Mental Health Act Guardianship and the Protection of Children

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**Re F (Mental Health Act: Guardianship) [2000] 1 FLR 192, CA**

Court of Appeal (30th September 1999). Evans, Thorpe, and Mummery LJJ. Judgment of the

Court given by Thorpe LJ**.**

**Introduction**

This case arose as a spin-off from what on the face of it was a relatively straightforward application

for care orders, made by the Social Services Department of the London Borough of Hackney

(‘LBH’), in respect of eight siblings. The case is of interest to mental health lawyers by reason of

the attempt of LBH to use creatively elements of the Mental Health Act 1983 (‘the 1983 Act’)

regime to plug apparent gaps in the powers available to local authorities and the courts in the

Children Act 1989. This entailed the court’s consideration of various provisions of the 1983 Act,

as they relate to persons with learning difficulties. This case will also be of interest to family

lawyers, as the boundary between family law and mental health law, such as it is, was also

considered by the Court of Appeal. Moreover, it is worth remembering that the backdrop to all

judicial activity in the field of mental health law at present is the on-going root-and-branch reform

of this area of law. As will be discussed below, this case adds to a growing number that highlight

deficiencies in the operation of the current regime as it applies to adults with learning difficulties.

Finally, although there is little direct discussion to be found in the law report of the judgment of

the Court of Appeal, this case raises broader issues of human rights; a topic that none can afford

to ignore in light of the Human Rights Act 1998.

**The Facts**

The appeal concerned the plans proposed by LBH in respect of T, the eldest of eight children born

to the F family between 1981 and 1992. All eight had been the subject of Emergency Protection

Orders (EPOs) made on 11 November 1998. The F children were taken from their home and placed

in various local authority accommodation. T, along with two of her sisters, was placed in a

specialist children’s home. This was intended by LBH as a first step to the seeking of full care

orders. The basis for the intervention of LBH was claimed neglect of the F children by their

parents, and the particular claim that the F children were exposed by their parents to adults ‘prone

to sexual abuse or exploitation of children’ in the words of Thorpe LJ[[2]](#footnote-2). The care order hearing was

pending at the time of the instant case. The Court of Appeal was therefore confronted with

allegations rather than proof of inadequate parenting.

An EPO lasts for a maximum of eight days in the first instance[[3]](#footnote-3), renewable for one further period

of seven days[[4]](#footnote-4). Eight days after the EPOs had first been made, interim care orders were made in

respect of the seven youngest children of the family. However, in the intervening period T had

passed her seventeenth birthday and so could not be made subject to a care order[[5]](#footnote-5). In her case,

therefore, the EPO was renewed for a further seven days. Thereafter, the order lapsed, although T

remained in local authority accommodation on a voluntary basis. During that time she was

examined by a consultant paediatrician, who formed the view that she had experienced sexual

intercourse. Some two months later, T’s parents announced that they wished for T to return home.

As T was being ‘voluntarily accommodated’ by LBH, s.20 (8) Children Act 1989 provides that

persons with parental responsibility ‘may at any time remove the child’. There is no requirement

that notice be given.

T also wished to return to live in the family home. LBH was concerned that T would again be

exposed to the risks that had prompted their initial intervention. As T could not be made subject

to a care order, LBH felt that it had to seek another mechanism to ensure her protection. Of the

options open to it (discussed further below), it chose to seek a Guardianship Order under s.7 of

the 1983 Act, on the grounds that T was ‘mentally impaired’ within the meaning of that Act,

having a ‘mental age’ assessed at between five and eight years of age, and that it was necessary for

her welfare and protection.

An order under s.7 of the 1983 Act cannot be made without the consent of the ‘Nearest Relative’

of the person to be made subject to the order[[6]](#footnote-6). In the present case that person was Mr. F, T’s

father, who would not give his consent. However, there is provision[[7]](#footnote-7) for the substitution of the

Nearest Relative on grounds, *inter alia*, that that person ‘objects unreasonably’ to the guardianship

application or has objected ‘without regard to the welfare of the patient’. Shoreditch county court

had, on the application of LBH, made an order under s.29 of the 1983 Act, by which Mr. F had

been replaced by a LBH social services department officer as Nearest Relative. A Guardianship

Order had then been made by LBH.

