



MENTAL HEALTH SERVICES POLICY

GUIDELINES FOR THE APPOINTMENT/DISPLACEMENT OF NEAREST RELATIVE

1. Introduction

Relatives have an important role to play in the assessment, treatment and care of patients who may require this under the Mental Health Act 1983 as amended by the Mental Health Act 2007. It is important to remember that the nearest relative for the purposes of the Act may not be the same person as the patient's next of kin. The identity of the nearest relative may also change with the passage of time e.g. if the patient enters into a marriage or civil partnership.

The nearest relative has legal responsibilities to safeguard the client's interests and to help ensure that the compulsory powers of the Act are used appropriately. The definition of a nearest relative is contained in Section 26 of the Act. Defining the nearest relative can be complex and should be undertaken by Approved Mental Health Professional (AMHP) or someone who has experience of the Act.

These guidelines are to advise staff of the action that will be taken by the AMHP should a patient not have the benefits of a nearest relative to act for them or they wish to displace the nearest relative due to identified problems. The nominated nurse should discuss the problems with the AMHP and the AMHP will take appropriate action.

2. Delegation of nearest relative functions

A nearest relative is not obliged to act as such and can authorise in writing another person to perform the functions of the nearest relative on their behalf.

3. Where there is no nearest relative

Where the AMHP discovers that the patient appears to have no nearest relative, the AMHP should advise the patient of their right to apply to the County Court for the appointment of a person to act as their nearest relative.

4. Grounds for making an application for Appointment/Displacement

The grounds for making the application are contained in Section 29 and are as follows:

- That the patient has no nearest relative within the meaning of this Act, or that it is not reasonably practicable to ascertain whether he/she has such a relative, or who that relative is

- The nearest relative of the patient is incapable of acting as such because of illness or mental disorder
- The nearest relative is otherwise not a suitable person to act as such
- That the nearest relative of the patient unreasonably objects to an application for admission for treatment or a guardianship application in respect of the patient: Or
- That the nearest relative of the patient has exercised the power to discharge a patient without due regard to the patient's welfare or the safety of the public.

The effect of a Court Order appointing an acting nearest relative is to displace the person who would otherwise be the patient's nearest relative.

5. Who can make an application to the Court?

An application to displace the nearest relative may be made by any of the following people

- The patient
- Any relative of the patient (as defined in Section 26(1) of the Act)
- Any other person with whom the patient is residing (or, if the patient is then an in-patient in a hospital, was last residing before he was admitted), or
- An AMHP acting on behalf of a local social Services authority (LSSA)

6. Application made by the Patient

AMHPs should bear in mind that some patients may wish to apply to displace their nearest relative but may be deterred from doing so by the need to apply to the county court.

Where a patient wishes to make an application to displace their nearest relative an AMHP should discuss with the patient their reasons for wanting to displace their nearest relative.

Where the AMHP agrees that it is in the best interests of the patient that the nearest relative should be displaced then the AMHP should offer to make the application on behalf of the patient.

Where the AMHP does not agree with the patient's decision to displace their nearest relative they should provide or arrange support for the patient to make the application themselves. This can include support from an independent mental health advocate (from April 2009)

Hospital Managers should provide support to detained patients to enable them to attend court, if they wish, subject to the patient being granted leave under section 17 for this purpose.

If the court decides to interview the patient (as the applicant), the court has the discretion to decide where and how this interview may take place.

7. Application made by an AMHP

AMHPs will need to consider making an application for the displacement or appointment if:

- They believe that a patient should be detained in hospital under Section 3 of the Act, or should become subject to a Guardianship under Section 7 but the nearest relative objects unreasonably.
- They believe that the nearest relative is likely to discharge a patient from detention or guardianship unwisely.
- A patient has no identifiable nearest relative or their nearest relative is incapable of acting as such
- They have good reason to think that a patient considers their nearest relative unsuitable and would like them to be replaced and it would be unreasonable in the circumstances to expect the patient or anyone else, to make the application

Factors which an AMHP might consider when deciding to make an application to displace a nearest relative on the grounds of unsuitability, and when providing evidence in connection with an application could include:

- Reason to think that the patient has suffered or is suspected to have suffered abuse at the hands of the nearest relative or is at risk of suffering abuse
- Evidence that the patient is afraid of the nearest relative or seriously distressed by the possibility of the nearest relative being involved in their life or their care.
- A situation where the patient and nearest relative are unknown to each other, there is only a distant relationship or their relationship has broken down irretrievably
- An important consideration will be the patient's psychiatric history, the person's circumstances and their estimated stay in hospital. Clearly, if a person with a long standing mental illness, who is known to the hospital, is admitted and there is no nearest relative (or the nearest relative is incapable of acting), then an application to the County Court must be considered.
- There will be other situations where other Team Managers such as those responsible for social work services for older people with a mental illness will identify the need to seek the appointment of a person acting as nearest relative or displace a nearest relative.

