Chapter 8

THE ROLE OF THE FAMILY

A. DEFINITIONS AND FUNCTIONS

8.01 *Background*

8.02 *Definition of "Relative" and "Nearest Relative"*

8.03 *The Functions of Nearest Relatives*

8.04 *Authorising Another Person to Act as Nearest Relative*

B. APPOINTMENT BY THE COUNTY COURT OF AN ACTING NEAREST RELATIVE

8.05 *Application for Appointment of Acting Nearest Relative*

8.06 *Functions of the Acting Nearest Relative*

8.07 *"Unreasonable" Objection to the Making of an Application*

8.08 *Discharge, Variation and Expiration of the Order*

8.09 *Procedure on Application to the County Court*

8.10 *Nearest Relative's Access to Confidential Patient Information*

A. DEFINITION AND FUNCTIONS

8.01 Background

Mental disorder can have a profound affect on a patient's family; often the most important people who care for the mentally disordered are near relatives. Relatives from the earliest times have had a part to play in the compulsory admission to hospital of mentally disordered people. (See para. **1.05.2** *ante*). But there has also been a persistent assumption that safeguards must exist to prevent relatives from resorting to compulsory powers for inappropriate reasons—for example, to obtain property or to be rid of troublesome individuals. Thus, whenever legislation has given near relatives functions in the compulsory admission process, it has always ensured the existence of checks on their powers. The law also has permitted the relatives' objections to the use of compulsory powers to be overridden. These basic principles continue in the Mental Health Act 1983.

8.02 Definition of "Relative" and "Nearest Relative"

For the purposes of Part II of the Act, the term "**relative**" means any of the following (s. 26(1)):

(*a*) husband or wife;
(*b*) son or daughter;
(*c*) father or mother;
(*d*) brother or sister;
(*e*) grandparent;
(*f*) grandchild;
(*g*) uncle or aunt;
(*h*) nephew or niece.

If a person is not one of the relatives specified above, that person cannot be a "relative" for the purposes of the Act.

The "**nearest relative**" is the person first described in the list above who is alive; any relationship of half blood is treated as if it were of whole blood and, if there are relatives of equal standing, the eldest is preferred, regardless of sex (s. 26(3)). There are a number of detailed criteria to determine accurately who is the nearest relative which are examined below; the patient's own preference is not taken into account. If the patient has no nearest relative or if it is not reasonably practicable to ascertain whether he has such a relative, an application may be made to the county court for appointment of an acting nearest relative under section 29(3)(*a*) (see para. **8.05** below).

(*i*) **Husband or wife**—A surviving spouse, even if under the age of 18, is the nearest relative under the Act (s. 26(5)(*c*)). However, the spouse cannot be the nearest relative if he or she is permanently separated from the patient by agreement or under an order of a court, or if one of them is in desertion of the other[1] (s. 26(5)(*b*)). If the patient is unmarried or the spouse can be disregarded under section 26(5)(*b*), then the nearest relative is any person who is, or was immediately before admission to hospital, living with the patient *as husband or wife* and had done so for a period of six months or longer (s. 26(*b*)); living together as husband and wife suggests a relationship between two people of the opposite sex.[2] A non-relative who has lived with the patient for five years or more, but *not as husband or wife*, is treated as a relative. For the purposes of the list of relatives under section 26(1), that person is treated as if last on the list (s. 26(7)), but see (*ii*) below). This provision resulted from an amendment to the Mental Health (Amendment) Bill at Committee stage of the House of Commons and was

[1] A desertion is a question of fact which need not be for two years as required by s. 1(2)(*c*) of the Matrimonial Causes Act 1973.
[2] See *Harrogate B.C. v. Simpson* (1984) 17 H.L.R. 205, C.A. (living together as husband and wife is "not apt to include a homosexual relationship").

designed to cover non-relatives of the same sex who live together.[1]

(*ii*) **Relatives who ordinarily reside with or care for the patient**—Where the patient ordinarily resides[2] with or is cared for by his *relative* (or if he last resided with or was cared for by a relative before being admitted to hospital) that person takes preference over all other relatives for determining the nearest relative (s. 26(4)). Owen J. said that to "care for" implies taking substantial responsibility for the wellbeing of a person. The factors to consider are the duration, continuity and quality of care.[3] Note that the patient could be "cared for" by a relative even though they do not reside together—for example, where the relative nursed, shopped for, cooked and did the housework for a mentally disordered person who was not capable of looking after himself. To illustrate how these often complicated provisions operate, consider the case of a non-relative of the same sex living together with a patient for five years. Although under section 26(7) he is treated as last on the list of relatives, he would become nearest relative by virtue of ordinarily residing with or caring for the patient as provided for in section 26(4).

