RE F (MENTAL HEALTH ACT: GUARDIANSHIP)

Court of Appeal

Evans, Thorpe and Mummery LJJ

30 September 1999

Mental health – Child shortly attaining majority accommodated but wishing to return home – Local authority seeking guardianship under Mental Health Act 1983 – Whether wardship preferable route

T, aged 17, was the eldest of eight children born to an elderly father and his much younger wife. She had a mental age assessed as being within the 5–8 year range. In November 1998, emergency protection orders were obtained in relation to all eight children on the basis of chronic neglect, inadequate standards of parenting and exposure to adults prone to sexual exploitation of children, and they were removed from the home. Interim care orders were made in relation to the seven younger children but could not be made in relation to T since she was over 16. Consequently, she was accommodated on a voluntary basis until the parents withdrew their consent. The local authority believed that her return home would expose her to risk and was granted a guardianship order under the Mental Health Act 1983 (on the basis that T suffered from mental impairment within the meaning of s 1(2) of the Act) rather than invoking wardship. On appeal, it was argued that T's conduct in wanting to return home could not be labelled 'seriously irresponsible' as the section required, but rather that wardship was the more appropriate proceeding for T's protection. The local authority argued that such conduct was an issue of fact, that the judge was entitled to reach the conclusion he did and that it was almost too late to invoke wardship.

Held – allowing the appeal –

(1) A restrictive construction of mental impairment under s 1(2) of the Mental Health Act 1983 was to be preferred. The deficiencies of a home are more apparent to other adults than to the young who have known no other and the urge to return there is almost universal. Here, T would not be exposed to risks from which she was currently protected and it was simply inapt to construe her determination to return as constituting seriously irresponsible conduct.

(2) The judge was in error in rejecting wardship as the more appropriate remedy as an immediate advantageous consequence would have been the appointment of the Official Solicitor as guardian ad litem thereby granting the advantage of separate representation, and in practical terms would have enabled one judge to consider the needs of all eight children in consolidated proceedings.

Per curiam: the Court of Appeal would wish to see the Family Division judge given wider powers to deal with the welfare of adult patents where that cannot be fully achieved under the provisions of the Mental Health Act 1983.

Statutory provisions considered

Mental Health Act 1959, s 33
Mental Health Act 1983, ss 1, 7, 8, 29
Children Act 1989, s 100(3)
Mental Health (Hospital and Guardianship) Regulations 1960 (SI 1960/1241), reg 6(2)
Civil Procedure Rules 1998 (SI 1998/3132), r 12

Cases referred to in judgment

C (Mental Patient: Contact), Re [1993] 1 FLR 940, FD
Cambridgeshire County Council v R (An Adult) [1995] 1 FLR 50, FD

Cases cited but not referred to in judgment
D-R (Adult: Contact), Re [1999] 1 FLR 1161, CA
R v Bournewood Community and Mental Health NHS Trust ex parte L [1998] 2 FLR 550, [1998] 3 WLR 107, [1998] 3 All ER 289, HL
R v Kent County Council ex parte Marston (unreported) 5 September 1997, CA
R v Mental Health Review Tribunal ex parte Ryan [1992] COD 157

Richard Gordon QC and *Sarah Forster* for the father
Nigel Pleming QC and *Fenella Morris* for the local authority

THORPE LJ (Giving the judgment of the court):
The parties to this appeal are effectively the London Borough of Hackney and JF. The appeal arises out of Mental Health Act proceedings in the Shoreditch County Court. However, in reality the focus of the case is upon TF who was born on 15 November 1981 and who will shortly attain her majority. Furthermore, the real issues in the case surround the neglect, abuse and protection of children.

