

# Mental Health Law Briefing

Solicitors

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## Challenge by patient to the appointment of nearest relative

We are often involved in cases on behalf of both NHS Trusts and private sector providers in the mental health field, resulting from patients who allege that they have been unlawfully detained under the Mental Health Act 1983 (MHA) because of the hospital's failure to consult the correct Nearest Relative.

We have recently successfully defended a court application brought by a patient against an NHS Trust in such circumstances. In that case, the patient brought an application for habeas corpus and judicial review arising out of detention under s.3 MHA, claiming that his girlfriend should have been consulted in the capacity of Nearest Relative. The background to this may be helpful for practitioners in this area.

### The Facts

The hospital had contacted the patient's aunt about the patient's detention, taking her to be the patient's Nearest Relative in accordance with the list set out in s 26 MHA. After the aunt had been contacted, the patient's girlfriend with whom he had been living gave written notice claiming to be the patient's Nearest Relative. In that notice she requested that the patient be released from detention under the MHA. The patient's case was that the correct identity of the Nearest Relative would have come to the attention of the hospital had they made appropriate enquiries.

It was common ground between the Trust and the patient's legal representative that the identity of the person who was the Nearest Relative was a matter of objective fact and was to be determined in accordance with the list set out in s.26 of the MHA. Section 26(6) of the Act states: "*In this section "husband" and "wife" include a person who is living with a patient as the patient's husband or wife, as the case may be (or, if the patient is for the time being an inpatient in a hospital, was so living until the patient was admitted) and has been or had been so living for a period of not less than six months*". Accordingly, if the male patient in this case could establish that he had been living with his girlfriend for a period of at least six months then the patient would have been able to justify his allegations that the hospital had wrongly contacted his aunt once they had become aware of the girlfriend's presence.

The hospital put forward evidence in support of its submissions that the girlfriend of the patient should not be treated as the Nearest Relative because they had not in fact been living together for a continuous period of six months. A central aspect of the evidence was that the girlfriend had told the patient to leave her flat, where they had been living together, following an argument. The patient had then sought alternative one bed accommodation.

## The Court's Decision

The Judge acknowledged that the point that had to be established was not just whether the patient and his girlfriend were "living together" but whether they were living together as *husband* and *wife*. This required them to establish the sharing of their life, the tasks of life, their ambitions and other such aspects of life.

The Judge concluded that the patient and his girlfriend were not living together as husband and wife, placing reliance on the fact that shortly before the patient's admission to hospital the girlfriend had told the patient to leave her flat. The patient's legal representative had argued that this had just been a temporary row and it would be unfair to seek to establish whether such a period had been interrupted; the Judge rejected this and stated that although all the facts were difficult to obtain the hospital had to ascertain whether a patient had been cohabiting with another person. It might be necessary to ascertain whether the period had been interrupted by, for example, periods spent by the patient abroad, compulsory detention in hospital or a custodial period in prison. The implications of such a period of separation would depend

upon the individual circumstances of each case. If a couple had been living together for a number of years, the period of separation may not have the result of bringing a period in which they could be said to be living together as husband and wife to an end. An interruption must depend on the circumstances and will depend on the duration of the relationship and when the separation took place.

## Comment

Although each case must be seen on its individual facts, this case suggests that if a patient does have a girlfriend (or boyfriend) it is advisable to seek details on admission about the nature of that relationship and how long, if at all, they had been living together. We were assisted in defending this case by the fact that the Social Worker who worked for the Community Mental Health Team had seen the patient prior to his admission to hospital and was familiar with the patient's history. He had recorded details of his conversations with the patient clearly in the records, which was very helpful evidence.

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