(*iii*) **Son or daughter**—An adopted child is treated as if he were the child of his adoptive parents (Adoption Act 1976, s. 39(1)) and an illegitimate child as if he were the legitimate child of his mother (s. 26(2)). An illegitimate person may be treated as the legitimate child of his father if the latter has parental responsibility for him within the meaning of section 3 of the Children Act 1989 (s. 26(2)(*b*)). A child must be aged 18 or over to be treated as a relative (s. 26(5)(*c*)). Stepchildren are *not* relatives, but can be treated as relatives if they have resided with the patient for five years or more by virtue of section 26(7).

(*iv*) **Father or mother**—A parent is included as a relative even if under the age of 18 (s. 26(5)(*c*)).

(*v*) **Child in care of a local authority**—Where a patient who is a child or young person is in the care of a local authority by virtue of a care order within the meaning of the Children Act 1989 or the rights and powers of a parent of a patient who is a child or young person are vested in a local authority under s. 16 of the Social Work (Scotland) Act 1968, the authority is deemed to be the nearest relative of the patient in preference to any person except the patient's spouse, if any (s. 27).

---

[1] See C. Price (May 25 and May 27, 1982) *H.C. Debs.* Special Standing Committee, 10th and 11th sitting, cols. 419–448.

[2] As to the definition of "ordinarily resides" see *Akbarati v Brent London Borough Council* [1983]2 W.L.R. 16, H.L.

[3] *Dewen v. Barnet Healthcare NHS Trust*, CO/4015/99, 29 October 1999, Q.B.D., unpublished (Transcript: Smith Bernal).

(*vi*) **Minor under guardianship**—Where a guardian (other than a Mental Health Act guardian) has been appointed for a person under 18, the guardian shall, to the exclusion of all others, be deemed to be the nearest relative. If a patient under the age of 18 is subject to a residence order as defined in s. 8 of the Children Act 1989, the person named in the residence order shall be deemed to be the nearest relative, to the exclusion of all others. It is to be observed that a guardian under the Mental Health Act is not included for the purposes of section 28 (s. 28(3)). Thus a Mental Health Act guardian would not be regarded as the nearest relative under the Act unless, apart from his guardianship responsibilities under the Act, he would be the nearest relative.

(*vii*) **Minor who is a ward of court**—Where a minor who is a ward of court is liable to be detained in a hospital under an application for admission under Part II of the Act, the powers of the nearest relative can be exercised only by, or with leave of, the court (s. 33(2)).

(*viii*) **A relative who is not a U.K. resident**—In the case of a patient ordinarily resident in the United Kingdom, the Channel Islands or the Isle of Man, if the relative is not so resident then he is not considered a relative under the Act (s. 26(5)(*a*)).

8.02.1 *Detained patient as nearest relative*

The Mental Health Act does not disqualify a detained patient from exercising the powers of the nearest relative. Where two patients detained under the Act are married, the Department of Health advises that the hospital give consideration to encouraging an application to the County Court under section 29(3) for the appointment of an acting nearest relative (see para. **24.12A** *post*).[1] The criteria for displacement of the nearest relative, however, would have to be met (see paras. **8.05–8.09** below).

