

## **Guidance for Approved Mental Health Professionals (AMHPs) on Appointing and Displacing Nearest Relatives Within the Context of Assessments Under the Mental Health Act 1983/2007**

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## Version History

<b>Version</b>	<b>Date</b>	<b>Reason for Change</b>
1	17/10/2008	Wendy Garrard - Updated/reviewed previous policy to ensure compliance with amended Mental Health Act
2	12/02/2013	Steve Dawson/ David Pugh/ Karl Gluck – Reviewed current policy in light of CQC inspection and recommendations to strengthen emphasis on appointment and to ensure compliance with MCA 2005. Plus explicit policy statement and Appendices C and D
3	01/12/2018	Anouska Inns – Updated previous policy to ensure compliance with amended Code of Practice 2015.

## Guidance for Approved Mental Health Professionals on Appointing and Displacing Nearest Relatives Within the Context of Assessments Under the Mental Health Act 1983/2007

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## **1. Policy Statement**

- 1.1 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 as a person's next of kin. The identity of the nearest relative may also change with the passage of time, e.g., if the person enters into a marriage or a civil partnership.
- 1.2 The nearest relative's responsibilities contribute to the safeguarding of the person's interests and to help to 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 Professionals (AMHPs).
- 1.3 This policy aims to ensure the following:
  - That staff are advised of the action taken by an AMHP should the patient not have the benefit of a nearest relative to act for them or should they wish to displace the nearest relative for identified problems
  - That the process for nominating a nearest relative is clear
  - Outline the roles and responsibilities of the nearest relative
  - Outline the process and whereby the role of the nearest relative can be delegated

## **2 PURPOSE**

- 2.1 This guidance is intended to assist AMHP's in their consideration of whether to make an application for displacement of a nearest relative and who it would be appropriate to nominate to be appointed as nearest relative.
- 2.2 The attached guidance is intended to help AMHPs manage issues relating to the Nearest Relative, such as: consulting with the Nearest Relative; applying to displace the Nearest Relative and seeking advice about the legal process.

## **3 SCOPE**

All AMHPs, Responsible Clinicians, Approved Clinicians, Acute Ward Managers and Fieldwork Team Managers.

## 4 DEFINITIONS

<b>AMHP</b>	Approved Mental Health Professional
<b>CoP</b>	Code of Practice
<b>FSC</b>	Families and Social Care
<b>IMCA</b>	Independent Mental Capacity Advocate
<b>IMHA</b>	Independent Mental Health Advocate
<b>GCC</b>	Gloucestershire County Council
<b>LSSA</b>	Local Social Services Authority
<b>MCA</b>	Mental Capacity Act
<b>MHA</b>	Mental Health Act

## 5 LEGAL CONTEXT

- 5.1 The Mental Health Act 1983 as amended by the Mental Health Act 2007:S29 gives powers to the county court with respect to displacement of a nearest relative on the basis of specified grounds and to appoint a person to take on the particular function of nearest relative for a patient.
- 5.2 The patient, any relative of the patient, any other person with whom the patient is residing (or, with whom the patient was last residing before admission to hospital) or an approved mental health professional (AMHP) can apply to the county court on the grounds that:
- 5.3 Section 29(3)
- a) The patient has no nearest relative within the meaning of the Act, or that it is not reasonably practicable to ascertain whether he has such a relative, or who that relative is;
  - b) The nearest relative of the patient is incapable of acting as such by reasons of mental disorder or other illness
  - c) The nearest relative of the patient unreasonably objects to the making of an application for admission for treatment or a guardianship application in respect of a patient
  - d) The nearest relative of the patient has exercised without due regard to the welfare of the patient or the interests of the public his power to discharge the patient under this part of the Act, or is likely to do so
  - e) The nearest relative of the patient is otherwise not a suitable person to act
- 5.4 Additionally the provisions of Section 38 of the County Court Act 1984 provide the county court with the power to make an interim order which is a temporary order and which would require cogent reasons to support the making of an order.

