Secure Tenancies, Succession Rights and Minors

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To what extent is it possible for a child to succeed to a tenancy under the Housing Act 1985? Since a minor does not have capacity to hold a legal estate in land, the question arises whether the tenancy can be held on trust for the child pending their majority. This article examines the case law and also the practical difficulties which may be associated with the child's occupation of the premises whilst a minor.

When a residential tenant dies, the tenancy may pass by succession to a spouse, cohabitee or family member provided the successor meets certain residence requirements in the period leading up to the tenant's death. So far as a periodic assured tenancy is concerned, under the s.17 of the Housing Act 1988, only one succession is allowed in favour of the tenant's spouse. The Rent Act 1977, on the other hand, in relation to deaths after early 1989, permits a first succession to a surviving spouse, in which case a second succession is allowed on the spouse's death to another spouse or family member. If the tenant leaves no qualified spouse, there is only a single succession to a family member: see, s.39 and Schedule 4 to the Housing Act 1988.

Under the Housing Act 1985, the same rules apply to secure tenancies. Section 87 of the 1985 Act provides that a person is qualified to succeed to a secure tenancy if he (or she) is the tenant's spouse or another member of the tenant's family and has resided with the tenant throughout the period of 12 months ending with the tenant's death. The phrase "member of the tenant's family" is defined in s.113(1) as being "that person's parent, grandparent, child, grandchild, brother, sister, uncle aunt, nephew or niece". A child, therefore, qualifies to succeed to a secure tenancy under the 1985 Act.

The difficulty, however, lies with the fact that a legal estate in land does not vest in a minor but is held in trust for him (or her) until majority: see, para.2 of Sch.1 to the Trusts of Land and Appointment of Trustees Act 1996. This is because a child (under the age of 18) does not have capacity to hold a legal estate in land: see, s.1(6) of the Law of Property Act 1925. The upshot, therefore, is that the child will acquire only an equitable interest in the secure tenancy pending majority. If the deceased tenant died intestate, the legal estate in the tenancy will vest automatically in the Public Trustee pending the grant of letters of administration to an appropriate relative. Alternatively, if the tenant died leaving a will, the legal estate will pass to their executor(s) named in the will. Either way, it is apparent that the legal estate will have vested in a person who does not qualify to succeed to the tenancy. Does this, therefore, preclude the child from succeeding to the tenancy under s.87 of the 1985 Act?

Such a result would be surprising given that the 1985 Act itself presupposes that a child may succeed to a secure tenancy despite their incapacity to hold a legal estate in land. So, how may this conundrum be resolved?

An equitable tenancy in favour of the child

In *Kingston-upon-Thames RBC v Prince* (1999) 31 H.L.R. 794; [1999] L. & T.R. 175, the Court of Appeal concluded that the 1985 Act clearly included minors within its succession provisions. In that case, the deceased's adult daughter (Wendy) was held to succeed to the legal tenancy (even though she did not qualify) so as to enable her to hold the legal estate on trust for the deceased's granddaughter (Marie, aged 13) who was entitled to succeed under s.87 because she had lived with the deceased (her grandfather) for almost three years prior to his death. It seems that the daughter was willing to act in this way in order to avoid the difficulties associated with the legal tenancy not passing to the granddaughter during her minority. Hale J (giving the leading judgment) stated, at p 802:

> "A minor is quite capable of becoming a tenant, albeit only in equity. Marie's mother was declared trustee because she was willing to act and no one objected. But the relevant tenancy is the equitable tenancy held by Marie. Housing legislation may include an equitable tenancy without catering for it expressly ... If there is nothing to stop a local authority granting a tenancy effective in equity to a minor in appropriate circumstances, there can be no insuperable technical objection to Parliament rendering that equitable tenancy secure. If Parliament had wanted to limit these provisions to adults, it could easily have said so: but it did not."

The point was also considered in *Newham LBC v Ria (A Child)* [2004] EWCA Civ 41. Here, the minor had resided with her mother until the latter's death in 2001. The mother had left in her will her entire net estate to be held upon trust for the minor (her daughter) and appointed her aunt as sole executrix and trustee. The minor was clearly a person qualified to succeed to her mother's secure periodic tenancy. The Court of Appeal, applying *Prince*, held that the legal tenancy vested in the child's aunt by virtue of the mother's will. Moreover, the 1985 Act did not prevent the aunt from holding the tenancy in this way on trust for the daughter despite the fact that she was not someone who could qualify to succeed to the tenancy herself. On reaching her majority, however, the daughter would be entitled (by way of an assent from her aunt) to have the legal estate in the tenancy vested in her absolutely as legal and equitable owner. Significantly, Sir Martin Nourse rejected the notion that the legal estate had vested in the Council on the mother's death. His Lordship stated, at [14]:

> "... the notion of a landlord being a trustee of a tenancy of the demised premises for the benefit of the tenant is a very curious one, to which effect should not be given without express provision. Nor can the court accept any argument that the vesting of the legal estate is in some way suspended or in limbo until [the minor] attains her majority."

His Lordship also made reference to para.2 of Sch.1 to the Trusts of Land and Appointment of Trustees Act 1996 which refers to a legal estate in land vesting in a person by reason of intestacy "or in any other circumstances" which clearly contemplated not only intestate succession, but also (as in the instant case) dispositions of land by will.