Mr. F appealed, challenging the decision of the county court to displace him as Nearest Relative.

A narrow reading of the case, therefore, would deem the issues to be the interpretation of the

powers given to the county court by s.29 of the 1983 Act and, tangentially, the circumstances in

which an order under s.7 of the Act is appropriately made. However, as Thorpe LJ noted, ‘the real

issues in the case surround the neglect, abuse and protection of children’[[8]](#footnote-8); and the desire to attend

to these issues drew the Court of Appeal into a consideration of a broader legal terrain than might

have been the case had a narrower construction of the case been adopted.

**Judgment**

The Court of Appeal allowed the appeal, holding that Mr. F could not be said to have been

objecting unreasonably to the making of the guardianship order as this was not a suitable case for

the making of such an order.

The court reached that relatively straightforward conclusion by a rather less straightforward

reasoning process. The issues in this case are strung together like a daisychain: whether Mr. F could

be said to have objected unreasonably to the guardianship application depended on whether it

could be said that the guardianship order had been appropriately sought and made. This in turn

depended not only on whether the requirements for the making of such an order had been satisfied,

but also on whether there was a more appropriate alternative course of action open to LBH.

**The Construction of ‘Mental Impairment’**

The court dealt first with the construction of the relevant words of the 1983 Act. ‘Mental

impairment’ for the purposes of the 1983 Act, including its provisions relating to guardianship

orders, is defined in s.1 (2) as

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

As Thorpe LJ discussed at some length, the reason for the association of the fact of mental

impairment with abnormally aggressive or seriously irresponsible behaviour that s.1 (2) makes, is to

exclude from the ambit of the legislation all but ‘the small group to whom we wished it to apply’[[9]](#footnote-9),

that is, mentally impaired persons ‘for whom detention in prison should be avoided,[[10]](#footnote-10).

Applying this approach, the court decided that T’s desire to return home should not be construed

as ‘seriously irresponsible’, notwithstanding that LBH had concerns that this would expose T to

risk. In the view of the court, this was a judgment that to a considerable extent turned on the facts

of the case. The court decided that LBH’s concerns related to a household of ten, rather than one

of three, and that there was considerably less risk of neglect if T were the only child of the family

living at home[[11]](#footnote-11). It also noted that the vast majority of children who are received into local

authority care return home by the age of eighteen, so that it could not be said that T’s desire was

seriously irresponsible by comparison with that of other young people in her situation. Indeed, it

was ‘natural’[[12]](#footnote-12). Finally it was pointed out that two of the four incidents cited by LHB as evidence

of risk to T occurred at school, which she continued to attend whilst living in the children’s

home[[13]](#footnote-13). Preventing her from returning home would not reduce her exposure to these risks.

**The Choice between Guardianship and Wardship**

Having decided that T’s desire to return home could not be labelled as ‘seriously irresponsible’ and

so did not fall within the scope of Part II of the 1983 Act, the court then turned to consider the

alternative course of action in this situation. It was held that, rather than looking to the Mental

Health Act, those in the position of LBH should invite the court to give leave to invoke the

inherent jurisdiction of the High Court, under the procedure found in s.100 (3) Children Act 1989.

This would have the effect of making T a ward of court. The court noted a number of advantages

that this mechanism has over the use of guardianship.

First, a court operating under the inherent jurisdiction ‘would have ensured [T’s] continuing

protection in the exercise of its almost unlimited powers’[[14]](#footnote-14). The Guardianship regime, by contrast,

has since the coming into force of the Mental Health (Amendment) Act 1982[[15]](#footnote-15), operated a

circumscribed ‘essential powers’ approach, which had been introduced purposefully to reform the

extremely wide and vaguely defined powers which a guardian enjoyed under the Mental Health Act

1959. Under the existing law, a guardian has three powers: to specify where the person subject to

the order shall live; to require that person to attend specified places for the receipt of medical

treatment, occupation, education or training; and to require that access to the person subject to

the order be given be given to any doctor, approved social worker or other specified person[[16]](#footnote-16).