8.03 The Functions of Nearest Relatives

The nearest relative, or a person authorised by him to act as nearest relative (see para. **8.04** below), or a person appointed by the County Court as acting nearest relative (see para. **8.05** below) have the following rights:

(*i*) **To make an application**—The nearest relative can make an application for admission for assessment (s. 2 or 4) or for treatment (s. 3) or for reception into guardianship (s. 7) under Part II of the Act (s. 11(1)). The ASW is usually regarded as the preferred

[1] M.J. Cantrell, Sol C2, *re*: Two married Couples—Rampton Hospital Nearest Relative, 18 February, 1987.

applicant because of his professional training, knowledge of the legislation and of the local resources, together with the potential adverse effect that a nearest relative application might have on the relationship with the patient. However, the A.S.W. or, where reasonably practicable,[1] the doctor should inform the nearest relative of his rights under the Act to make an application or to require the social services authority to consider making an application. See para. **7.17** *ante*. (Code of Practice, para. 2.30).

(*ii*) **To be consulted before, or object to, the making of an application**—Before or within a reasonable time after an approved social worker (ASW) makes an application for **assessment** he must take such steps as are practicable to inform the person (if any) appearing to be the nearest relative of the application and of the nearest relative's power to exercise a discharge order under section 23(2)(*a*) (s. 11(3)). An ASW cannot make an application for **treatment** or **guardianship** if the nearest relative objects. The nearest relative can register his objections either by notifying the ASW or the local social services authority which appointed him. Before making an application the ASW must consult with the person (if any) appearing to be the nearest relative unless such consultation is not reasonably practicable or would involve unreasonable delay (s. 11(4)). At that time the nearest relative can also lodge his objection. The ASW should make every reasonable effort to find out who the nearest relative is and to consult with him or her. (Consultation is usually desirable even though it might cause a short delay). See further paras. **7.12**, **11.05.2** and **11.06.2**.

(*iii*) **To discharge the patient**—The nearest relative has the right to exercise a discharge order in respect of a patient liable to be detained for assessment (s. 2) or for treatment (s. 3)[2] or a patient subject to guardianship[3] (s. 7) (s. 23(2)). An order for the

---

[1] The original words were "where necessary", which according to a statement by Baroness Blatch on behalf of the Government were to be interpreted as meaning that where the nearest relative is unaware of his or her rights then the ASW or doctor(s) involved in the patient's assessment should positively draw the nearest relative's attention to the existence and substance of these rights. House of Lords on 29 January 1990, *Hansard* Cols. 68–86; Department of Health and Welsh Office, Code of Practice: Section 118 of the Mental Health Act 1983, EL (90) P(85)/ LASSL (90) 5/ WHC (90) 38, May 1990. The code now says that ASWs should in all cases, advise the nearest relative of his right to make the application if the ASW has decided not to make one. Doctors should give this information where reasonably practicable (Code of Practice, paras. 2.27–2.30).

[2] The discharge order must be served on the hospital managers and may be set out in Form 34 (reg. 15(1)). The order can be delivered at the hospital to an officer of the managers authorised by them to receive it or by sending it prepaid post to the managers at the hospital (see reg. 3(3), and para. **6.13** *ante*.

[3] The discharge order must be served on the responsible social services authority (defined in s. 34(3)) and may be set out on Form 35 (reg. 15(2)).

discharge of a patient subject to guardianship takes effect immediately and cannot be barred. However in order to discharge a patient liable to be detained in hospital the nearest relative must give at least 72 hours notice in writing to the hospital managers. If within the 72 hour period the responsible medical officer furnishes to the managers a report[1] certifying that in his opinion the patient, if discharged, would be likely to act in a manner dangerous to himself or other persons, then the discharge order will have no effect. Where the RMO has issued a report barring the discharge, that nearest relative cannot exercise a discharge order again for a period of six months from the date of the report (s. 25(1)). In any case where a report is furnished in respect of a patient liable to be detained in pursuance of an application for admission for treatment (but not assessment) the managers must ensure that the nearest relative is informed (s. 25(2)). The nearest relative then has the power to apply to a Mental Health Review Tribunal within 28 days of receiving notice of the RMO's report barring the discharge order (s. 66(1)(*g*), (2)(*d*)). See further para. **17.02.3** *post*.