Practical difficulties

It is noteworthy that, in *Prince*, the mother was willing to hold the legal estate in the tenancy on behalf of her daughter until the latter reached majority. In *Newham*, the deceased had expressly appointed her sister trustee of her entire estate in her will, who (again) was willing to act and give an assent of the legal estate in favour of her niece upon reaching 18.

Had, however, the mother and sister in these cases refused to co-operate and act as trustee, then presumably an application to court would have been necessary so as to appoint someone suitable (for example, the child's uncle or other guardian) to act in their place as trustee of the legal tenancy until the child reached full age. Interestingly, the Court of Appeal in *Newham* ruled out the possibility that the legal estate in the tenancy could simply remain in abeyance pending majority. Equally, as we have seen, the Court did not favour the suggestion that the legal estate should vest in the local authority in trust for the minor. No doubt, such an approach would have the huge potential for a conflict of interest if a local housing authority acted both as landlord and legal tenant of its own property. The better course, in such cases, is that the person with parental responsibility for the child should act as independent trustee.

Of course, there may be rare cases where the child has no one to look after their well-being after the tenant's death. As was suggested in *Prince*, in these circumstances, the local social services authority may have to step in to provide accommodation for the child under the Children Act 1989. Unless the child can be supported in their own home, social services may have little choice but to place the child in other premises, in which case the tenant condition under s.81 of the 1985 Act will no longer be fulfilled and the tenancy will cease to be a secure tenancy. There may be other difficulties. For example, the child may not be able to pay the rent or otherwise discharge the obligations of the tenancy. The landlord would then be able to bring the tenancy to an end and obtain possession of the premises under one of the grounds listed in Schedule 2 to the 1985 Act. If, however, the child is able to comply with the terms of the tenancy (because they are working or are being provided for by other means), then there would be no obvious difficulty in allowing them to continue to occupy the premises as their only or principal home pending majority.

It may also be asked whether the child would have the right to acquire the freehold (or be granted a lease) of the premises under Part V of the 1985 Act. Since an equitable secure tenancy satisfies the definition of a secure tenancy under s.79, there seems no reason why this could not be possible, especially as neither equitable secure tenancies nor minors are expressly excluded from the right to buy provisions under the Act. In the words of Hale J in *Prince*, at p 804):

> "... there is ample reason to conclude that minor children are not 'non persons' in the law of landlord and tenant let alone the law of property generally. The modern tendency of the law is to recognise that children are indeed people. It simply cannot be assumed that they are omitted from legislation unless the contrary is expressly stated."

A more fundamental objection?

Aside the practical difficulties, however, there is a more fundamental objection to allowing the device of the trust to be used so as to permit a minor to succeed to a secure tenancy in equity pending majority. As has been noted by other commentators (see, S. Mills and N. Joss, "Children and Secure Tenancies" (2001) 5 L. & T. Rev. 53, 54), the decision in *Prince* may be explained on the basis that:

> "If both the legal and equitable interests in a tenancy vest in a non-qualifying person, that tenancy cannot be secure by virtue of section 89(3). If, however, the equitable estate vests in a qualifying minor and the legal estate vests in a non-qualifying adult, the equitable tenancy will remain secure by reason of *Prince*, although bizarrely the legal tenancy may lose its secure status."

The inherent problem with the *Prince* ruling is that the tenancy will cease to be secure when it is vested or disposed of to a person not qualified to succeed to the tenancy unless it is vested in accordance with one of the limited exceptions contained in s.89(3). The Court of Appeal, on the other hand, concluded that Marie's mother could hold the legal tenancy even though she did not qualify under s.87 and the exceptions did not apply because it was enough that the child held an equitable tenancy of the premises whilst a minor.

Interestingly, it was argued in *Prince*, on behalf of the local authority, that the 1985 Act did not permit the separation of the legal and equitable estates in this way. The word "tenancy" in the 1985 Act referred only to the legal estate and excluded an equitable tenancy. Consequently, succession could not apply to a minor because the minor could not hold the legal estate which is the "tenancy" within the meaning of the Act. In essence, the effect of the order in *Prince* was to constitute Marie's mother the "tenant" of the property and, therefore, a secure tenant even though she was not qualified to succeed.

Conclusion

Despite the technical arguments associated with the separation of the legal and equitable interests, there is no doubt that the *Prince* ruling provides an obvious answer to the conundrum of allowing a child to succeed to a secure tenancy notwithstanding their incapacity to hold a legal tenancy until majority. As Mills and Jones conclude in their article, (see above), the Court of Appeal "may have simply taken a pragmatic approach in order to do justice in the case": *Prince* at 54.

However, whilst, no doubt, providing a just solution, the decision is not without its practical difficulties which may (in less fortunate circumstances) deny the minor the opportunity to succeed to a secure tenancy or operate so as to give the local authority reason to bring to an end the tenancy and seek possession of the premises.

Interestingly and by way of postscript, it seems possible also for a child to succeed to a Rent Act statutory tenancy since such a tenancy does not create an estate in land and a minor does have sufficient capacity to contract for necessaries (such as housing) which will bind the child during their minority: see, *Portman Registrars and Nominees v Mohammed Latiff* [1987] C.L.Y. 2239; [1988] 18 E.G. 61, HH Judge Hill-Smith, (Willesden County Court), where a 16 year old daughter was held entitled to succeed to a statutory tenancy.