In the view of the court these powers are simply not designed to be flexible enough to deal with all

the welfare and protection issues that may arise in the case of a young person like T.

Secondly, by extension, the court pointed out that the guardianship regime is not a child-centred

jurisdiction[[17]](#footnote-17). Indeed, guardianship is only available for persons aged sixteen and over[[18]](#footnote-18). Wardship

by contrast is exclusively concerned with the protection and furtherance of the best interests of

the child. Had T been made a ward of court, she would have been represented by the Official

Solicitor, who would have carried out an independent inquiry into the situation, and have

provided the court with a report of that inquiry[[19]](#footnote-19). The Official Solicitor could also have provided

independent legal representation for T in court[[20]](#footnote-20). In the Guardianship regime, by contrast,

r 12(3)(b), Civil Procedure Rules 1998 specifically provides that the person to be made subject to a

guardianship order shall not be made a respondent in a disputed s.29 application. The court held

that ‘T would have been advantaged by that aspect of the wardship jurisdiction’, whilst the

situation under the Mental Health Act ‘seems a comparatively impoverished alternative’[[21]](#footnote-21).

Finally, the court noted, had wardship been invoked it would have been possible for one judge to

consider the interests of all eight children together in consolidated proceedings, whereas the choice

of guardianship had channeled T away from her siblings[[22]](#footnote-22). Taking all these points together, the

court concluded that guardianship was in any case less suitable than wardship as a mechanism to

best protect the interests of a young person such as T.

**Commentary**

On one view, seemingly the view of the Court of Appeal, this is a case that turned on its own facts.

On the question of the preferability of wardship over guardianship, the court underscored the fact

that ‘Clearly each case must depend on its particular facts and we would not wish to be taken as

offering any general guideline’[[23]](#footnote-23). And by way of conclusion, the court again stated that ‘we wish to

emphasise that we have reached our conclusions on the special facts of a difficult and unusual

case’[[24]](#footnote-24). Yet the fact is that this judgment does impact at the level of ‘policy’, and does so in a

number of ways.

First, the judgment does make clear that an important element of the distinction between wardship

and guardianship is that between a child-centred and an adult-centred regime. Guardianship is

posited on the policy of minimum interference with the rights of the individual. Wardship is based

on the much broader concept of the welfare of the child. It will be rare indeed that, when there is

a choice between the two (that is when the person who is to be the subject of the order is aged

sixteen or seventeen), guardianship will be the preferable option. It is not surprising that the Court

of Appeal, when presented with a choice, expressed such a preference, as in this it follows earlier

decisions of the court, which also have preferred to construct older children as children rather

than as adults[[25]](#footnote-25). Of course, wardship was only invoked in this case because of the limitation placed

on the availability of care orders by s.31(3) Children Act. But although the powers of a court

exercising the wardship jurisdiction are greater than those available to a local authority over a child

in care[[26]](#footnote-26), nothing turns on this in the present context, since a care order shares many of the

advantages of wardship by comparison with guardianship.

Secondly, it provides confirmation that ‘abnormally aggressive or seriously irresponsible conduct’,

which features in the definition not just of ‘mental impairment’, but also of ‘severe mental

impairment’ and ‘psychopathic disorder’ in s.1 (2) of the 1983 Act, is to be construed narrowly.

It is interesting to note, first, that the court emphasised that those found to be seriously

irresponsible became liable not only to guardianship but also to civil confinement[[27]](#footnote-27); and, second,

that in arriving at its conclusion the court focused not on the words themselves, but on the

intention behind them. For the fact is that, although this form of words was selected, according to

Lord Elton ‘after a long dictionary search and a good deal of discussion’[[28]](#footnote-28), their meaning is not

transparent. This is because ‘abnormal aggression’ and ‘serious irresponsibility’ are more

moralpolitical than medical concepts, and so their meaning will always contain a considerable

subjective element. They are in fact words upon which meaning is *imposed* by the reader.

