Chapter 16: Mental health and the law

Steven, aged 20, has a developmental age of around 4 or 5. As a child, he spent a significant amount of time in residential care, provided or paid for by the local authority, though he never required care under a care order. His parents struggled to cope, but managed. Recently his mother, to whom he was very attached, died. Now he is an adult and, though he receives day care, is living at home with his father, Cyril. Since his mother died, Steven has become quite aggressive towards Cyril, who finds it difficult to maintain a safe environment at home for Steven; also Steven tends to wander off, talk with strangers, and stay out for long periods, sometimes having to be brought home by police or others. Recently Cyril hit Steven. A social services assessment of Steven's needs and those of Cyril as his carer, which involved obtaining psychiatric evidence, now recommends that Steven should be accommodated elsewhere as Cyril cannot cope. Cyril is strongly opposed to Steven being removed from his care and, in so far as it can be determined, Steven does not want to live away. In light of community care and mental health law, what options should the various agencies responsible for Steven's welfare consider?

The question is phrased to require a look at both mental health law and community care. It potentially raises in addition the question of capacity under the Mental Capacity Act 2005, which we address first.

The 2005 Act provides a framework within which a person can take decisions on behalf of a person who lacks capacity. Clearly Steven cannot make decisions about his own life and someone has to do so on his behalf. Under Part it would be lawful for Cyril to take decisions for the benefit of Steven – putting him to bed, spooning him his food, giving him prescribed medication, and helping him through his daily routine. Cyril could lawfully restrain him to keep him out of danger, because this would be in his interests. He could take Steven to the doctor or on a holiday. He would be able to make the decisions which Steven cannot make for himself (but only those), so long as he made decisions which were in Steven's best interests.

But these powers are not sufficient for making long-term decisions about Steven's future welfare or treatment. For that purpose more formal discussions are required with health and social work agencies, and either/both will have to consider using their statutory powers to provide a framework for caring for and treating Steven.

Community care and mental health each involve different agencies, though there is an overlap. We would suggest starting with an analysis of the possible solutions – not necessarily a legal analysis – and then looking at the ways in which community care law and mental health law can facilitate these.

Steven clearly has a mental disorder and needs long term looking-after. His age means that any powers which arose under the Children Act to provide services or make decisions about his residence, schooling etc no longer can be used.

There is a conflict of view on the facts given above as to what the arrangements should be. The National Service Framework for Mental Health, the Mental Capacity Act Code of

Practice, and the Mental Health Act Code of Practice, all require the professional agencies involved to take careful account of the views of the patient Steven and those of his carer/family. Any assessment of Steven under the community care legislation should also assess his father's needs as his carer. We can assume that this assessment has taken place from the facts provided.

Whose views should prevail? There is no presumption in the legislation about keeping families together, as there would be under Children Act Schedule 2 if Steven were still a child. His father has no automatic decision-making trump card merely by virtue of being a parent, since parental responsibility has ceased to apply.

The professional assessment is that Steven should live away from home, and we have no basis, on the facts given, to suggest that such an assessment is the wrong one, though there is no suggestion that it is in Steven's interest to sever or limit the relationship with his father, so living away is a means of meeting his needs, not a goal in itself. Cyril's views, if they are to be overridden, mean that he will need considerable support in order not to feel marginalized.

The various options are now listed. We start with community care, on the basis that the government's policy guidance (see community care chapters) suggests the starting goal is living at home, then remaining in the community even if not at home, and, as a last measure, hospital accommodation. Steven is clearly entitled to community care services the Care Act since he suffers from a mental disorder (mental impairment); so were it possible to support Steven at home a care plan could be drawn up to provide the necessary support. If residential care is required, the power to provide this in suitable accommodation exists under the Care Act. The difficult question is whether Steven can effectively consent to the move to this accommodation, since we know that he would prefer to stay with his father. It is possible that, if his father agreed that this was the best course, then Steven would also agree, or at least go along with being taken there. Powers to remove him compulsorily exist, though the exercise of such powers may well be damaging to the relationship with Cyril: there is a common law power under the doctrine of necessity for a court to make an order to allow the local authority to determine the living arrangements for a person who lacks capacity him or herself to decide – see *Re F (Adult Patient)* (2000).

A rather draconian possibility is to use Mental Health Act powers of detention. But there is no evidence that Steven needs to be admitted for treatment to hospital, and even less that a hospital assessment is required.

Guardianship under the MHA, however, offers a possible route to resolve this dilemma. If Cyril is unwilling to co-operate, as nearest relative of Steven, an application would need to be made under MHA s.29 to the county court for Cyril to be displaced as the nearest relative, and for the AMHP to take his place. An application could then be made, supported by the evidence of a specialist doctor and an additional doctor, who, together with the AMHP, will have to confirm that the criteria for admission to guardianship are met. In this case the criteria are that Steven suffers a mental disorder and that a guardianship order will be in his interests (s.7 MHA). The application is submitted to the social services department, and will name either the department, the AMHP, or Cyril (if he has changed his view on what is appropriate) as the guardian. The attraction of the guardianship route

is that the guardian is now empowered to determine where Steven will live. The guardianship order will last initially for six months, and will have to be renewed by a further application at the end of that period, and thereafter at 12 month intervals as long as the criteria are met. It may be that once Steven is accommodated away from his father the need for formal powers to be renewed will diminish as Cyril accepts the arrangements.