(*iv*) **To apply to a Mental Health Review Tribunal**—In addition to the power of the nearest relative to apply to a tribunal within 28 days of receiving notice that a report barring his discharge order has been furnished by the RMO, he can apply in the following circumstances: if the patient is liable to be detained under an **application for admission for treatment**, within 28 days after he is notified that a report has been furnished reclassifying the patient's mental disorder (s. 66(1)(*d*), (2)(*d*)); if the patient is liable to be detained under **a hospital order without restrictions** under Part III of the Act, between six and twelve months of the making of the order, and during each subsequent period of one year (s. 69(1)(*a*)); if the patient is subject to a **guardianship order** under Part III of the Act, within twelve months of the making of the order and in any subsequent period of twelve months (s. 69(1)(*b*))[2] (see para. **18.04** *post*). The foregoing powers to apply to a tribunal are exercisable by the acting nearest relative if a county court has made an order under s. 29(6).[3]

(*v*) **To authorise examination of patient**—For the purposes of advis-

[1] Any report given by the RMO for the purposes of s. 25 must be set out in Form 36, Pt. I and the receipt of that report must be recorded by the managers in the form set out in Form 36, Pt. II (reg. 15(3)).

[2] These powers to apply to a tribunal are exercisable by the **acting** nearest relative if a county court has made an order under s. 29. In such a case the **actual** nearest relative has a separate power to apply to a tribunal while the order continues in force (s. 66(1)(*h*), (2)(*g*). (See further para. **8.06** *below*).

[3] *Merrill v. Herefordshire District Council*, 27 July 1999, C.A., unpublished (Transcript: Smith Bernal). The one exception appears to be the power to apply to a tribunal following an order under s. 29 to displace the nearest relative. This power lies with the actual, not the acting, nearest relative (ss. 29(6), 66(1)(*h*), 66(1)(*ii*)).

ing as to the exercise by the nearest relative of the power to discharge a patient, any registered doctor authorised by the nearest relative may, at any reasonable time, visit the patient and examine him in private (s. 24(1)). Any doctor authorised for these purposes can require the production of and inspect any records relating to the detention or treatment of the patient in **any** hospital (s. 24(2)). A person who without reasonable cause refuses to allow visiting or examination of a patient or who refuses to produce any document for inspection commits an offence under section 129 (see para. **25.05** *post*).

(*vi*) **To receive information**—The nearest relative is entitled to receive information about his or her rights to make an application or to require the social services authority to consider making an application (see (*i*) above). After a patient is compulsorily admitted to hospital, the managers must, except where the patient requests otherwise, take such steps as are practicable to furnish the person (if any) appearing to be the nearest relative with a copy of written information given to a detained patient concerning his rights (s. 132(4)) (see para. **6.07** *ante*). Where a detained patient is discharged, other than by the nearest relative, the managers must (unless otherwise requested by the patient or nearest relative) take such steps as are practicable to inform the person (if any) appearing to be the nearest relative (s. 133) (see para. **6.08** *ante*).

Very few specific functions are conferred on relatives who are not the nearest relative. The views of **any** relative must be taken into account before an application under Part II is made by an ASW (s. 13(1)). Further, **any** relative can make an application to the county court for the appointment of an acting nearest relative (s. 29(2), and the county court can appoint the relative to act as nearest relative under the Act (s. 29(1)). See further para. **8.05** below.

8.04 Authorising Another Person to Act as Nearest Relative

The nearest relative under reg. 14 can authorise any person other than the patient or a person under section 26(5) (persons deemed not to be the nearest relative see para. **8.02** above) to perform the functions conferred upon the nearest relative. The nearest relative also at any time can revoke such authority. The authority or revocation must be in writing (reg. 14(1)). The nearest relative must also give a copy of the authority or revocation to the hospital managers if the patient is liable to be detained in hospital, or to the responsible social services authority and to the private guardian (if any) if the patient is under guardianship (reg. 14(2)). Any authority or revocation takes effect immediately upon receipt of the written authority by the person authorised (reg. 14(3)). A person authorised to act as nearest relative can exercise any of the functions given to nearest relatives under Part II of

the Act. A nearest relative who is mentally disordered and who cannot make a valid power of attorney could not make a valid authorisation of another person to act as nearest relative. (As to the making of a power of attorney see para. **23.27** *post*).