The real significance of the decision of the court on this point, then, is that by turning to the,

highly contextualised, intention of the framers in ‘giving meaning’ to this phrase, the court

reaffirmed civil libertarianism over paternalism in the use of guardianship, turning its back on the

opportunity to start a process which may have extended the scope of guardianship considerably. It

would not have involved any particular corruption of the English language to hold that T was

exhibiting ‘seriously irresponsible conduct’ in returning to live in a home at which she was at real

risk of sexual abuse and neglect. It would, however, have involved a muddying of the ethos behind

the scheme. And who could say where, if T’s conduct fell on the ‘seriously irresponsible’ side of

the line, that line would be drawn in future cases?

We know, from the case of *R v Hall* (1988) 86 Cr App R 159 (CA) that both ‘severe mental

impairment’ and ‘mental impairment’ are to be assessed in the context of the Sexual Offences Act

1956 by reference to normally developed persons. Although there is some uncertainty regarding

the transferability of this decision into the context of the interpretation of the 1983 Act[[29]](#footnote-29), Hall

nevertheless seems to suggest that ‘abnormally aggressive or seriously irresponsible conduct’

should be defined in the same way. And on one level this is what the Court of Appeal proceeds to

do, holding essentially that T’s desire to return home is ‘natural’; that is, normal; that is, not

sufficiently distinct from normally developed young persons. But for the court, it was in any case

‘simply inapt’[[30]](#footnote-30) to construe T’s conduct as falling within the s.1 (2) definition; and this is a statement

about the underlying policy of the 1983 Act, rather than about the particular facts of the case. In

the sense that this view is not dictated or governed by legal rules, it is an extra-legal judgment: the

judge as citizen or as politician but not as lawyer.

This should not be taken to imply, however, an argument that the Court of Appeal adopted the

‘wrong’ policy. It seems unarguable that the ‘essential powers’ approach is unsuitable to meet the

needs of a person such as T. For instance, the court noted in passing that LBH had placed

restrictions on contact between T and her parents, purportedly under the powers given by the

guardianship order, which in the court’s view were of doubtful legality[[31]](#footnote-31). The point was incidental

to the appeal and so perhaps understated by the court. But it is clear: there is no provision in the

powers given by s.8(1) of the 1983 Act to place limitations on those with whom the person subject

to the order may have contact. On the other hand, it may be suggested that the Court of Appeal

was so closely focused on the intention behind the guardianship scheme that it failed to consider

how a guardian is actually able in practice to control contact between the person subject to the

order and others. In *Cambridgeshire County Council v R (An Adult)* [1995] 1 FLR 50 (FD), which

involved a situation broadly comparable to that of T in the instant case[[32]](#footnote-32), Hale J. took the view that

‘Guardianship would ... give the [local] authority the greater part of what they seek’[[33]](#footnote-33). In Hale J.’s

view this would allow the authority to dictate where R would live and this, combined with the

general right to control access to private property, could in practice regulate contact between R and

her family. This view may be problematic for other reasons[[34]](#footnote-34), but it does make the point that the

Court of Appeal’s explanation of guardianship as nothing more than the three powers specified in

s.8 (1) of the 1983 Act may capture the technical position but is rather further away from what will

often be the realities of the situation.

That the Court of Appeal took a rigorously civil libertarian approach to the interpretation of the

1983 Act does not of course mean that it was indifferent to the arguments in favour of paternalism

or protectionism. Rather, for the court it was an issue concerning appropriate mechanisms. As far

as children are concerned, the regime established under the Children Act 1989 and related

legislation, supplemented by the inherent jurisdiction, is the appropriate forum for the

implementation of protectionist concerns. For adults these mechanisms are not available. Instead,

at present, all that exists is the inherent jurisdiction of the High Court to issue declarations as to

the best interests of an adult lacking competency to take his or her own decisions. This was of

course a live issue in this case as T, having passed her seventeenth birthday shortly after the making

of the initial EPOs, was rapidly approaching her eighteenth birthday by the time of the appeal, at

which time the wardship jurisdiction would no longer be available.

The court declined to embark on a comparison between the powers available under guardianship

and that which is possible by way of the issuance of a best interests declaration[[35]](#footnote-35). It did, however,

express a ‘wish to see the Family Division judge given wider powers to deal with the welfare of adult

patients where that cannot be fully achievable under the provisions of the Mental Health Act

1983’[[36]](#footnote-36). Family Division judges have in fact proven fairly ready to develop the use of the mechanism

of the declaration since the landmark decision of the House of Lords *in Re F (Mental Patient:*

*Sterilisation)* [1990] 2 AC 1 (sub.nom. *F v West Berkshire HA* [1989] 2 All ER 545). In that case, as is

well known, the House held that a Family Division judge might properly issue a declaration that a

proposed course of action, in respect of the medical treatment of an adult patient who lacks the

capacity to take his or her own decisions and protect his or her own best interests, is lawful. In

explaining the concept of ‘best interests’, Lord Goff with the concurrence of other member of the

House, used the seemingly broad phrase ‘life, health or well-being’[[37]](#footnote-37). But it has generally been

assumed that the jurisdiction is of limited effect. The Court of Appeal in the present case referred to

two High Court decisions, *Re C (Mental Patient: Contact)* [1993] 1 FLR 940 (FD) and *Cambridgeshire*

*County Council v R (An Adult)* (above). In the former of these, it was held that where an adult child

with learning difficulties lived with one parent, and that parent was refusing access to the

absent parent, the High Court could, in the best interests of the young person in question, grant

access by way of declaration. This was on the basis that access to one’s parents is a common law

right and hence infringement is unlawful and therefore properly the subject of a declaration. But in

the latter case, as discussed above, the issue was not access but the prevention of contact between

an adult woman with learning difficulties and members of her family. Re C was distinguished as the

prevention of contact is not the protection of a common law right but the infringement of one,

namely the right to freedom of association. Hale J. took the view that the power to issue

declarations was in effect only a power to state the strict legal position[[38]](#footnote-38), which did not extend to

permitting the infringement of common law rights. As such, as the Court of Appeal seemed to

accept, the mechanism of the best interests declaration would not be able to prevent contact

between T and her parents, or prevent T returning home, in the instant case. If this is correct, then

on her attaining adulthood, the law would be able to offer T no protection in this regard.

There are three points that can be made here. First, in lamenting the limitations of the mechanism

of the best interests declaration, the Court of Appeal in this case adds its voice to what has become

a virtual collective mantra for all those with an interest in this area of law and social policy. As is

well known, the process to reform this area of law began in the late 1980s following the decision

in *F v West Berks*. It has threatened to produce legislation on a couple of occasions in the 1990s.

The situation at present, likely to continue until after the next general election at the earliest, is that

the government accepts the need for reform but is unable to pledge the necessary parliamentary

time[[39]](#footnote-39). Until legislation is forthcoming - the courts have stated on numerous occasions from the F

case onwards that the changes required are beyond their jurisdiction to deliver - they will no doubt

continue to identify gaps in the coverage of the protection offered to persons like T.

The second point, however, is that perhaps in the meantime more creative use could be made of

the existing law. Little was said in this regard by the Court of Appeal in the present case. But it

would also have been interesting to see how the court would have responded, for example, to an

argument that the common law right of access between parent and child was never absolute at

common law[[40]](#footnote-40), and therefore it is possible to **declare**, in an appropriate fact situation, that the

common law position is that the right is not exercisable[[41]](#footnote-41), on the basis that its exercise is contrary

to the best interests of the person concerned[[42]](#footnote-42).

In *Cambridgeshire* Hale J. also discussed the relevance of the law relating to harassment. At that

time, it was at least arguable that there was no tort of harassment, the latest decision at that time

being that of the Court of Appeal in *Khorasandjian v Bush* [1993] QB 727 (CA). But since

