

Number 10

Nearest Relatives and Next of Kin

One of the greatest misconceptions in the health sector is to ascribe to the next of kin a legal status. They have no such legal status: The phrase “next of kin” is not one recognised by the law. Next of kin can certainly not either purport to consent on an individual’s behalf or manage their affairs (unless they also have an appropriate Power of Attorney or are a duly appointed receiver).

However, there is a different, but similar term, which does carry legal status, namely that of the “nearest relative” under the Mental Health Act 1983.

The nearest relative of a patient detained under the Mental Health Act is determined by Section 26 of the Act. This provides a strict order of precedence to decide which relative is to exercise the role of nearest relative. Although the fact that the patient cannot choose his nearest relative has been confirmed by the Courts to breach the Human Rights Act, nevertheless the provisions of the Act are still in force.

The nearest relative, contrary to the position of the next of kin, does have significant powers and rights in connection with the admission and detention of a patient detained under the Act. These include the following:

- There is a statutory requirement on an Approved Social Worker (ASW) to inform the nearest relative of a patient who it is proposed will be made or has been made the subject of an application for admission under Section 2 that that application is to be or has been made (Section 11(3)) and the nearest relative must also be informed of his power to apply for discharge of a patient from the Section. If the ASW has been unable to inform the nearest relative before the patient’s admission to hospital, the ASW should then notify the hospital as soon as this has been done.
- The ASW must consult the nearest relative before making an application under Section 3 for admission for treatment, unless such consultation is not reasonably practicable or would involve unreasonable delay. If the nearest relative objects to the application being made, it cannot proceed unless the County Court displaces the nearest relative.
- The nearest relative should be given a copy of any written information given to the patient detained under the Act, as required by Section 132(1) and (2), unless the patient otherwise requests.
- The nearest relative can make an “order for discharge” under Section 23 of the Act in respect of a patient detained under Section 2 or 3 of the Act, but does not have this power in relation to a patient who is subject to a hospital order or to a guardianship order made by a Court. The discharge order does not have to be in any specific form, although it must be in writing and it can be barred by the RMO

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- In the event that the patient's RMO does make a barring order, as the nearest relative must be informed so he can consider applying to the Mental Health Review Tribunal (see below).
- It should be noted that in order for the RMO to prepare an effective report preventing the patient's discharge the RMO's opinion should be that there is a **probability** that the patient is likely to act in a dangerous manner either to other persons or to himself; there should not simply be a *possibility* of such dangerousness.
- The hospital managers are required to review whether or not detained patients should be discharged and must consider holding a review: (a) when they receive a request from a patient; (b) when the RMO makes a report under Section 25 opposing a nearest relative's application for the patient's discharge.
- The hospital managers can direct that the patient be discharged. The nearest relative should be informed if the patient is to be discharged.
- Where the RMO has made a barring order under Section 25 in respect of a detained patient the patient's nearest relative can apply to the Mental Health Review Tribunal for the patient's discharge (if the managers have not discharged). If the nearest relative makes enquiries about legal representation then members of staff should be able to refer the nearest relative to local solicitors whom will be able to undertake this work. If a nearest relative wishes to apply to the Tribunal he should do so within 28 days of the RMO's order.

Given that many care homes may be registered to take patients detained under the Act (often arising because of senile dementure) the role of the nearest relative is obviously important. It should however not be confused with issues of "next of kin" which have no legal status.

The Department of Health website contains information on the most recent Local Authority Circular ([LAC\(2003\)22](#)) published on the financial assessment for residential accommodation on 6 October 2003. Through attached policy guidance and the revised Charging for Residential Accommodation Guide (CRAG), it:

- * Announces a new savings disregard into the financial assessment for residential accommodation, to come into force on 6 October 2003.
- * Announces a disregard of cash in lieu of concessionary coal for temporary residents into the financial assessment for residential accommodation, to come into force on 6 October 2003, and deals with other matters linked to the introduction of Pension Credit.
- * Announces a disregard of payments under paragraph 3 of Schedule 4 to the Adoption and Children Act 2002 into the financial assessment for residential accommodation, to come into force on 6 October 2003, and covers other matters.

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For more information on Care Home Law contact Andrew Parsons at RadcliffesLeBrasseur on 020 7227 7282, or email: andrew.parsons@rlb-law.com.

Out of office emergency advice available 24hrs on 07802 506 306.

Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing. Future editions can be received by email. Please e-mail: marketing@rlb-law.com or telephone 020 7227 7388.

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