B. APPOINTMENT BY THE COUNTY COURT OF AN ACTING NEAREST RELATIVE

8.05 Application for Appointment of Acting Nearest Relative

The county court may direct that the functions of the nearest relative shall, during the continuance in force of the order, be exercisable by another person (s. 29(1)). The following people are entitled to apply to the county court for such an order: **any relative** of the patient; any person with whom the patient is residing (or, if the patient is in hospital, any person who was last residing with the patient before admission), or an approved social worker (ASW) (s. 29(2)). The county court can appoint any of the following persons to act as the nearest relative: the applicant or any other person specified in an application who, in the opinion of the court, is a proper person to act as the nearest relative and is willing to do so (s. 29(1)). However, if an ASW is the applicant, he **cannot** be appointed as nearest relative; instead the local social services authority can be so appointed (s. 29(1), (2)). This is for the purposes of ensuring continuity if the ASW should leave the employment of the authority. However the ASW would usually assume and exercise the functions of the nearest relative on the authority's behalf.

An application to the county court can be made on any of the following grounds:

(*a*) the patient has no nearest relative which can reasonably be ascertained;

(*b*) the nearest relative is incapable of so acting by reason of mental disorder or physical illness;

(*c*) the nearest relative unreasonably objects to the making of an application for admission for treatment or guardianship (see para. **8.07** below);

(*d*) the nearest relative has exercised without due regard to the welfare of the patient or the interests of the public his power to discharge the patient from hospital or guardianship under section 23, or is likely to do so in future. This suggests that the nearest relative must carefully consider whether the patient himself will suffer, for example, from exploitation or deteriorating health if discharged or if there would be a danger to the public. Clearly

some risk can be justified; the nearest relative must only pay due regard to these factors before exercising a discharge order as would any prudent nearest relative.

8.05.01 *Extension of period of detention until a final order is made*

If an application made either on ground (*c*) or (*d*) above is pending before the county court at the time when the period for detention for assessment is about to expire, there are provisions under section 29(4) for the period of detention to be extended. The period of detention is extended until the county court makes a final decision regarding the application.[1] If an order is made for the appointment of an acting nearest relative, the detention for assessment is extended for a further seven days after the final order; this is to give the acting nearest relative the opportunity, if he so wishes, to make an application for admission for treatment.

The power to extend the period of assessment beyond the normal twenty-eight day period can have major repercussions. These extensions, as explained by Lord Donaldson, can be "quite considerable" and raise serious concerns about the patient's liberty.[2] Patients may not be entitled to a tribunal hearing during this extended period, justifying reconsideration by Parliament.

One way to avoid the problem of extending the period of detention is to permit the county court to make *ex parte* and interim orders appointing an acting nearest relative. While the county court has these powers, as explained below, *ex parte* and interim orders also may raise concerns about the patient's liberty.

8.05.2 *Ex parte and interim orders*

The county court has general power under section 38 of the County Courts Act 1984 to make *ex parte* and interim orders. Consequently, county court orders to appoint an acting nearest relative can be made on an *ex parte* and interim basis. Moreover, the hospital managers and other authorities are entitled to rely on non-final county court orders when making decisions to admit and detain patients.[3]

In *R. v. Central London County Court, ex parte London*, the county court made an *ex parte* order directing that the functions as nearest relative be exercised by the local social services authority. Thereafter,

---

[1] For the purposes of s. 29(4) an application to the county court is disposed of at the expiration of the time allowed for appealing the decision or, if notice of appeal has been given, when the appeal is heard or withdrawn (s. 29(4)).

[2] *Perkins v. Bath District Health Authority and Another*; *R. v. Wessex Mental Health Review Tribunal, ex parte Wiltshire County Council* (1989) 4 B.M.L.R. 145.