## 6 ROLES AND RESPONSIBILITIES OF NEAREST RELATIVES

- 6.1 The Nearest Relative may apply for:
- Admission for assessment or treatment
  - Admission in an emergency
  - Guardianship
- 6.2 The Nearest Relative must be consulted where practicable before the AMHP applies for admission under s2 for treatment or Guardianship. The Nearest Relative **must** be consulted for s3 unless it is not reasonably practicable or would involve unreasonable delay. The application cannot be made if the Nearest Relative objects Section 11(4).
- 6.3 The Nearest Relative should be informed when the Approved Mental Health Professional (AMHP) applies for admission for assessment
- 6.4 The Nearest Relative has power to discharge a patient detained for assessment or treatment with certain restrictions. The Nearest Relative also has power to discharge a patient from Guardianship.
- 6.5 Section 116 requires the Local Authority, when acting as a Nearest Relative to a patient in hospital, whether for treatment for mental disorder or any other reason, to arrange for visits to be made to him/her and for such other steps to be taken as would be expected to be taken by his/her parents.

## 7 PRACTICE GUIDANCE ON APPOINTMENT AND DISPLACEMENT ON GROUND OF UNREASONABLE OBJECTION

- 7.1 In summary, grounds for making an application to the Court for appointment of the nearest relative or displacement of a nearest relative are as follows:
- There is no Nearest Relative or the Nearest Relative cannot be ascertained.
  - The Nearest Relative is incapable of acting by reason of illness or mental disorder.
  - The Nearest Relative unreasonably objects to section 3 application or section 7 guardianship being made.
  - The Nearest Relative has discharged the patient from a section without regard to the patient's welfare or the public interest.
  - The Nearest Relative is not a suitable person to act as such.

## 7.2 Other Factors & Considerations

7.2.1 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 person 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 person 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 person 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 person'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 known nearest relative (or the relative is incapable of acting), then an application to the County Court must be considered.

7.3 The AMHP should discuss the case with the AMHP Service Lead and/ or Head of Profession for social care and;

- If Community AMHP - flag up the urgent need for this to be allocated to the AMHP Hub as it is unlikely to be resolved in one duty day
- Consider involving County Legal and Democratic Services (LDS).
- Advise others involved in the assessment not to pre-determine whether a s2 or s3 may be the right outcome. Once the process for either has begun (e.g. by preparing a medical recommendation in advance of an assessment) it could be unlawful to change.

7.4 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 the AMHP Service Lead.

7.5 Prior to making an application to the County Court, the AMHP where practicable should attempt to ensure that there are no other relatives or friends 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.

7.6 Check:

Check	Tick
Is s3 the most appropriate detention to be considering?	
CoP 14.27 legitimises the use of s2 e.g. when there is a need to carry out a new inpatient assessment, to re-formulate a treatment plan or to reach a judgement as to whether that patient would accept treatment on a voluntary basis.	

That the person objecting to the best of your knowledge and belief <i>is</i> the nearest relative.	
That the nearest relative is truly objecting. It can be that the objection represents a misunderstanding which can be resolved.	
Whether the apparently objecting nearest relative would wish to hand over his/her responsibilities to another person who may be better placed to undertake the task	

- 7.7 Having liaised fully with others who know the case well, including care coordinator and read the notes, then interview nearest relative. This may need to be done on more than one occasion. Form a view regarding the reasonableness of any remaining objection
- 7.8 Should objections still be raised, make a preliminary decision about whether the patient should be detained with some urgency. Consider less restrictive options and discuss further with RC/ AC and team and attempt to agree an alternative course of action.
- 7.9 Discuss with both recommending doctors and if their views coincide with the RC/AC, arrange for them to speak to nearest relative and/ or significant others listening to concerns and explaining their plans in depth.
- 7.10 If this fails to convince nearest relative and there is no alternative to detention then liaise with AMHP Service Lead and discuss if the NR should be displaced. Consider if there is anyone else who is suitable to take on the role of NR.
- 7.11 If there is no suitable person to take on the role of NR, then legal advice should be sought and consideration should be taken to go to court to displace/ appoint NR. The court has the discretion to appoint the person nominated to act as NR if the person is 'in the opinion of the court' a suitable person. Each case will be considered on its own merits. The nominated Nearest Relative will be the Director of Adult Social Services but can also be named generically as the Local Authority. This function can be delegated to a named officer who should not be involved in providing services to the mentally disordered individual to avoid a conflict of interest.

