

# Mental Health Law Briefing

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## Marriage of Detained Patients

Article 12 of the European Convention on Human Rights confers a right upon all men and women of marriageable age to marry and found a family, according to the national laws governing the exercise of this right.

Section 1 of the Marriage Act 1983 provides for the marriage of patients detained under the Mental Health Act 1983. It places no restriction on mentally disordered patients, whether detained or not, from marrying, so long as they have sufficient mental capacity to contract to marry.

The level of understanding required to enter into marriage is lower than for many other decisions. The patient must have a broad understanding of the marriage contract, that is the “duties and responsibilities normally entailing to a marriage.”<sup>1</sup>

There is guidance on the application of the Marriage Act in DHSS Circular No. LAC (84) 9 which states that hospitals will wish to arrange careful counselling for any detained patient who wishes to marry, and possibly for their prospective spouses, so that both parties may consider the matter fully.

For patients who wish to get married in the hospital, there is a mechanism to facilitate this. Except where patients are detained under shorter term provisions of the Mental Health Act 1983, the Marriage Act of that year allows the ceremony to take place in the hospital. In that event the notice of marriage required by section 27 of the Marriage Act 1949 must be accompanied by a statement from the hospital managers in a prescribed form, not more than 21

days before the date of the marriage notice. This statement must:-

1. Identify the establishment where the patient is detained; and
2. Confirm that the hospital managers do not object to the establishment being specified in the notice as the place where the marriage will be solemnised.

The Matrimonial Causes Act 1973 provides that a marriage is voidable if at the time of entering into it, despite having capacity, a person was suffering from a mental disorder to the extent that they were “unfitted to marriage,” being unable to fulfil the duties and obligations of marriage. Proceedings to nullify the marriage would generally need to be commenced within three years and the burden of proof is on the person bringing the proceedings.

If it is felt, by the clinical team or individual, that the marriage should not go ahead for reason of the patient’s incapacity to consent, a “caveat” by way of a letter to the appropriate person (the registrar or the clergyman) setting out the grounds for asserting a lack of capacity could be entered. The burden of proving incapacity therefore rests on the person seeking to oppose the marriage. In the case of a church wedding, an objection may be raised by dissenting against the publication of the banns.

The caveat by way of a letter puts the registrar or clergyman on notice, requiring them to investigate the question of capacity, through requesting reports from doctors, social workers, psychologists or other persons well placed to comment on the individual’s capacity regarding marriage and bearing in mind any religious beliefs.

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<sup>1</sup> Park v Park [1954]P.112

Medical opinion that marriage may not be suitable for the patient is unlikely to be sufficient to persuade the Registrar to deny a certificate. Any substantial interference with the patient's intention to marry could amount to a violation of their human rights under Article 12 and perhaps Article 8 concerning private life.

To avoid a breach of a patient's human rights, any attempt to prevent a marriage would therefore have to be proportionate and necessary in the interests of, amongst others, public safety, the prevention of crime or disorder, the protection of health or morals, or the protection of the rights and freedoms of others.

These are obviously significant hurdles. There may be a justification where the patient posed a serious danger to the prospective spouse.

Although it is not yet in force, it is perhaps worth noting that section 27 of the Mental Capacity Act 2006 expressly excludes a person consenting to marriage on another's behalf.

The question of capacity remains significant looking to the future, given the fact that marriage has implications in other spheres of the patient's life, in particular their financial and property affairs and in particular will revoke all previous wills and codicils. The patient's capacity in this regard is likely to need to be considered, although it would not stand as a bar on the marriage. The patient should be given the opportunity to obtain their own independent legal advice about such matters.

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#### **Implementation of the Mental Health Act 2007**

Our previous briefing referred to the anticipated implementation of the Mental Health Act 2007 in April 2008, which was the then best available information on this. Since that briefing was published, we understand that the target date for implementation both in England and Wales for the majority of the Act is October 2008.