

Number 35

## Protection of vulnerable adults: Guardianship or the Court's inherent jurisdiction

The Mental Health Act 1983<sup>1</sup> provides for a Guardianship Order to be made if an individual is suffering from mental disorder (as defined in the Act)<sup>2</sup> and it is necessary in the interests of the welfare of the individual or the protection of others that this is done. It may well be applicable where it is necessary to protect a vulnerable mentally disordered adult.

The High Court also has powers as part of its inherent jurisdiction to protect incapable adults. The interaction of these two powers has recently been considered by the Court<sup>3</sup>.

### The facts

The patient had severe learning disabilities as a result of Down's Syndrome. Until recently she had been living with her mother but her mother's health had deteriorated

to such an extent that the local authority had arranged for her to be taken from her home to hospital where she was detained under Section 2 of the Mental Health Act. This authorised detention for 28 days. Thereafter the local authority intended to apply for guardianship. This would have given it the power to require her to live in the community at a place specified by the Council.

The patient's mother (who was her "nearest relative" for the purposes of the Mental Health Act) objected to this and the local authority therefore applied to the Court to displace her from her role as nearest relative. Pending determination of this an interim order was made giving the Council the power to act as nearest relative and as a result they arranged for her to be placed in a care home for adults with learning disabilities.

When the substantive application was heard by the County Court it directed that the local authority should undertake the role of nearest relative and that the mother had acted unreasonably in objecting to the guardianship. The mother argued that her daughter's care should be regulated by the High Court as part of its inherent jurisdiction rather than by use of the guardianship procedure but the court rejected that argument.

### Court Decision

On appeal to the Court of Appeal the patient's mother argued that the necessary grounds for guardianship were

<sup>1</sup> Section 7

<sup>2</sup> A guardianship application may be made in respect of a patient on the grounds that –

- a) he is suffering from mental disorder, being mental illness, severe mental impairment, psychopathic disorder or mental impairment and his mental disorder is of a nature or degree which warrants his reception into guardianship under this section; and
- b) it is necessary in the interests of the welfare of the patient or for the protection of other persons that the patient should be so received.

<sup>3</sup> Lewis v Gibson [2005] EWCA Civ 587

not made out as it was not necessary in the interests of the patient for a guardianship order to be made because the local authority could have asked the High Court to declare whether it would be lawful for it to remove her from her mother's home.

Use of guardianship is only possible where the patient's mental disorder falls within the definition referred to above (see footnote 2). The definition of mental impairment and severe mental impairment requires this to be associated with abnormally aggressive or seriously irresponsible conduct. As a result guardianship is not available to protect many adults with learning disabilities who are being poorly cared for.<sup>4</sup>

However the Court has held previously that it can declare whether it is in an adult's best interests for a local authority to remove it from a deficient caring environment.

Taking these points into account the Court of Appeal rejected the mother's arguments. Once the County Court had decided that the patient met the criteria for

guardianship and that her mother had unreasonably objected to it the Court felt that it was unnecessary for the High Court to consider a declaration as to what would amount to her best interests. As the local authority had established by law its entitlement to the Guardianship Order, the Court was not prepared to intervene further.

## Comment

Although this decision makes it plain that where guardianship is made out the Court will not intervene to utilise its protective powers under its inherent jurisdiction, equally it should be noted that the Court did not say that declarations of best interest would not be made in respect of individuals who do not meet the criteria for guardianship nor that there were no circumstances in which a declaration might be made where a patient was subject to guardianship. For example it may be necessary to invoke the Court's inherent jurisdiction to make a declaration as to a patient's best interests in respect of matters which are not within the powers of a guardian under a Guardianship Order (for example regulating contact with family and friends).

**Andrew Parsons**  
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## Department of Health launches consultation into care home information

Just before Christmas the Department of Health announced a consultation into care home price information. The NMS and Care Standards regulations relating to care homes already require this information to be provided but not when it must be given. The Department have already confirmed to the OFT that this ambiguity will be removed and that care homes will be required to provide prices prior to the person moving into the home.

The consultation period will run until 10 February 2006.

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<sup>4</sup> Re F (Mental Health Act: Guardianship) [2000] 1FLR192 and Re F (No.2) [2002] 2FLR512