An AMHP should prior to making an application to displace the nearest relative look at possible alternatives, i.e. that the nearest relative will agree to delegate their role as the patient's nearest relative to someone else or providing support for the patient (or someone else) to make an application themselves.

Each situation will need to be carefully considered and in situations where an application has been made the responsibility for this rests with the AMHP who made the application in conjunction with their Team Manager.

The legal responsibilities of the nearest relative are at Section 2. However the role of "acting as nearest relative" is not just limited to statutory functions as there is a responsibility on the person acting as nearest relative to generally act in the best interests of the patient. If the functions of the nearest relatives are transferred to the local Social Services Authority then the Authority acquires additional responsibilities

Prior to any application being made to the County Court the AMHP must make every attempt to ensure that there are no other relatives, friends or professional (e.g. solicitor, accountant) who are willing to act as the nearest relative. If there is such a

person then depending on the circumstances of the case the rights can be transferred or the appropriate application made to the County Court.

Where an application is made and granted and there is no other appropriate person to become the person acting as nearest relative, the Director of Adult and Community Services can be appointed by the Court. These responsibilities will be undertaken on his behalf by an appropriate Social Worker.

8. Procedure for appointment and displacement.

The procedure involves the AMHP, the relevant Social Services Team Manager, the relevant Social Services Service Manager and a Legal Services Solicitor from the Corporate Services Directorate. The decision to apply to the County Court rests with the relevant Social Services Service Manager, having regard to any legal advice which the Solicitor to the Council has given. These procedures focus on situations where a nearest relative needs to be displaced. The procedures also apply where the appointment of a nearest relative is being sought because there is no nearest relative within the meaning of the Act.

The Solicitor will require

- An indication of the urgency of the matter.
- Information and a full report on the client concerned including his/her mental health, details of any hospital involved, Consultant Psychiatrist, other relatives involved, other professionals involved, dates of visits/contacts, copies of medical recommendations and AMHP application, etc.
- In the case of displacement, details of the nearest relative (**The Respondent**) to be displaced. **The Respondent** has the right to contest the application.
- Relevant written information from medical personnel. (This is particularly important if the grounds for displacing the nearest relative are those under Section 29(3) (b))
- Information as to who will become the person acting as nearest relative. In situations where other family members or friends are thought suitable, careful consideration will need to be given to the effect of the appointment. Where practicable the AMHP should consult with the patient about their preferences and concerns about who the AMHP is proposing.
- The AMHP should advise the Solicitor of the respondent's attitude to the application. The County Council would wish to act in a positive and helpful way, as far as possible, to the respondent.
- If the grounds for displacing the nearest relative are those of, incapable of acting as such, by reason of mental disorder or other illness then a 'next friend' e.g. another relative, or a solicitor with some knowledge of the respondent must be located if possible. The respondents own legal interests will have to be considered. The 'next friend' will be contacted by the Solicitor to the Council to ascertain if the respondent will be defending the case.
- If the case is likely to be defended then consideration will have to be given to witnesses, e.g. Consultant Psychiatrist that may be required to attend.
- If the patient has any concerns that the information given to the court on the suitability of the nearest relative may have implications for their own safety, an application can be made to the court seeking permission not to make the

current nearest relative party to the proceedings. The reasons for the patient's concerns should be set out clearly in the application.