[3] *R. v. Central London County Court, ex parte London* [1999] 3 All E.R. 991, 2 F.L.R. 161, [1991] 3 W.L.R. 1, [1999] Fam. Law 452, C.A.

the court made an interim order to that effect. Before the final hearing of the section 29 application, at which the judge made a final order, the hospital managers, relying on the interim order, admitted the patient for treatment under section 3 based on the application of the social services authority. The Court of Appeal held that, because the county court had the jurisdiction to make *ex parte* and interim orders, the hospital managers' decision to rely on those orders for the purposes of admission and detention were lawful.[1]

The Court of Appeal opined, however, that unless there are cogent reasons to the contrary, it is preferable that section 29 orders should be finally determined before authorities make an application for admission for treatment. Instead, the authorities should use the machinery for extension of detention for assessment afforded by section 29(4) until a final order is made. *Ex parte* orders are troubling because they do not give the nearest relative the opportunity to be heard and present evidence. Interim orders are also unsatisfactory because the patient may be detained for treatment against the nearest relative's wishes before the court finally determines that the nearest relative's judgment has been unreasonably exercised. If the court, having made an interim order, decides not to appoint an acting nearest relative, the patient's interests may have been undermined. In these circumstances, Stuart-Smith L.J. said, *obiter*, that, arguably, the hospital managers would have to discharge the patient from detention under section 3 on the ground that the application had been flawed.

8.06 Functions of the Acting Nearest Relative

The functions of the acting nearest relative appointed by the county court, while an order is in force, are specified in section 29(6). These comprise all the rights set out in para. **8.03** above. The acting nearest relative continues to exercise these functions during the continuance of the order even if the person who was the nearest relative when the order was made is no longer the nearest relative (s. 29(*b*)). Note that the **acting nearest relative** holds the power to apply to a Mental Health Review Tribunal. However, the **actual nearest relative** (*not* the one appointed by the county court) has a separate power to apply to a tribunal within twelve months of the date of the county court order, and in any subsequent period of twelve months during the continuance in force of the order (ss. 29(6), 66(1)(*h*), 66(2)(*g*)).

[1] *R. v. Central London County Court, ex parte London* [1999] 3 All E.R. 991, 2 F.L.R. 161, [1991] 3 W.L.R. 1, [1999] Fam. Law 452, C.A.

8.07 "Unreasonable" Objection to the Making of an Application

The meaning of an "unreasonable" objection by the nearest relative requires some discussion. Note, firstly, that the provision applies to an admission for **treatment** or reception into **guardianship** and not to any other kind of application. The reason for this is that these are the only cases where the nearest relative can object to an application and, therefore, prevent it from being made. The statute says that the objection of the nearest relative must be unreasonable; it need not be "correct" in the sense that the ASW and doctors take the same view. The court should not review afresh the merits of the case and substitute its discretion for that of the nearest relative, but enquire whether there is sufficient evidence upon which a reasonable person could conclude that an application should not be made.

In *W. v. L. (a mental health patient)*[1] a man who had perpetrated occasional senseless acts of cruelty on domestic animals and also threatened his wife was admitted to hospital under an emergency application (s. 29) and then for observation (s. 25) under the 1959 Act. He was considered by most professional opinion as only suffering from psychopathic disorder, save for one consultant psychiatrist who considered he was also mentally ill. A person over age 21 suffering only from psychopathic disorder could not be compulsorily admitted for treatment under the 1959 Act (s. 26) and, in any event, the nearest relative (his wife) objected to the application. The mental welfare officer brought proceedings to displace the nearest relative on the ground that the wife was objecting unreasonably. On the facts the objection could have been considered to be reasonable in the sense that reasonable people might disagree on the proper course to be taken. There was a conflict of medical opinion as to whether he was legally detainable and the wife felt she could manage at home by ensuring he took his medication. The Court of Appeal, however, affirmed the decision of the county court to appoint the local authority as acting nearest relative. The Court said it was not correct to look at the matter from the wife's point of view; the test was similar to that for "unreasonably" withholding agreement to an adoption—*i.e.* to ask what a reasonable person in her place would do in all the circumstances of the case. This raises the question as to whether any decision taken by a nearest relative contrary to medical opinion is necessarily unreasonable; or is the nearest relative also entitled to consider all of the circumstances, not only the doctor's recommendations, but his or her own assessment? Carrying on the adoption analogy the test to be preferred is whether the decision of the nearest relative was within the bounds of what an objectively reasonable person **could** have decided.