JF is 75 years of age and his wife D is 49 years of age. They began to cohabit in 1980 and T is the eldest of eight children born to them between 1981 and 1992. They married in 1984. In the presentation of their case for care orders in relation to the F children Hackney prepared a chronology in 1999 which runs to 15 pages building up a picture of chronic neglect, including failure to provide adequate standards of parenting as well as cleanliness in the home. Within the chronology there are also numerous instances in which the children have been exposed to contact with adults prone to sexual abuse or exploitation of children. Those proceedings are not before this court but our understanding is that Hackney's case is disputed and that the facts will be determined at a 10-day final hearing fixed for November next. If Hackney prove a large measure of what is asserted in the chronology it is perhaps surprising that proceedings were not issued until 11 November 1998 when Hackney obtained emergency protection orders in relation to all eight children. The children were removed from the family home in E5 and T, together with two of her sisters, was placed at Agatha House, a specialist children's home in N16. On 19 November 1998 the emergency protection order in respect of T was extended to 26 November 1998 and interim care orders were made in respect of the seven other children. An interim care order could not be made in respect of T since she was over 16. After 26 November 1998 T's accommodation at Agatha House was extended on a voluntary basis. On 8 December 1998 she was examined by a consultant paediatrician who concluded that she had experienced penile penetration. On 17 February 1999 the parents withdrew their consent to T's continuing accommodation at Agatha House. Hackney were clear that to permit T's return home would expose her to risk. The legal path to prevent that return was far from clear.

One option was to apply under s 100(3) of the Children Act 1989 for leave to issue proceedings in respect of T under the inherent jurisdiction. The effect would have been to render T a ward for the remainder of her minority. During that period the court would have ensured her continuing protection in the exercise of its almost unlimited powers. Furthermore, in such proceedings T would have had the advantage of representation by the Official Solicitor. The option preferred by Hackney was to apply for guardianship under the Mental Health Act 1983. That path was open since

T's mental age has been assessed as being within the 5–8 year range. It is common ground therefore that she suffers from 'arrested or incomplete development of mind' within the meaning of s 1(2) of the Act. She is therefore a patient within the meaning of s 1(1) of the Act. Hackney could not obtain a guardianship order under s 7 of the Act because T's father objected. Accordingly, Hackney applied for his displacement as nearest relative on the grounds that his objection to the guardianship order was unreasonable. The application was filed in the Shoreditch County Court on 25 February 1999. Evidence was filed in support and in opposition. Each side relied on the evidence of an expert on the issue of whether or not T was mentally impaired within the meaning of s 1(2) of the Act. One expert expressed the opinion that she was whilst the other expressed the contrary opinion. The application was granted by his Honour Judge Graham on 4 June 1999. He accepted the evidence of Hackney's expert and held that T suffered from mental impairment. He rejected the submission that the alternative route of wardship was more appropriate and he concluded that T's father had acted unreasonably in opposing the imposition of guardianship.

Mr Gordon QC attacks both conclusions. He emphasises that the statutory definition of mental impairment requires proof not only of a state of arrested or incomplete development of mind but also of one that is associated with 'seriously irresponsible conduct'. His simple submission is that a natural desire to return home, albeit to an inadequate home, cannot be labelled seriously irresponsible conduct. Secondly, he submits that an application to the Family Division judge in wardship was always the more appropriate remedy for a number of reasons. The first of these was the absence of representation for T in the Mental Health Act proceedings. At times during his argument Mr Gordon seemed to elevate this consideration into an independent ground of appeal constituting a breach of T's rights under the European Convention.

For Hackney, Mr Pleming QC submitted that what constituted seriously irresponsible conduct was a pure issue of fact. The judge was clearly entitled to reach the conclusion that he did on Hackney's evidence as to the risks to which T would be exposed were she to return home and on the expert evidence which the judge accepted. He stressed the finite nature of the guardianship order and the rights of appeal to a mental health review tribunal. He naturally relied upon the fact that the protective powers in wardship expired on T's eighteenth birthday and he contrasted the limited powers of the Family Division judge in making best interest declarations in respect of adult patients.

This appeal does raise some difficult issues but we have reached the conclusion that Mr Gordon is entitled to succeed on both his primary grounds.

Before giving our reasons we will set out those parts of the sections of the Mental Health Act 1983 with which we are principally concerned:

> '1(1)The provisions of this Act shall have effect with respect to the reception, care and treatment of mentally disordered patients, the management of their property and other related matters.
>
> (2) In this Act—
>
> "mental disorder" means mental illness, arrested or incomplete

development of mind, psychopathic disorder and any other disorder or disability of mind and "mentally disordered" shall be construed accordingly;
"severe mental impairment" means a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned and "severely mentally impaired" shall be construed accordingly;
"mental impairment" means a state of arrested or incomplete development of mind (not amounting to severe mental impairment) which includes significant impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned and "mentally impaired" shall be construed accordingly;
"psychopathic disorder" means a persistent disorder or disability of mind (whether or not including significant impairment of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the person concerned.