*Cambridgeshire* was decided the Court of Appeal in *Burris v Azadani* has stated that there is a tort

of harassment; or at least that the High Court should be prepared to invoke its inherent

jurisdiction to issue an injunction to prevent an activity that is not tortious if, on balancing the

needs and interests of those concerned ‘the court recognises a need to protect the legitimate

interests of those who have invoked the jurisdiction’[[43]](#footnote-43). Perhaps this element of the inherent

jurisdiction - to issue injunctions - could usefully be developed in the area of mental health as it

seemingly has been in the area of family law[[44]](#footnote-44). It is worth noting that in Cambridgeshire Hale J. did

not hold that the law of harassment is inapplicable, she merely noted that ‘no one has sought to

persuade’[[45]](#footnote-45) her that it was applicable. But even if *Burris* turns out to be a questionable authority,

there are still the mechanisms to regulate contact between adults that are contained in the Family

Law Act 1996 and the Protection from Harassment Act 1997. This is not to deny that these statutes

are aimed at a fairly narrow set of issues, but this does not mean that they could not usefully be

employed in appropriate circumstances.

Moreover, this being the third point, if the Court of Appeal has shown itself willing to abandon

the requirement that there need be an identifiable legal right that has been infringed before a

Family Division judge acting under the authority of the inherent jurisdiction might properly issue an

injunction placing limits on the rights of another party[[46]](#footnote-46), then perhaps it is arguable that this might

also enable the judge to issue a declaration as to best interests that does not defend an identifiable

common law right, but which rather declares that a particular course of action is lawful as in the

best interests of the person concerned, even where that infringes in some way the legal rights of

that person or some third party. After all, no legal right is absolute, and the power to issue

declarations and to issue injunctions are both merely part of a broad raft of powers that comprise

the inherent jurisdiction[[47]](#footnote-47). Perhaps a greater willingness to issue injunctions under the authority of

Burris[[48]](#footnote-48) would be a useful development in the protection of persons lacking capacity. The inherent

jurisdiction seems to operate with a very broad definition of ‘harassment’, similar to that of

‘molestation’ in the Family Law Act 1996, which is ‘any conduct which could be properly regarded

as such a degree of harassment as to call for the intervention of the court’[[49]](#footnote-49). This may not be the

strongest argument in legal terms, but I for one would like to have seen it put to the Court of

Appeal in this case.

Finally, it is worth pointing out that the court chose to ‘express no view’[[50]](#footnote-50) in respect of the

submission of council for Mr.F, that the situation whereby a person in T’s position is prevented

from representation before a court hearing an application to displace her Nearest Relative amounts

to a breach of her human rights. The law report does not disclose which particular right or rights

were mentioned. It may well have been Art 6.1 of the Convention[[51]](#footnote-51), which provides that ‘In

determination of his civil rights and obligations... everyone is entitled to a fair and public hearing’.

Art 6 is one of those convention rights incorporated into domestic law by s.1 Human Rights Act,

1998. It is not, however, clear that it would be able to assist a person in T’s position. Art 6.3 gives

those charged with a criminal offence with rights, **inter alia**, to defend him- or herself and to

examine witnesses. Although there is no corresponding positive right in relation to civil

proceedings, it is likely that a similar right of audience is inherent in the generally applicable

requirement for ‘a fair and public hearing’. The attitude of the European Court of Human Rights

has been that Art 6.1 should not be construed restrictively[[52]](#footnote-52), but it is not clear whether this means

that the protection offered by Art 6 extends to those who are not a party to the proceedings in

question. Technically, s.29 proceedings do not determine the civil rights of the person subject to,

or intended to be subject to, the order under the 1983 Act. There is scope for arguing that in

practice this may be the case, but even so there are of course mechanisms - at present the mental

health review tribunal system - that are available to a person detained under the 1983 Act which

clearly are designed to be determinative of the extent of civil freedom enjoyed by the person

subject to the order, and at which representation is a right. On the other hand, the decision of the

county court in this case, to make the s.29 order, did have, as an immediate consequence, the

making of an order under s.7, In reality, therefore, T’s interests were all but directly before the

court, and it does seem at least arguable on the basis of Moreira de Azevedo that that is enough to

bring a person in her position within Art.6. In future, of course, it will not be so easy for the courts

to avoid addressing such arguments.

**Concluding Comments**

In one sense, the Court of Appeal was quite right to say that this is an unusual case, which turns

on its own facts. The choice between guardianship and wardship can only arise in respect of young

people who are ‘mentally disordered’ in one of the four ways required by s.7 (1) of the 1983 Act,

and who are of seventeen years of age. For those younger than seventeen, a care order rather than

wardship is the appropriate option, and for those younger than sixteen guardianship is not

available. For those older than seventeen, neither wardship nor a care order is possible.

So it is fair to say that this is a factually unusual case which has forced us to look at familiar legal

provisions from an unfamiliar angle. But in so doing, as this note has shown, the facts of this case

have acted so as to provide an insight into various broader policy questions, allowing the Court of

Appeal to specify in some detail why it is that wardship should have been preferred to guardianship

on these facts. The message is that the Court of Appeal is not prepared to allow the extension of

the guardianship regime on grounds of beneficence, any further than was, in the court’s view,

intended by the framers of the legislation. But as this note has also shown, this case leaves

questions unanswered and options unexplored. For now, whether there could be an increased role

for the law of harassment in this area; whether the inherent declaratory powers of the High Court

have been developed to the fullest extent possible; and whether human rights law is set to make a

marked impact on mental health law and policy, are questions that still await an answer.

1. \* Ralph Sandland, Senior Lecturer, School of Law, University of Nottingham. [↑](#footnote-ref-1)
2. [2000] 1 FLR 192 at 193 D-E. All subsequent references will be to this report unless specified. [↑](#footnote-ref-2)
3. Children Act, 1989, s.45 (1). [↑](#footnote-ref-3)
4. Children Act, 1989, s.45 (5). [↑](#footnote-ref-4)
5. Children Act, 1989, s.31 (3). [↑](#footnote-ref-5)
6. Mental Health Act 1983, s.11 (4). [↑](#footnote-ref-6)
7. In s.29 of the 1983 Act. [↑](#footnote-ref-7)
8. At 193 C. [↑](#footnote-ref-8)
9. Lord Elton, introducing these words into the Mental Health (Amendment) Bill, the forerunner of the 1983 Act, on 19th January 1982. [↑](#footnote-ref-9)
10. Ibid. [↑](#footnote-ref-10)
11. At 198 D-E. [↑](#footnote-ref-11)
12. At 198 C. [↑](#footnote-ref-12)
13. At 198 G-H. [↑](#footnote-ref-13)
14. At 193 H. [↑](#footnote-ref-14)
15. Later consolidated into the Mental Health Act 1983. [↑](#footnote-ref-15)
16. Mental Health Act 1983, s.8(1). [↑](#footnote-ref-16)
17. At 199 G. [↑](#footnote-ref-17)
18. Mental Health Act 1983, s.7 (1). [↑](#footnote-ref-18)
19. At 193 H. [↑](#footnote-ref-19)
20. At 199 D. [↑](#footnote-ref-20)
21. At 199 F. [↑](#footnote-ref-21)
22. At 199 F-G. [↑](#footnote-ref-22)
23. At 198 E. [↑](#footnote-ref-23)
24. At 200 D-E. [↑](#footnote-ref-24)
25. Re R (A Minor) (Wardship: Consent To Treatment) [1991] 3 WLR 592; Re W (A Minor) (Medical Treatment: Court’s Jurisdiction) [1992] 3 WLR 758. [↑](#footnote-ref-25)
26. For example, s.34, Children Act 1989 limits the restrictions that a local authority can place on contact between a child in care and his or her parents and other defined carers. An authority can, however, seek the permission of a court to prevent contact. [↑](#footnote-ref-26)
27. At 198 B-C. [↑](#footnote-ref-27)
28. Lord Elton, op cit, cited by Thorpe LJ at 197 C-D [↑](#footnote-ref-28)
29. See P.Bartlett and R. Sandland, (1999) Mental Health Law Policy and Practice, London: Blackstones Press, pp 27-29. [↑](#footnote-ref-29)
30. At 198 E. [↑](#footnote-ref-30)
31. At 198 G-H. [↑](#footnote-ref-31)
32. like T, R, a young woman of twenty-one, having mild learning difficulties, lived away from her family in local authority accommodation having been taken into care. Also like T she had expressed a wish to return to live in the family home, whereas the local authority wished to prevent contact between R and members of her family, including her father who had been convicted of a serious sexual offence against her. [↑](#footnote-ref-32)
33. [1995] 1 FLR 50 at 55E. [↑](#footnote-ref-33)
34. Namely that there may well have been no ‘seriously irresponsible conduct’ on the part of R, as that phrase was explained by the Court of Appeal in the present case, thus excluding her, like T, from the ambit of guardianship. [↑](#footnote-ref-34)
35. At 199G-200A. [↑](#footnote-ref-35)
36. At 200 D-E. [↑](#footnote-ref-36)
37. [1990] 2 A.C. 1 at 76. [↑](#footnote-ref-37)
38. [1995] 1 FLR 50 at 52 F-G. [↑](#footnote-ref-38)
39. Lord Chancellor’s Department (1999) Making Decisions: The Government’s proposals for making decisions on behalf of mentally incapacitated adults, London: Lord Chancellor’s Department. www.open.gov.uk/lcd/family/mdecisions [↑](#footnote-ref-39)
40. As would be possible, for example, on the basis what was said by the House of Lords in Gillick v West Norfolk and Wisbech AHA [1986] AC 112 per Lord Scarman at 183: ‘Parental rights clearly do exist, and they do not wholly disappear until the age of majority... But the

common law has never treated such rights as sovereign or beyond review and control case.’ [↑](#footnote-ref-40)
41. This argument was rejected by Hale J. in the Cambridgeshire case, [1995] 1 FLR 50 at 52 E-53 C. [↑](#footnote-ref-41)
42. In point of fact, T’s situation continued to be litigated after her eighteenth birthday, with LBH seeking declarations from the High Court, that it would be lawful to keep T in LBH accommodation, and to prevent contact with her mother (her father having died shortly after the present appeal was heard). On the preliminary question, of whether the High Court has jurisdiction to grant declarations in regard to such matters, the Court of Appeal (In re F (adult patient), CA, case no. 2000/0094) answered in the affirmative, taking a very broad view of the legitimate scope of declaratory relief. This important decision is the subject of a case note in this Journal at p196. [↑](#footnote-ref-42)
43. Per Lord Bingham, M.R., [1995] 4 ALL ER 802 at 807. [↑](#footnote-ref-43)
44. J. Conaghan [1996] ‘Gendered Harms and the Law of Tort: Remedying (Sexual) Harassment’ 16(3) OJLS 407 has argued that reliance on Burris should be cautious, because the decision goes so clearly against the accepted wisdom that the inherent jurisdiction can only operate by way of an injunction to prevent the infringement of an identifiable legal right. [↑](#footnote-ref-44)
45. [1995] 1 FLR 50 at 52 H. [↑](#footnote-ref-45)
46. In Burris, the defendant had been made subject to an injunction preventing him from approaching within a specified distance from the complainant’s home, thus limiting his legal right to use a public road. The defendant was found to have breached the terms of the injunction and imprisoned for contempt of court. On appeal, the Court of Appeal upheld the terms of the injunction. [↑](#footnote-ref-46)
47. Again, readers are referred to the decision of the Court of Appeal in the sequel to the case presently under discussion, see fn.41, above, which addresses directly arguments along these lines and see p196 of the Journal. [↑](#footnote-ref-47)
48. In fact, as it is most often contact with family members that is at issue, the powers in Family Law Act to issue ‘non-molestation orders’ would often be available, and here it is clear that there need be no infringement of an identifiable legal right. [↑](#footnote-ref-48)
49. Horner v Horner [1982] 4 F.L.R. 50 at 51 Ormrod L.J., but see also C v C (Non-Molestation Order: Jurisdiction] [1998] 1 FLR 554 (CA). [↑](#footnote-ref-49)
50. At 199 F. [↑](#footnote-ref-50)
51. Arts 5 and 8 of the Convention (concerning the rights to security of the person and regard for family life), were to be discussed by Sedley LJ in the later proceedings relating to F (see fn. 41, above) in the context of declaratory relief. [↑](#footnote-ref-51)
52. Moreira de Azevedo v Portugal (1990) 13 EHRR 721. [↑](#footnote-ref-52)