

Number 29

## Deciding who is the “nearest relative” of a patient

The need to consult with a patient’s nearest relative before admission under section 3 is well known (see section 11(4) Mental Health Act). The question that arose in a recent case<sup>1</sup> is who was the correct nearest relative, and if the wrong person had been consulted, whether the detention was unlawful (in which case the Court was asked to Order the release from detention of the patient under the Court’s ancient jurisdiction known as habeas corpus).

Section 26 Mental Health Act provides:

“(4)...where the patient ordinarily resides with or is cared for by one or more of his relatives... his nearest relative shall be determined (a) by giving preference to that relative...”

In this case, where the daughter of a mental patient (with whom the patient did not reside, but who had provided more than minimal care) had been consulted by the ASW as being the nearest relative, the Court held it could not be said that the detention was unlawful on the ground that the ASW was wrong to consult that daughter rather than her elder brother, who was in fact the nearest relative, pursuant to section 11(4).

The Court of Appeal held that the word “ordinarily” in section 26(4) did not qualify “resides with” and “is cared for”. The Court held that “cared for” were clear every day words and that the ASW had to act in a common sense manner. The care provided by the daughter was more than minimal. In any event, the Court held that its role was not to decide whether legally the correct nearest relative had in fact been consulted, but whether the patient’s daughter had appeared to the ASW to be the correct relative.

The Court commented (as it has before) that the Mental Health Act was to be construed strictly since it involved the liberty of a person. The ASW had correctly consulted the person who appeared to be the nearest relative. The Court held there was no duty of reasonable enquiry on the ASW to ascertain who the nearest relative legally was. The Court accepted the submission made on behalf of the Local Authority that the imposition of such a duty would be an intolerable one.

**RadcliffesLeBrasseur**

**August 2000**

For more information on Mental Health Law contact Andrew Parsons at RadcliffesLeBrasseur on 020 7227 7282, or email: [andrew.parsons@radleb.com](mailto:andrew.parsons@radleb.com). Out of office 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.

<sup>1</sup> In re: D (Mental Patient: Habeas Corpus) The Times 9<sup>th</sup> May 2000

MENTAL HEALTH LAW

RadcliffesLeBrasseur  
5 Great College Street  
Westminster  
London SW1P 3SJ

Tel +44 (0)20 7222 7040  
Fax +44 (0)20 7222 6208  
LDE 113

6-7 Park Place  
Leeds LS1 2RU

Tel +44 (0)113 234 1220  
Fax +44 (0)113 234 1573  
DX 14086 Leeds Park Square

25 Park Place  
Cardiff CF10 3BA

Tel +44 (0)29 2034 3035  
Fax +44 (0)29 2034 3045  
DX 33063 Cardiff 1

[info@rlb-law.com](mailto:info@rlb-law.com)  
[www.rlb-law.com](http://www.rlb-law.com)