## 8. WHO CAN MAKE AN APPLICATION TO COURT?

- 8.1 The following can make an application to court:
- Any relative
  - Any person with whom the person resides or, if an in-patient, was last residing before admission to hospital.
  - An Approved Mental Health Professional (AMHP).



## **9. WHEN AN APPLICATION CAN BE MADE BY THE PATIENT TO THE COURT**

- 9.1 AMHPs should bear in mind that some people who may wish to apply to displace their nearest relative may be deterred from doing so by the need to apply to the County Court. Where a person 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.
- 9.2 Where the AMHP agrees that it is in the best interests of the person that the nearest relative should be displaced then the AMHP should consider whether it would be practicable to make the application on behalf of the person.
- 9.3 Where the AMHP does not agree with the person'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.

## **10. WHEN AN APPLICATION CAN BE MADE BY AN AMHP TO COURT**

- 10.1 AMHPs will need to consider making an application for the displacement or appointment if:
- They believe that a person 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 person from detention or guardianship unwisely or has exercised their right to discharge the patient and that is not considered to be in the best interests of the patient
  - A person has no identifiable nearest relative or their nearest relative is incapable of acting as such.
  - They have good reason to think that a person considers their nearest relative to be unsuitable.
  - See appendix 4 for a pro-forma of the AMHP report for court purposes.

## **11. What action needs to be taken where the patient lacks capacity**

- 11.1 Where the patient lacks capacity, steps should be taken to engage an Independent Mental Health Advocate (IMHA) to act on the patient's behalf. POhWER is the advocacy service in Gloucestershire and a referral can be made by contacting 0300 0031162.

## **12. Delegation of role by Nearest Relative, Regulation 24 of the Mental Health Act (Hospital, Guardianship and Treatment) (England) Regulations.**

- 12.1 The Nearest Relative of a person may authorise in writing another person to take on the role of Nearest Relative (see appendix 3 for printable form). The delegation will continue until revoked in writing. If the Nearest Relative delegates their functions, the following must be notified:
- (a) the person authorised
  - (b) in the case of a patient liable to be detained in a hospital, the managers of that hospital
  - (c) in the case of a patient subject to guardianship, the responsible local social services authority and to the private guardian, if any
  - (d) in the case of a community patient, the managers of the responsible hospital

## **13 Children and Young People in Local Authority Care: Section 27**

- 13.1 Section 27 of the Mental Health Act 1983 refers to children who are 'looked after' by the Local Authority. This means that the Local Authority has full Parental Responsibility for the child. When a child is looked after and the LA has full Parental Responsibility, the LSSA will be the Nearest Relative.

## **14 Children and Young People subject to guardianship, special guardianship or Child Arrangement order: Section 28**

- 14.1 However, there are occasions where Parental Responsibility will be divided between the parents and the LA. If a guardian or special guardian has been appointed for a child or a young person under 18, that person will be deemed to be the nearest relative to the exclusion of anyone else. A guardian in this instance refers to someone who is sharing Parental Responsibility with the Local Authority. This does not refer to a Guardian under the Mental Health Act 1983.
- 14.2 Similarly, if a Child Arrangement Order is in force (as defined in section 8 of the Children Act 1989) in relation to a child or young person under 18, the person(s) named in the order will normally be deemed to be the nearest relative to the exclusion of anyone else.
- 14.3 The only occasions where guardians or people named in Child Arrangement order would not be eligible to act as nearest relative would be:
- If they are under 18 years of age
  - If they do not live in the UK, Channel Islands or Isle of Man
  - If they are the separated spouse of the young person
- 14.4 In the case of adopted children, full Parental Responsibility has been granted to their adopted parents on the date of the Adoption Order.

## **15. Discharge of the Order**

- 15.1 The order granting nearest relative status to an individual or organisation can be discharged by an application to the County Court. This can be undertaken by:
- The person having the functions of the nearest relative by virtue of the order
  - 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 capable of acting as such.
  - 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.

