

Number 62

## So Who is the Nearest Relative? Gay and Lesbian Patients

The nearest relative has an important role, the most important of which are set out below (see box). These provide important protections for unrestricted patients detained under the Act and those subject to guardianship and supervised discharge.

Section 26 of the Act provides a mechanism to identify a patient's nearest relative. It identifies the various categories of "relative" and the priority by which they shall each be treated as the nearest relative for the purposes of the Act.

At the top of the list is the husband or wife of the patient. No reference is made to the much misused phrase "common-law husband" (or wife) but provision is made<sup>1</sup> to include a person who has been living with the patient as husband or wife for six months or more (assuming any legal spouse is disregarded because of desertion or separation<sup>2</sup>). There is a separate provision that confers on a person with whom the patient has been residing for not less than 5 years the power to be their nearest relative<sup>3</sup>.

What of gay and lesbian patients? Do their "partners" have any rights to act as their nearest relative?

The Human Rights Act provides at Article 8 a right to respect for an individual's private and family life. As long ago as 2000 it was acknowledged by the European Court that this Article embraced the nearest relative provisions and that the fact that a patient had no right under the Mental Health Act to choose their nearest relative was incompatible with the Human Rights Act<sup>4</sup>. As yet, no remedial legislation has been proposed although the draft Mental Health Bill replaces the concept of nearest relative with a "nominated person" appointed by the patient.

The Court has recently had to consider the position of same sex partners in the context of the nearest relative provisions of the Act<sup>5</sup>. In that case, the patient had been in a stable relationship with her female partner for over 3 years. Under Section 26 the nearest relative appeared to be her mother. However, the patient did not consider her mother was ever likely properly to exercise or consider the exercise of her power of discharge and wanted her partner to act as her nearest relative. The authority's failure to treat her as the nearest relative was subject to judicial review which was compromised on the basis that the patient's partner would be treated as her nearest relative as this would fall within the phrase "living with the patient as the patient's husband or wife as the case may be" as referred to in Section 26 (6).

This case would therefore suggest that gay and lesbian patients may have their partner treated as their nearest relative if they have lived together as a couple for at least 6 months (and if any legal spouse is to be disregarded)<sup>6</sup>

<sup>1</sup> Section 26(6)

<sup>2</sup> Section 26(5)

<sup>3</sup> Section 26(7)

<sup>4</sup> JT –v- United Kingdom (2000 [1FLR909])

<sup>5</sup> R (on the application of SSG) –v- Liverpool City Council

<sup>6</sup>Section 26(5)

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## Rights of Nearest Relative

- To apply for admission
- To be informed of an admission
- To be consulted by the ASW before admission under Section 3 or guardianship
- To require Social Services to direct an ASW to apply for admission
- To discuss decisions not to admit
- To discharge
- To apply to the Mental Health Review Tribunal

## MENTAL HEALTH LAW

### NEW LEGISLATION

#### Community Care (Delayed Discharges) Bill 2003

The Government have recently published a bill requiring social services departments to pay compensation to NHS Authorities when patients' discharge is delayed because the relevant community services are not available.

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