Lord Justice Lawton in *B.(A.) v. B.(L.) (mental health patient)*[2] said

---

[1] [1974] Q.B. 711, [1973] 3 All E.R. 884.
[2] [1980] 1 W.L.R. 116, [1979] 3 All E.R. 494, C.A.

that the "county court judge is concerned with the question of dispensing with the consent of the nearest relative. The judge must have some evidence that compulsory admission to hospital and detention is necessary". This is not the reasonableness test that the Mental Health Act provides for, but it may be that the Court was referring to the evidentiary basis upon which the Court of Appeal should review the county court's judgment. The case was essentially concerned with procedural matters.

Two county court cases offer persuasive support for the preferred reasonableness test suggested above; both cases concerned an application for admission for treatment under the 1959 Act that the nearest relative unreasonably objected to. In *S. v. G.*[1] the nearest relative asked the court for an adjournment to seek further medical evidence. The independent report supported the nearest relative's case and the court refused to make an order despite the patient's long history of mental illness and the opinion of the ASW, RMO and a general practitioner that he should be compulsorily admitted. Judge Pears said "it is vitally important that matters about which doctors are satisfied are clearly proved". He appears to have considered the nearest relative's character as important in determining reasonableness: "if he really thought that his son was a danger to the public he would not have objected to the application". The other interesting aspect of the case was the granting of an adjournment so that the father could assemble further psychiatric evidence, which influenced the decision.

In *N. v. S.*[2] the patient had been mentally handicapped and under medical supervision his entire life; he had engaged in periodic aggressive behaviour. The nearest relative had placed restrictions on the use of medication and would not permit blood tests needed to monitor particular medication. The judge found that the mother's constant complaints had been unreasonable. The test to be applied, however, was an objective one. "The Court must not substitute its own view for the view of the parents and I accept, on the authorities, that the question is whether **at the date of the hearing** the parents' refusal comes within the band of possible reasonable decisions and not whether it is right or mistaken and I accept that there is a band of decisions within which no court should seek to replace the parents' judgment with its own". Eight months had elapsed since the patient was admitted for observation and his condition had markedly improved, with less aggression and the need for fewer prescribed drugs. Given the changed circumstances, the nearest relative's objections were not unreasonable and the application was dismissed. It is suggested that when the Court of Appeal comes again to consider the matter this kind of formulation of a "reasonableness" test is to be preferred.

---

[1] [1981] J.S.W.L. 174.
[2] Unpublished, Croydon Crown Court, Jan. 1, 1983.

The Liverpool County Court went the other way in *Re B.*[1] The issue was raised as to whether, in deciding an application for displacement of the nearest relative, the court had to be satisfied that the grounds for guardianship were established. The court held that the test to be applied is what a "reasonable" person would do in the circumstances, which must be judged in relation to the statutory criteria for reception into guardianship. If there is acceptable evidence of a relevant mental disorder of an appropriate degree and the welfare of the patient requires reception into guardianship then an order for displacement would be made. It is not necessary for the court to be satisfied that the application for guardianship would be successful.

The courts have failed to come to a consistent position on the test to be applied in applications for displacement. It is suggested that when the Court of Appeal next comes to consider the matter, the formulation of the "reasonableness" test in *N. v. S.* is to be preferred.

[1] Unpublished, Liverpool County Court, Nov 29, 1985.

THIS PAGE IS DELIBERATELY LEFT BLANK

8.08 Discharge, Variation and Expiration of the Order

An order appointing an acting nearest relative can be **discharged** by the county court upon an application by the acting nearest relative. The nearest relative who was displaced may also make an application for the discharge of the order but only if the displacement was on ground (*a*) or (*b*) in para. **8.05** above (*i.e.* because the nearest relative at the time could not reasonably be ascertained or that the nearest relative was incapable of acting because of mental disorder or other illness). If, since the order was made, the nearest relative has ceased to be nearest relative (*e.g.* another relative now lives with or cares for the patient (s. 26(4)) then the new nearest relative can make an application to the county court for the discharge of the order (s. 30(1)).

The county court may **vary** the order by substituting a new acting nearest relative who must either be a local social services authority or any other person who in the opinion of the court would be a proper person to exercise those functions. The new acting nearest relative must be willing to take on that role. Such an order varying the original order may be made on application of an ASW or the acting nearest relative (s. 30(2)).

If the acting nearest relative dies then **any** relative can apply to the county court for discharge or variation of the order under section 30(1) or (2). Until the order is discharged or varied the functions of the nearest relative cannot be exercised by any person (s. 30(3)).

The order appointing an acting nearest relative made on ground (*a*) or (*b*) in para. **8.05** above can be made for a specified period (s. 29(5)) and, unless the order has been previously discharged by the court, it ceases to have effect at the expiration of that period. If no such period is specified the order ceases to have effect as follows:

(*i*) if the patient was on the date of the order liable to be detained for treatment or under a hospital order or equivalent order or was subject to guardianship, or if he becomes so liable or subject within three months of the date of the order, then the order ceases to have effect when he ceases to be liable to be so detained or subject to guardianship;

(*ii*) if the patient was not so liable to be detained or subject to guardianship on the date of the order or for three months thereafter the order ceases to have effect (s. 30(4)).

Note that these provisions for expiry of the order do not apply if the order was originally made on ground (*c*) or (*d*) (*i.e.* the nearest relative unreasonably objected to the making of an application or exercised his discharge order without due regard to the patient's welfare or the public interest).

If the order is discharged or varied it does not affect the validity of anything previously done by the acting nearest relative (s. 30(5)).

8.09 Procedure on Application to the County Court

The county court rules may provide for the hearing of section 29 applications otherwise than in open court,[1] for the admissability of evidence irrespective of whether it would be otherwise admissable, and for visiting and interviewing patients in private by or under the directions of the court (s. 31) (see County Court Rules 1981, S.I. 1981 No. 1687, Ord. 49, r. 12). The Court of Appeal has said that under the provisions of what is now r. 12(4) it is sufficient if medical reports are handed to the applicant's legal adviser in circumstances where the adviser could give advice and take instructions.[2]

8.10 Nearest Relative's Access to Confidential Patient Information

The nearest relative, in order to perform his or her functions, has access to information that patients may regard as sensitive and private. Most importantly, the nearest relative gains access to information during the Mental Health Review Tribunal process.[3] Nearest relatives who apply to a tribunal for discharge are considered "applicants" and are informed of the arrangements for the hearing, attend the hearing, and receive relevant documents. In cases where the application is made other than by the nearest relative, the tribunal must notify the nearest relative of the application and arrangements for the determination of the application. The nearest relative will also receive a copy of the decision which contains the tribunal's reasons. Patients are not permitted under the act to interfere with the nearest relative's access to this sensitive information and they are not entitled to apply themselves to the county court to replace the nearest relative. (See para. **8.05** above.)[4] The European Commission of Human Rights held admissible an application alleging that the nearest relative's access to sensitive information amounts to an interference with her private life in violation of Article 8 of the Convention.[5]

---

[1] The publication of information relating to proceedings before a county court is a contempt of court under s. 12(1)(*b*) of the Administration of Justice Act 1960.

[2] *B.(A.) v. B.(L.) (mental health patient)* [1980] 1W.L.R. 116.

[3] There are other instances where nearest relatives potentially could gain access to sensitive information. First, in most circumstances, ASWs must consult with the nearest relative prior to making an application for admission for treatment (s. 11(4)). Second, prior to exercising an order to discharge the patient, the nearest relative can appoint a medical practitioner to examine the patient and that practitioner can require the production of patient records (s. 24).

[4] There are instances, however, where the patient does have a veto over the information that may be received by the nearest relative. While the detaining authority has a duty to notify the nearest relative that the patient is to be discharged, this duty can be overridden at the patient's request (s. 133(2)). Similarly if a patient is to be discharged under supervision in accordance with ss. 25A–25H of the 1983 Act (inserted by the Mental Health (Patients in the Community) Act 1995, provisions requiring consultation with, or notification to, the nearest relative are subject to the patient's veto except if the patient has a propensity to violence or the RMO considers that it is appropriate for the consultation and information process to take place.

[5] *J.T. v. United Kingdom*, Appl. No. 26494/95, 23 E.H.R.R.C.D. 81 (26 February 1997).