## **16. Review of policy**

- 16.1 This policy will be reviewed yearly.

## **17. References**

- The Mental Health Act 1983 as amended by the Mental Health Act 2007
- The 2015 Code of Practice to the Mental Health Act
- The Mental Health Act Manual 20th Edition: Richard Jones

## **18. Appendices**

- 1 Choosing a suitable acting nearest relative
2. The functions of a nearest relative
3. Authorising Another person to Act as Nearest Relative Mental Health Act ~ (Hospital, Guardianship & Consent to Treatment) (England) ~ Regulations 2008 (printable format)
4. AMHP Report pro-forma for the Purposes of Appointment and Displacement of Nearest Relative

## 1 Choosing a suitable acting nearest relative

Considerations	
1.	Wherever practicable, consult the patient about their preferences and any concerns they have about the person the AMHP proposes to nominate
2.	Consider any language, gender, age and cultural needs
3.	Identify if there is a suitable person within the patient's family or social network
3.	If there is no suitable person within the patient's family or social network, it is in the spirit of the Act that the Nearest Relative should be a person with the best existing knowledge of the person concerned. This could mean that the or the AMHP who best knows the person should be the Nearest Relative.
4.	Care should be taken to ensure that there is no potential conflict of interest in the choice of NR
5.	Does the person understand the purposes of the role of NR and is the person willing to fulfil the functions of NR?

## 2 The functions of nearest relative

Functions	
1.	If a member of staff of the LSSA is appointed to fulfil the functions of NR, Section 116 (2) c) requires them to arrange visits to the patient and take such steps as would be “expected to be taken by parents”. This requires the allocation of a specific professional.
2.	To be consulted within the context of a Mental Health Act assessment and advised of the outcome
3.	To be able to exercise the right to request discharge of the section
4.	To be consulted regarding plans to discharge the section and the patient from hospital or guardianship
5.	To be consulted regarding supervised community treatment
6.	To be consulted within the context of a Mental Health Review Tribunal
7.	To receive information
8.	To be able to delegate the functions to another person
9.	To be able to apply for the patient to be detained under Section 4,2,3, or placed on a guardianship order under section 7
10.	To make a Section 13(4) request for an AMHP to consider a patient’s case with a view to making an application for his admission to hospital and to receive information in writing if the AMHP decides not make an application

**3. Authorising Another person to Act as Nearest Relative  
Mental Health Act ~ (Hospital, Guardianship & Consent to  
Treatment) (England) ~ Regulations 2008**

Authorising Another person to Act as Nearest Relative  
Mental Health Act ~ (Hospital, Guardianship & Consent to Treatment)  
(England) ~ Regulations 2008

<b>(1) Name</b>		
Address		
Post Code		Tel:

Being *(Within the meaning of s.26, Mental Health Act 1983)* The Nearest Relative  
Of:

<b>(2) Name</b>		
Address		
Post Code		Tel:

Hereby Authorise

<b>(3) Name</b>		
Address		
Post Code		Tel:

To exercise the function under the Act of that person's Nearest Relative

I agree to this letter being passed to the person I have authorised. In addition a copy given to the Hospital Managers in respect of a person liable to be detained in Hospital and / or a copy being passed to the Social Services Department if the person is subject to Guardianship.

I understand that whilst I retain the authority to authorise another person to act as Nearest Relative, I may revoke this at any time by giving notice, in writing, to the person I originally authorised.

Signature	Date
Please print name:	

#### **4. AMHP Report pro-forma for the Purposes of Appointment and Displacement of Nearest Relative**

- Patients name:
- Address:
- Date of birth:
- Diagnosis:
- Current location:
- Legal status:
- Date of Detention:
- GP:
- Responsible Clinician:
- Care Co-ordinator:
- Current Nearest Relative:
- Address:
- Report Author:
- Professional Qualifications:
- Short history of involvement with patient:
- Why the patient should be detained under the Act or accepted into Guardianship:
- Risk to/from the patient:
- Current/ proposed care plan:
- Actions of NR, including any history of NR's objection, if any:
- Rationale for Displacement:
- Proposed Nearest Relative:
- Address:
- Rationale for Appointment: