eg two children or two siblings, the successor can be agreed between them. Where agreement is not reached, the landlord can select the successor. The unsuccessful potential successor may be able to challenge the decision by way of judicial review however this would be difficult given the landlord has a broad discretion in the matter.

3. DISPUTED SUCCESSION – N2Q OR NOSP

In succession cases there will be two main issues between the landlord and the would-be successor. These are:

1. When the landlord does not accept there has been a succession,
2. When the landlord accepts there has been a succession but avers that the property is under-occupied by the successor tenant (not spouse/partner)



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3.1 No Succession

Where the tenant has died and the landlord believes there is no successor, the landlord is required to serve a Notice to Quit terminating the tenancy.

The Notice to Quit must be served on the executor of the late tenant's will or, where there is no will, on the next of kin if there is a Grant of Administration.

Where there is no grant of probate or letters of administration, the tenancy vests in the Public Trustee until there is such a grant. The notice must be served on the personal representatives of the late tenant at the last known place of residence of the deceased tenant. A copy of the Notice to Quit must also be served on the Public Trustee.

Until the service and expiry of the Notice to Quit, no possession proceedings can be brought by the landlord.

3.2 Under-Occupation

Ground 15A of Schedule 2 of HA 1985 provides a ground for possession that can be used by the local authority landlord where there is a statutory right to succeed, but where the property considered too large for the successor's needs. This ground does not apply to a successor who is the spouse/civil partner of the deceased secure tenant.

Ground 15A

The dwelling-house is in England, the accommodation afforded by it is more extensive than is reasonably required by the tenant and—

(a) the tenancy vested in the tenant by virtue of section 89 (succession to periodic tenancy) or 90 (devolution of term certain) in a case where the tenant was not the previous tenant's spouse or civil partner, and

(b) notice of the proceedings for possession was served under section 83 (or, where no such notice was served, the proceedings for possession were begun) more than six months but less than twelve months after the relevant date.

For this purpose "the relevant date" is—

(a) the date of the previous tenant's death, or

(b) if the court so directs, the date on which, in the opinion of the court, the landlord (or, in the case of joint landlords, any one of them) became aware of the previous tenant's death.



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The matters to be taken into account by the court in determining whether it is reasonable to make an order on this ground include—

(a) the age of the tenant,

(b) the period (if any) during which the tenant has occupied the dwelling-house as the tenant's only or principal home, and

(c) any financial or other support given by the tenant to the previous tenant

The timeframe for a local authority wishing to use Ground 15A is very strict. They must serve a notice of seeking possession no sooner than 6 months but no later than 12 months from the date of death of the deceased tenant (or the date on which they are informed of the death). Where no notice has been served, possession proceedings must be begun within the same time frame.

Yildiz v London Borough of Hackney (2019) EWCA Civ 1331

Mr Y succeeded to his father's four bedroom house. The local authority offered him one-bedroom property, which he declined due to having shared responsibility for his three children, who frequently stayed part of the week with him. The local authority served a notice of seeking possession relying on ground 15A. The NOSP was valid for a 12 months however the local authority did not issue possession proceedings until more than 12 months had passed and the NOSP had lapsed. The claim was defended on the basis that the NOSP had lapsed. The local authority applied to dispense with the requirement for notice. This was granted and a possession order made.

Mr Y appealed this decision however the appeal was dismissed by the Circuit Judge. Mr Y appealed to the Court of Appeal. It was argued for Mr Y that ground 15A was a self-contained procedure where a landlord had to either serve a s83 notice or, if no such notice was served, issue a claim for possession within the same statutory timeframe. This was accepted by the court and the appeal was allowed.

Therefore if the NOSP has not been served or claim issued in accordance with ground 15A, this is a defence to the possession claim.



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If a valid notice has been served and/or possession proceedings issued, a court must consider whether it is reasonable to make an order for possession. The judge must consider all the facts of the case including (as stated within the ground):

- (a) the age of the tenant;
- (b) the period during which the tenant has occupied the dwelling as his only or principal home;
- and
- (c) any financial or other support given by the tenant to the previous tenant.

If the judge is satisfied that it is reasonable to make an order for possession, he or she must also be satisfied that suitable accommodation will be available for the tenant when the order takes effect.

Bracknell Forest BC v Green [2009] EWCA Civ 238

Son succeeded to the tenancy of a three-bedroom house on the death of his mother. He had lived in the property for more than 50 years. The local authority issued possession proceedings on the basis of under-occupation. The judge accepted that the authority had a shortage of three-bedroom houses. He said that he believed that the bungalow offered was suitable alternative accommodation but went to say: "However, there is no point in discussing this issue until first the issue of reasonableness has been decided. Plainly if it is unreasonable to make a possession order it is immaterial whether suitable accommodation is available". The judge held that it was not reasonable to grant a possession order given the length of time that the defendant and his sister had lived in the house and their emotional attachment to it. The local authority appealed but the decision of the lower court was upheld.

Hackney LBC v Sheehan (12 January 2012, Clerkenwell & Shoreditch County Court)

The claim for possession was dismissed on the basis that it was not reasonable to grant the order. The judge took account of Mr S's age, the fact that he had lived in the three-bed flat almost all his life and the personal care he had provided to his late mother. His medical condition (chronic depression and diabetes) was also taken into account.



