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IN THE FAMILY COURT
AT CHRISTCHURCH

FAM-2005-009-003589

IN THE MATTER OF	The Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003
BETWEEN	LIZETTE HUITEMA Compulsory Care Giver Applicant
AND	P G K Care Recipient Person in respect of whom the Application is made

Hearing: 18 June 2008

Judgment: 24 June 2008

RESERVED JUDGMENT OF JUDGE J J MORAN
SECTION 85 – EXTENSION OF COMPULSORY CARE ORDER

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[1] On 24 February 2005 PK (P) was convicted of sexual violation by unlawful sexual connection (Crimes Act 1961, s 128) and made a care recipient under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (IDCC&R Act) and pursuant to s 34(1)(b)(ii) Criminal Procedure (Mentally Impaired Person) Act 2003. The compulsory care order was made for a period of three years and the care co-ordinator has applied under s 85 IDCC&R Act to extend it for a further three years. It has been extended to 27 June 2008 pending determination of this application.

[2] P opposes the application as he believes that it is no longer necessary for him to be subject to compulsory care but says that if the Court finds that the order should be extended then its term should be for less than three years.

Background

[3] P is 56 years old and has been living in premises operated by Richmond New Zealand since the compulsory care order was made. He has been in his current home for about 18 months and lives there with two other residents. A minimum of two staff members are on duty at all times.

[4] P is subject to supervised care but this operates at a high level. There are alarms fitted to his bedroom door and windows to ensure that staff are always aware of his needs and available to provide him with an adequate level of support. They accompany him on each occasion that he leaves the property.

[5] P has a well established routine which is directed at extending and developing his interests and skills and addressing safety issues. To that end, he attends the STOP programme for sexual offenders each Thursday.

[6] P has a history of offending that dates back to 1993 that, in addition to sexual offending, includes aggravated robbery, attempted arson, threatening to kill, and wilfully setting fire to property. He has been institutionalised since the age of seven and numerous Court reports detail the difficulties and dysfunction which he has experienced in his life. It is unnecessary to traverse this background information but

it is apparent that for many years P has exhibited challenging and aggressive behaviours. Unfortunately, he too, has been sexually abused.

Statutory Requirements

[7] Before the compulsory care order can be extended I must be satisfied that P is a care recipient subject to a compulsory care order.[1] That is accepted.

[8] It is then necessary to consider and determine which of the two levels of care available to P, as a person no longer subject to the criminal justice system,[2] is appropriate. The options are supervised or secure care. Under supervised care P may be directed to stay either in a facility or at an alternative residence which could include a dwelling house, while secure care is much more restrictive and would require him to stay in a secure facility. The latter option is only warranted if supervised care would pose a serious danger to P's health and safety or to that of others.[3] This application is for a continuation of supervised care.

[9] The purposes and principles of the Act[4] provide a helpful starting point. The stated purposes are threefold. Firstly they are to provide the Courts with appropriate compulsory care and rehabilitation options for persons who have an intellectual disability and who are charged with, or convicted of, an offence; secondly to recognise and safeguard the special rights of individuals subject to the Act; and thirdly to provide for the appropriate use of different levels of care for individuals who, while no longer subject to the criminal justice system, remain subject to the Act.

[10] The principles by which the Court must be guided also require consideration of three factors, namely, the protection of P's health and safety, the health and safety of others, and P's rights. However, the factors affecting P do not assume paramountcy and the Court has a clear duty to consider the community perspective and if necessary, to assume a protective mantle. This is particularly important when one has regard to the offending which triggered the application of the Act.

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[1] Section 85(1) Intellectual Disability Compulsory Care & Rehabilitation Act 2003 (IDCC&R Act)
[2] Section 6(3) IDCC&R Act
[3] Section 85(2) and (3) IDCC&R Act
[4] Section 3 and 11 IDCC&R Act

[11] I must also be mindful of s 13 which directs that the Court must exercise its powers with proper recognition of the importance and significance of familial relationships, cultural and ethnic identity and beliefs and proper respect for a care recipient's competencies and autonomy so that as far as possible, he/she can understand and participate in the process.

[12] In deciding whether to extend P's compulsory care order I must have regard to the most recent certificate given by the specialist assessor,[5] Mel Smith, under s 82 of the Act. But, this does not provide a platform for review of a care and rehabilitation plan. Although the Act directs that there must be a clinical review not later that 14 days before a care recipient's compulsory care order expires[6] this is clearly intended to ensure that the care co-ordinator has proper information from which to determine whether or not an application should be made for an extension and to provide the evidential foundation for such an application, if it is to be made. Hence the requirement for the Court to consider the specialist assessor's certificate.[7]

The Evidence

[13] To ensure that P could fully participate in the Court process the hearing proceeded on an agreed basis whereby he gave oral evidence and was carefully cross-examined by Mrs Thomas, for the applicant and answered questions from me. None of the applicant's witnesses were required for cross-examination and the following documentary evidence was accepted:

1. Specialist assessment of Olive Webb, Psychiatrist to the effect that Mr K has the requisite intellectual disabilities;
2. The application of Ms Anderson, the then co-ordinator dated 1 February 2008;
3. The specialist assessor's review by Mel Smith and accompanying s 79 certificate, both dated 9 January 2008 for the (updated) individual care and rehabilitation plan dated 6 June 2008.

[14] Ms Lizette Huitema, the applicant and compulsory care-cordinator and Rachel Spencer, P's care manager were present and clarified issues as they arose.

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[5] Section 79 IDCC&R Act
[6] Section 77(2)(c) IDCC&R Act
[7] Section 88 IDCC&R Act

P's Case

[15] P took no issue with Olive Webb's assessment of his intellectual disability but he nevertheless challenged the need for him to remain under compulsory care. His evidence was, in essence, that while he was willing to accept support and continue with the STOP programme, this could be undertaken on a voluntary basis.

[16] P was confident that if he were given responsibility he would step up to the mark and would not re-offend. He emphasised his understanding of being "on the good side" and "on the bad side" in relation to conduct which placed him at risk of re-offending, particularly around children.

[17] P also believed that he had adequate life skills to live independently in the community and outlined his ability to undertake tasks such as grocery shopping, cooking and financial management together with the maintenance of his health and hygiene. He repeatedly stated that he "wanted to get on with his life".

Should the compulsory care order be extended?

[18] To answer this I must consider P's health and safety, that of others, and P's rights. The certificate issued under s 79 highlights serious concerns for the health and safety of others if P were not under compulsory care. He has a long history of violent and sexual offending about which the following precipitating factors were identified:

- Unsuccessful attempts at living independently in the community resulting in feelings of abandonment, loneliness, low moods and anger;
- Absence of effective coping mechanisms;
- Disinhibition by alcohol and drug intoxication; and
- Beliefs supportive of use of violence and/or sexual offending.

[19] In the assessor's opinion, all of those precipitating factors are still present apart from drug and alcohol use which is controlled simply because P lives in a supervised environment. That is a view shared by those currently involved in P's supervision.

[20] While some treatment gains are recognised, P is still assessed in the high risk category of male sex offenders. This is a well founded assessment. P denies any current risk yet he is unable to provide information on self-management strategies. He expressed a wish to open a hostel for young men with intellectual disabilities or homeless youths but given that P's index offence was against a young man with an intellectual disability, this shows a serious lack of insight. At the hearing P denied any ongoing interest in this proposal but that denial was made in the face of an adverse report about which he was aware. His failure to recognise the inappropriateness of such a suggestion in the first instance, is concerning.

[21] Mel Smith reported that P continued to make comments which indicated a preoccupation with sexual matters and therefore a strong likelihood of re-offending. For example, P spoke of areas close to his residence which he thought would be suitable for committing sexual offences and had been observed staring at children for extended periods, touching his genitals while watching a cartoon featuring children, and engaging in sexually explicit conversations with his flat mate regarding anal sex. All of this shows an inability to regulate his sexual behaviour. Adding to those concerns is P's externalisation of responsibility for sexual offending, especially his comments that neighbours should prevent their children from walking outside his residence and that staff should stop him from staring at children.

[22] Staff also reported that when P returned from group treatment his mood was elevated and he exhibited sexualised behaviour. He had also failed to comply with all aspects of his safety plan including the requirement to notify staff of his whereabouts.

[23] Although P said that he would continue to attend the STOP programme on a voluntary basis, this is contrary to earlier statements made by him. His explanation for this inconsistency was that he had been angry when he made the comment and it was untrue. This was unconvincing. Furthermore, P displayed a remarkable lack of insight. One of his principal reasons for completing the programme was to prove that he could finish a course, which is an accomplishment that he has not achieved to-date. I am not at all confident that without compulsion, P would be sufficiently

motivated to continue with that programme and given the risk which he poses, it is critical that he does so.

[24] P also has difficulties with hostility and aggression and while some improvement has been noted it remains a management issue within his home.

P's health and safety

[25] P was reasonably satisfied with life at the Richmond New Zealand home although he thought that staff "may not really know him" and that one of the other residents, Shane, was difficult to live with. He said that Shane was verbally abusive and he found that distressing. Ms Spencer acknowledged some animosity between P and Shane but opined that there was a significant degree of mutuality in this and that P's aggression was closely managed. No issue of physical safety arose.

[26] My impression was that P's health and safety is enhanced by the provisions of his care plan and the degree of support which he receives in all aspects of his life including mood management and assertion training, motivation, exposure to appropriate pleasurable activities, learning how to access meaningful experiences and the development of safety plans and therapeutic interventions.

[27] It is also noteworthy that Ms Spencer did not share P's view that he could manage his self-cares if living independently in the community. In all aspects of P's day-to-day things he is supported and prompted. He has no literacy skills and is prone to impulsivity. I have no doubt that P's health and safety would be compromised if he were not a care recipient.

P's rights

[28] P's counsel, Mr Wilding, strongly advocated for the least restrictive intervention and relied on the provisions of the New Zealand Bill of Rights Act 1990 (The Bill of Rights) which affirms the independence and liberty of the individual. By way of analogy he referred to the Mental Health (Compulsory Assessment and Treatment) Act 1992 and the Protection of Personal Property Rights 1998 which, wherever possible, have been read consistently with the Bill of Rights so as to favour

the least restrictive intervention consistent with their purpose and object. I accept that P's rights should be acknowledged and respected, but not to the extent that they compromise the fundamental rights of members of the community to be safe.

[29] With respect to other concerns raised by P, they related primarily to the terms of his care plan and as previously noted, this application is not a review process. Those issues can be addressed through other avenues, for example specialist assessor reviews and/or by the District Inspector.

[30] On a positive note it was pleasing to learn that P has regular contact with his parents. This is in accordance with the principles of the Act. Richmond New Zealand staff have assisted his family in developing a safety plan to enable P to enjoy successful home visits.

Finding

[31] I am satisfied that grounds exist to extend the compulsory care order made on 24 February 2005. No challenge has been made to the statutory criteria and no evidence has been adduced which shows that circumstances which led to the order have changed.

Which level of care is required?

[32] Currently P is under supervised care and no change in this is sought. While the level of supervision provided for under the care plan is at the higher end there is no evidence to show that it would pose a serious danger to P's health and safety or that of others if it continued. Therefore, secure care is not required.

For what term should the order be extended?

[33] Mr Wilding submitted that there was good reason for the order to be extended for a period of less than the maximum of three years. He suggested that because there is no presumption as to duration, an order for a lesser period of say, one year, may serve as a useful tool for the Court to scrutinise P's progress and the manner in which he has been supervised and treated. Further, he submitted that a three year

order would not recognise any early significant improvement and inhibit P's transition to independence.

[34] While I am mindful of P's strongly held desire to achieve self-sufficiency and his belief that he is safe in the community, this is not a view shared by the professionals working with him and on which I place considerable weight. P has a long history of violence and sexual offending and he is still regarded as a high-risk despite being a care recipient for some three years. Little discernible progress has been made over that time and realistically any ongoing progress will be slow. The timeframe required is far greater than 12 months.

[35] P's care manager described him as being significantly more agitated and aggressive within the home during the month preceding the hearing and she attributed this, at least in part, to the stressors of the Court process. Mr Wilding challenged the foundation of that belief but submitted that in any event it was an irrelevant consideration and if brought into account, would support a maximum duration in many cases, which is inconsistent with the principled and rights-focussed approach contained in the IDCC&R Act and the Bill of Rights.

[36] What is required is a careful balancing exercise having regard to the individual needs of a particular care recipient on the one hand, and the community on the other. Court proceedings are invariably stressful, even for those without the challenges which P faces and I have little doubt that the increased number of Incident Reports involving P's aggression in the home during the month of May reflected his increased levels of anxiety. Given his high risk of re-offending and the other difficulties to which I have referred, little will be achieved in 12 months and I do not consider that it will be in P's interests to significantly increase his anxiety levels on an annual basis. Nor will he benefit from having his care and rehabilitation programmes disrupted in this way. An extension of the order for a period of three years is appropriate.

Order

[37] The compulsory care order providing for P K to receive supervised care is extended for a further three years.

JJ Moran
Family Court Judge

Signed at ___________ am/pm on _______ June 2008