...

7(1) A patient who has attained the age of 16 years may be received into guardianship, for the period allowed by the following provisions of this Act, in pursuance of an application (in this Act referred to as "a guardianship application") made in accordance with this section.
(2) A guardianship application may be made in respect of a patient on the grounds that—

(a) he is suffering from mental disorder, being mental illness, severe mental impairment, psychopathic disorder or mental impairment and his mental disorder is of a nature or degree which warrants his reception into guardianship under this section; and
(b) it is necessary in the interests of the welfare of the patient or for the protection of other persons that the patient should be so received.

8(1) Where a guardianship application, duly made under the provisions of this Part of this Act and forwarded to the local social services authority within the period allowed by subsection (2) below is accepted by that authority, the application shall, subject to regulations made by the Secretary of State, confer on the authority or person named in the application as guardian, to the exclusion of any other person—

(a) the power to require the patient to reside at a place specified by the authority or person named as guardian;
(b) the power to require the patient to attend at places and times so specified for the purpose of medical treatment, occupation, education or training;
(c) the power to require access to the patient to be given, at any place where the patient is residing, to any registered medical practitioner, approved social worker or other person so specified.

...

29(1) The county court may, upon application made in accordance with

the provisions of this section in respect of a patient, by order direct that the functions of the nearest relative of the patient under this Part of this Act and section 66 and 69 below shall, during the continuance in force of the order, be exercised by the applicant, or by any other person specified in the application, being a person who, in the opinion of the court, is a proper person to act as the patient's nearest relative and is willing to do so.

(2) An order under this section may be made on the application of—

(a) any relative of the patient;
(b) 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
(c) an approved social worker, but in relation to an application made by such a social worker, subsection (1) above shall have effect as if for the words "the applicant" there were substituted the words "the local social services authority".

(3) An application for an order under this section may be made upon any of the following grounds, that is to say—

...

(c) that 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 the patient; ...'

In expressing our preference for a restrictive construction of mental impairment associated with seriously irresponsible conduct we refer back to the Mental Health Act 1959. Under s 33 of that Act a guardianship application might be made in respect of a patient on the grounds:

'... that he is suffering from mental disorder, being ... in the case of a patient under the age of 21 years, psychopathic disorder or subnormality; and that his disorder is of a nature or degree which warrants the reception of the patient into guardianship under this section.' (See s 33(2)(ii).)

A guardianship order, if made, gave the guardian the powers of a father over a child under 14. Amongst specific powers, reg 6(2) of the Mental Health (Hospital and Guardianship) Regulations 1960 provided that:

'... the guardian may restrict to such extent as he thinks necessary the making of visits to the patient and may prohibit visits by any person who the guardian has reason to believe may have an adverse affect on the patient.'

The review of the Mental Health Act 1959 in September 1978 (Cmnd 7320) offered three options for the revision of a statutory regime which was not perceived to have worked well since its enactment. The publication of Cmnd 8405 in November 1981 revealed that the government had decided on the third option, namely the limitation of the powers of the guardian to three following essentials:

(a) the power to require the patient to live at a specified place;

A (b) the power to require the patient to attend specified places for the purpose of treatment, occupation or training;
(c) the power to ensure that a doctor, social worker or other specified person could see the patient at home.

In introducing these changes contained in the Mental Health (Amendment) Bill on 19 January 1982, Lord Elton explained that the term 'subnormality' B was to be replaced with the term 'mental impairment'. He continued:

'Having provided the substitute term, we had next to ensure that it was not going to be used to describe any people other than the small group to whom we wished it to apply. We therefore attached to it the requirement that, where the Act is to have effect upon a mentally impaired or severely C mentally impaired person, that impairment must be, "associated with abnormally aggressive or seriously irresponsible conduct".

We have tried in this phrase not only to establish the requirement that the behaviour of the person to whom the Bill applies shall be aggressive or irresponsible but that it shall be aggressive or irresponsible to a marked degree. We did so by using the adjectives "abnormally" and "seriously". We did so after a long dictionary search and a good deal of discussion ... I D do not think we can get any closer to expressing our intention, which is to limit the effect of the Bill and the Act on mentally handicapped people to those very few people for whom detention in hospital is essential so that treatment can be provided and for whom detention in prison should be avoided. That is the interpretation we intend to be put on these words. The revised definitions, and the interpretation I have just outlined, extend also E of course to powers to receive people into guardianship.'

The Mental Health (Amendment) Act 1982 was subsequently consolidated into the 1983 Act.

Retrospective support for a restrictive construction is to be found in the Law Commission report, Mental Incapacity (1995 Law Comm No 231). In para 2.21 this was said of the 1980 reforms:

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'The powers of a guardian were severely cut back and the categories of people who could be received into guardianship were radically restricted. Guardianship cannot now be used for clients who suffer from any form of arrested or incomplete development of mind unless it is associated with "abnormally aggressive or seriously irresponsible conduct". Unless the G meaning of these words is distorted, the vast majority of those with a learning disability (mental handicap) will be excluded from guardianship. The benign side of the guardianship coin was nowhere in evidence in the new legislation. The present state of the statute book therefore reflects a single-minded view of personal guardianship as a method of restricting civil rights and liberties rather than as a method of enhancing them.'

H In the fourth edition of *Mental Health Law* (Sweet & Maxwell, 4th edn, 1996) Hale J says:

'The patient's learning disability must be associated with "abnormally aggressive or seriously irresponsible conduct". This may not make much

> difference in criminal cases ... but presents difficulties especially with guardianship. On one view, most if not all severely disabled people are also "seriously irresponsible" in the sense that they cannot take responsibility for their own conduct. A broad approach would make guardianship available to protect them. It would, however, defeat the object of the changed definition, which was to exclude from the Act those who did not also exhibit psychopathic behaviour.'

Finally, in approaching the construction of this statutory phrase it must be remembered that it not only exposes the patient to the regime of guardianship but also to detention, subject to the requirements of s 2(2)(b) being also satisfied.

Opting as we do for a restrictive construction, what is its application to T's case? The urge to return is almost universal. Research has demonstrated that of children severed from their home by care orders 92% return by the age of 18. (See *Children Going Home*: Bullock, Little & Gooch – Ashgate 1998.) It seems easy to understand why. The deficiencies of the home are more apparent to other adults than to the young who have known no other. Furthermore, any measure of irresponsibility must depend upon an evaluation of the consequences of return. How great are the shortcomings and what are the perils and what is the degree of exposure? Mr Pleming takes the analogy of thrusting a hand into a burning fire. But the extent of the shortcomings, perils and risks is in dispute and will only be resolved at the final hearing in the Family Division. Furthermore, T's return would constitute a household of three whereas most of the evidence relied upon by Hackney relates to a household of ten. It is at least arguable that, if want of protection from external peril is the issue, T would be better protected in the future by the greater availability of her parents. Clearly each case must depend on its particular facts and we would not wish to be taken as offering any general guideline. But it is our opinion that it is simply inapt to construe T's determination as constituting seriously irresponsible conduct.

Judge Graham saw T at her request. This is what he recorded:

> 'What she said to me was that she wanted to go home. Her father is getting old, he is ill and he is dying soon. She has lived with him for 17 years and wants to be with him. She was happy at home, had plenty to do, went to the park. Her mother took her. She had always been with her mother and father and brothers and sisters and wanted to get back.'

Finally, it cannot be said that a return home involves an exposure to risks from which T is currently protected at the children's home. The first two specific powers of the guardian allow him to require T to reside at the home and to attend college. But it is doubtful if they are more extensive and there must be doubts as to the legality of the restrictions that Hackney have placed on T's contact with her parents since the making of the guardianship order on 4 June 1999. Of the four examples of conduct of particular concern to Hackney given in evidence, two occurred at school.

We turn now to Mr Gordon's second principal submission, namely that wardship was the more appropriate proceeding for T's protection. The judge rejected this submission summarily. He only said:

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> 'Guardianship is in my opinion the preferred procedure rather than inherent jurisdiction or wardship. Its object is to provide protection to vulnerable people with the minimum of interference with personal freedom.'

Mr Pleming had little if anything to say against wardship other than the manifest consideration that it is now almost too late to invoke it. However,
B T's need for protection arose only 2 days after her seventeenth birthday. Then when Hackney had to make their choice T was 9 months short of her majority. Furthermore her needs are probably finite, namely preparation for independence by further education and continuing supervision. Whilst the consequence of ordering guardianship is to place specific restrictions on the individual's liberty, the consequence of an order in wardship is to empower
C the court to take any step to promote the welfare of the ward as well as to ensure the ward's protection. Had Hackney applied in wardship an immediate consequence would have been the appointment of the Official Solicitor as her guardian ad litem. It may be that the Official Solicitor would have delegated his function to the guardian ad litem appointed for the other seven children in the public law proceedings. But in either event there would have been a full social investigation as a prelude to separate legal
D representation. By contrast r 12(3) of the Civil Procedure Rules 1998 provides that the nearest relative shall be a respondent to an application under s 29 and:

> '(b) the court may order that any other person, not being the patient, shall be made a respondent.'

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Mr Gordon submits that at the least a person vulnerable to the restrictive consequences of guardianship should be entitled to separate representation. We express no view on any human rights ingredient within Mr Gordon's argument. We simply conclude that T would have been advantaged by that aspect of the wardship jurisdiction and Mr Pleming's reliance on r 12(6), which says no more than that the judge in s 29 proceedings may interview the
F patient, seems a comparatively impoverished alternative.

Another practical consequence of an application in wardship is that it would have empowered one judge to consider the needs of all eight children in consolidated proceedings having made findings of fact necessary for the determination of all issues affecting all the children of the family. The other side of the same coin is that of the children of the family, T alone was
G diverted into a statutory field where power lies in the mental health review tribunal or, in the instance of s 29, the county court. This is not a child-centred jurisdiction and the child lacks the benefit of independent representation. The power of the judge is restricted to making or refusing the guardianship order. If the order is made the powers of the guardian are limited to the three specifics.

For all those reasons we are of the opinion that the judge was in error in
H rejecting Miss Forster's submission that wardship was the more appropriate remedy and that therefore her client's objection to guardianship could not be labelled unreasonable.

It is not necessary in this case to draw a comparison between the guardianship regime under the Mental Health Act and the jurisdiction of the

Family Division to make a best interest declaration in respect of an adult patient. Mr Pleming has quite rightly referred to the decisions in *Re C (Mental Patient: Contact)* [1993] 1 FLR 940 and *Cambridgeshire County Council v R (An Adult)* [1995] 1 FLR 50. In the later case Hale J drew attention to the limitations on the court's powers in determining an application for a best interest declaration. She went on to say at 56:

> 'It is clear, however, from the troubling circumstances of this case that there exists no wholly appropriate legal mechanism for examining whether or not W should be free to make her own decisions in the vital matter of her relationship with her family and if she should not what decisions should be made on her behalf. I share the view expressed by Eastham J in *Re C (Mental Patient: Contact)* [1993] 1 FLR 940 at 946 that it is a sad state of affairs that the law is unable to provide suitable protection in such a situation. The 1959 Act was thought to have placed all the necessary features of the ancient prerogative jurisdiction on a statutory footing. Cases such as this have proved that judgment wrong and it is to be hoped that Parliament will before too long turn its attention to the matter once more.'

We would only say that we would wish to see the Family Division judge given wider powers to deal with the welfare of adult patients where that cannot be fully achieved under the provisions of the Mental Health Act 1983.

Finally, we wish to emphasise that we have reached our conclusions on the special facts of a difficult and unusual case. We do so with some regret because it may be that with the imminent loss of wardship T will find herself at some degree of enhanced risk. Furthermore, everything that Hackney has done or attempted has been with the best of motives, with T's welfare to the fore and in the high traditions of social service. The election which they made in February 1999 is perfectly understandable. However, it is an election that has proved vulnerable to Mr Gordon's attack.

For all these reasons we allow this appeal and set aside the judge's order.

Appeal allowed with costs. Order for legal aid assessment of appellant's costs. Application for permission to petition the House of Lords refused. Upon the undertaking by Mr and Mrs F that they will make arrangements for T to return not before midday on Saturday, 2 October, no order on Miss Morris's application for an interim order, subject to any application being made in the Family Division.

Solicitors: *Goodman Ray* for the father
Local authority solicitor

DEBORAH DINAN-HAYWARD
Barrister