9. The Legal Procedures

- The Solicitor will draft an Originating Application in the name of the AMHP on behalf of Dorset County Council. A date will be allocated to the case at the time of issue. Depending on the circumstances (e.g. whether the case is contested) this could be within days or up to 4 weeks.
 - The Notice of the Hearing date and the Originating Application are served by the AMHP personally on the respondent because:
 - a. these respondents frequently deny receipt or do not turn up at Court and it is necessary to prove service in their absence.
 - b. the AMHP will need to show he/she has discussed the contents with them, and
 - c. time is frequently too short to allow for periods of service
 - The Solicitor will arrange with the Chief Clerk to the County Court for the case to be heard. This could be at Bournemouth, Poole or Weymouth, depending on the urgency of the situation and the availability of a Judge. The solicitor will ask for the interim hearing before the District Judge to be dispensed with because:
 - a. it delays things going through the listing process twice.
 - b. there are no areas requiring directions as the procedure is straight forward, and
 - c. the District Judge does not have power to make a final order.
- Courts like interim hearings to deal with those cases which are going to go by early consent with the District Judge can deal with.
- If the patient is already detained in hospital within the provisions of Section 2 and an application has been made to the Court, the Section 2 in accordance with Section 29(4) is then extended:
 - a. until the application to dispose the Nearest Relative has been finally disposed of
 - b. if an order is made for a further seven days (to enable any necessary application for a Section 3 to be made if the County Court grants an order)
 - The solicitor will attend the court with the AMHP. The case will usually be heard 'in Chambers' If the application is not opposed a District Judge will hear the case. If the application is opposed the case will be heard by a Full Judge. The Court has discretion to accept the written report if the respondent does not appear.
 - The AMHP attends Court to prove the evidence and to formally ask for the order. In Court the AMHP will have to take the Oath or Affirm. The Court has the discretion to accept the written report where there is no respondent or where the respondent fails to appear.

- If the order is granted a copy of the order will be given to the AMHP. Arrangements will be made for a copy, where appropriate, to be served on the displaced relative.
- The AMHP should send copies of the order to the Director of Adult and Community Services, Social Services Service Manager and the appropriate Manager in charge of DRH Independent Mental Health Hospital. A copy must be placed in the patient's file by DRH Manager.
- The displaced nearest relative has a right of appeal to the Court of Appeal but only on a point of law. The displaced nearest relative can apply for the patient's case to be reviewed by the Mental Health Review Tribunal in accordance with Section 66(1)(h)

10. The Effect of the Order

- If the order is granted then the rights of the nearest relative are transferred to the person acting as nearest relative. This could be a person who in the opinion of the Court is a proper person to act as a nearest relative and is willing to do so, or the local Social Services Authority.
- If Dorset Social Services Authority is appointed as acting as nearest relative then those responsibilities are delegated to Social Services Service Managers who will ensure that an appropriate Social Worker is allocated to undertake the necessary duties.
- If the functions of the nearest relative are transferred to the local Social Services Authority then the Authority acquires additional duties. If the patient is admitted to any hospital or nursing home the authority must in accordance with Section 116 of the Act arrange for the patient to be visited whilst in hospital or nursing home in the same way that a parent would be expected to visit a child in similar circumstances.

11. The Duration of the Order

- If the order was granted under Section 29(a) 'no nearest relative' or Section 29(b) 'nearest relative incapable of acting' the Court can specify a time limit for the order.
- If the order was granted under Section 29(c) 'nearest relative objects' or Section 29(d) 'exercised power to discharge without due regard' the order ceases to have effect when the patient is no longer liable to be detained or subject to guardianship. The order also ceases to have effect if no application is made for detention or guardianship within three months of granting of the order.

12. Discharge of the Order

- This order can be discharged by an application to the County Court (Section 30(1)). This can be undertaken by;
 - a) the person having the functions of the nearest relative by virtue of the order.
 - b) the actual nearest relative if the order was originally made under Section 29(3) 'no nearest relative' or Section 29(3)(b) 'nearest relative incapable of acting' and it transpires that the patient has a nearest relative within the meaning of the Act or that the nearest relative is subsequently capable of acting as such.

- c) a new nearest relative if it transpires that the person who was the nearest relative at the time of the order is no longer the nearest relative.

13. Variation of the Order

- Section 30(2) of the Act allows for the Order to be varied. Application can be made by:
 - a) the person having the functions of the nearest relative by virtue of the order
 - b) an Approved Mental Health Professional.
- The County Court can vary the order and substitute a new nearest relative who could be the local Social Services Authority or any other person who in the opinion of the Court is able to exercise the functions of the nearest relative and is willing to do so.
- If the person who is the nearest relative by virtue of an Order under Section 29 dies then in accordance with Section 30(3) the duties of the nearest relative cannot be exercised by anybody else. However, any relative within the meaning of the Act can then apply to the County Court for the Order to be discharged or varied.

NOVEMBER 2008

REVIEW NOVEMBER 2011