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Holt v Reading BC [2013] EWCA Civ 641

Four offers of alternative accommodation were made and rejected. Ms H argued that it was not reasonable for the court to make an order for possession and that, because there was no live offer of a particular property at the time of trial, the court could not be satisfied that suitable accommodation would be available for her when the order took effect. The trial judge rejected both arguments and made an order for possession, conditional on the local authority making an offer of accommodation which satisfied specific requirements set out in the order. This was appealed but dismissed however the Court of Appeal added that such conditional orders would not always be appropriate and the court should consider with great care whether it is necessary. It may be appropriate to adjourn the proceedings until a property had been identified. If the court were minded to make such an order, they should limit the time frame and retain the court's power to scrutinise the suitability of the property by allowing for liberty to apply or requiring the court's permission to issue a warrant.

There is no equivalent to ground 15A for assured tenancies however a housing association can seek possession against an assured tenant under Ground 9 of Schedule 2 to the Housing Act 1988 where "suitable alternative accommodation is available for the tenant or will be available when the order for possession takes effect." The court has discretion over whether to grant an order under Ground 9.

Ground 7 of Schedule 2 to the Housing Act 1988 also gives a housing association a mandatory ground for possession where a tenancy has devolved under the will of a tenant or on the late tenant's intestacy. Proceedings must be commenced no later than one year after the death of the tenant.

The relative living in the property should seek a grant of administration before the expiry of the notice to quit. They still remain vulnerable to a Ground 7 possession claim but only if the landlord issues the claim within one year as stated above.

Ground 7

The tenancy is a periodic tenancy (including a statutory periodic tenancy or a fixed term tenancy of a dwelling-house in England) which has devolved under the will or intestacy of the former tenant and the proceedings for the recovery of possession are begun not later than twelve months after the death of the former tenant or, if the court



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so directs, after the date on which, in the opinion of the court, the landlord or, in the case of joint landlords, any one of them became aware of the former tenant's death.

For the purposes of this ground, the acceptance by the landlord of rent from a new tenant after the death of the former tenant shall not be regarded as creating a new ... tenancy, unless the landlord agrees in writing to a change (as compared with the tenancy before the death) in the amount of the rent, the period or length of term of the tenancy, the premises which are let or any other term of the tenancy.

3.3 Where there is no right of statutory succession

Where there is no statutory right of succession to a tenancy, social landlords can exercise their discretion to offer a new tenancy to people left in occupation on the death of a tenant – either of the existing property or an alternative property. When exercising this discretion the landlord will usually want to ensure that their allocation policies are not undermined by a housing allocation to someone who is lower priority than an applicant on the housing register.

There used to be guidance on when it might be appropriate to grant a new tenancy to those members of the household who had been living with a deceased tenant but who did not have a legal right to succeed, contained in the Code of Guidance on the Allocation of Accommodation for Local Authorities (2002) however the 2012 replacement code did not contain this.

4. DEFENDING POSSESSION PROCEEDINGS

4.1 Defending a claim for possession based on no succession

If the claim for possession is brought on the basis that the succession is not accepted by the landlord, assuming the notice requirements have been satisfied, it is imperative to obtain as much evidence as possible from the would be successor. This should include the following:

1. Proof of the relationship

In some cases this will be easy to establish for example by way of birth certificate, marriage/civil partnership certificate. Where the would be successor is a cohabitee, proof of the relationship may be more difficult to evidence. The relationship can be established by things like letters, text/whatsapp messages, photos, cards (birthday, Valentines Day), witness statements from neighbours, friends and family confirming the relationship.



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2. Proof of occupancy and length of residence

Where the relationship itself is not questioned but the issue concerns establishing occupancy or length of residence, the would be successor must be asked to provide evidence including:

- Pay slips
- Bank statements
- Bills
- Driving licence/car insurance
- Benefits letters
- Electoral register
- GP/hospital records
- Electoral register
- Housing benefit and council tax benefit records
- HMRC records
- Any other correspondence
- Confirmation from neighbours, family and friends

Credit searches can be carried out for them to evidence their occupation. SARs can be made to relevant bodies requesting records. The tenancy file should also be requested as it may contain reference to the would be successor.

Where evidence is not plentiful, it is particularly important to have strong witness evidence both from the would be successor and from neighbours, friends and family.

It is advisable to send the evidence to the landlord/Claimant as early as possible with representations supporting the succession and ask that they agree to discontinue the possession claim.

If no agreement is reached, ultimately it will be a matter for the trial judge to assess the evidence and credibility of the Defendant.

If the judge is no satisfied as to the relationship or length of occupancy, there is no requirement for him or her to consider reasonableness. The Notice to Quit will be effective in terminating the tenancy and an order for possession will be made.



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4.2 Defending a claim for possession based on under-occupation

If the claim for possession is brought on the basis of under-occupation, the first thing to do is to check that the appropriate NOSP has been served and the relevant time-frames have been complied with. If these have not been complied with, this is a defence to the possession claim.

Assuming the relevant time-frames have been complied with, evidence should be obtained to confirm the tenant's age, the length of their residence, their connection to the property, their connection to the local community or support network as well as things like school and employment. Evidence should also be obtained confirming financial or other support provided to the deceased tenant, such as paying the rent or bills and caring duties such as helping with cooking, cleaning, dressing, bathing, taking to medical appointments etc.

Strong witness statements will be essential to persuade the judge that it is not reasonable to make an order for possession.

As above, it is worth putting representations to the landlord with supporting evidence early on.

If no settlement is reached the trial judge will have to consider all the facts of the case and whether it is reasonable to make a possession order.

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Hodge Jones & Allen is an industry leader in social housing law. The team has been ranked in Band 1 in the Chambers & Partners and Legal 500 - 2023 legal directories.

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