EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

NOTE: PURSUANT TO S 130 OF THE INTELLECTUAL DISABILITY (COMPULSORY CARE AND REHABILITATION) ACT 2003, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS.

IN THE FAMILY COURT
AT MANUKAU

FAM-2013-092-001980
[2016] NZFC 3928

IN THE MATTER OF	INTELLECTUAL DISABILITY (COMPULSORY CARE AND REHABILITATION) ACT 2003
BETWEEN	PAUL HARVEY Applicant
AND	AT Respondent

Hearing: 31 March 2016 (subsequent submissions filed)

Mr Allan Cooke for the Subject Person
Mr Paul Harvey for NIDCA

Judgment: 13 June 2016

RESERVED DECISION OF JUDGE MAUREEN SOUTHWICK QC

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[1] On 31 March 2016 an order was made pursuant to s 86 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 ("the Act") in relation to AT.

[2] During the course of the hearing, there was significant discussion as to the correct interpretation of various provisions of the Act, which interpretation impacts upon the information required to be provided when dealing with reviews of plans or

compulsory care orders. Although the order sought with respect to Mr AT was agreed by all to be appropriately made on the date of the hearing, it was decided that the question raised during discussion was important enough to seek guidance from the Court for the purpose of future applications.

[3] Written submissions have subsequently been filed by Mr Allan Cooke, lawyer for the care recipient and by the care co-ordinator for the National Intellectual Disability Care Agency ("NIDCA").

The Issue

[4] The question posed to the Court is whether the care co-ordinator has an obligation to satisfy the Court, both at the time of the original application for a compulsory care order and for all subsequent reviews, that the care recipient has an "intellectual disability" as defined in s 7 of the Act.

[5] It is accepted by both Mr Cooke and Mr Harvey that if a specialist assessor at any time reaches the conclusion that a care recipient no longer has an "intellectual disability", there is an obligation on the part of the care co-ordinator to file an application pursuant to s 84 of the Act seeking that an existing order is discharged. The Court does not have the ability to discharge an order unless such application is made.

[6] Beyond that consensus there is no agreement on the part of NIDCA that there is a need to provide any formal reassurance to the court that the care recipient's "intellectual disability" continues when review / variation is sought.

The Approach of NIDCA

[7] It is the submission of NIDCA that whilst there is an initial obligation to undertake a full assessment establishing "intellectual disability", it is impractical to require that a re-assessment occurs for the purpose of subsequent applications/reviews.

[8] It is said by NIDCA that in the majority of cases compulsory care orders are made for individuals who have a permanent diagnosis of intellectual disability. It is nevertheless acknowledged that there are cases where, for a variety of reasons, changes occur in the recipient's state so that they no longer fit the definition of suffering from an "intellectual disability".

[9] The care co-ordinator's submissions suggest that a change in the intellectual status of the care recipient will be identified through observation. It is further submitted that ongoing formal testing should not be required as there are "significant monitoring measures in place to ensure individuals are not detained inappropriately". These "monitoring measures" are not described.

[10] It is the view of the care co-ordinator that to require a formal re-assessment at six monthly intervals "would be neither practicable nor a clinically or statistically valid thing to do". This is submitted to be because repeated IQ testing, results in "practise effect" whereby an individual develops knowledge of questions asked previously and so can achieve an artificially high score. That submission is not altogether clear, given that one would not have expected that exactly the same test would have to be applied on each occasion. In addition, it would seem to be a reasonable conclusion that a care recipient who is able to manipulate answers in the fashion suggested (particularly when the first test is likely to have occurred six months earlier) would be unlikely to meet the definition of intellectual impairment as defined in the Act. However the Court acknowledges that these questions were not put directly to the care co-ordinator.

[11] A letter from the Ministry of Health, which is attached to the submissions of NIDCA, largely supports the approach taken by the care co-ordinator. The Ministry representative states that it "does not see recurrent testing at the time of an application for variation or extension of an order, as a sensible or necessary action in most cases". No reference is made to any specific difficulty in re-testing, rather emphasis is placed upon the view that an established diagnosis upon entry meets the requirements for further applications before the Court "unless there are clinically indicated circumstances". That comment begs the question as to how and when the care co-ordinator is placed in a position of judging "clinically indicated

circumstances". It also avoids consideration of what is, in fact, required by the legislation.

The Approach of Counsel for the Care Recipient

[12] Counsel for the care recipient analyses the relevant sections of the Act, concluding that there is an obligation to provide expert assessment of an individual's continuing "intellectual disability" at each review procedure. He notes in particular that s 8 (2) (a) provides that the provisions of the Act cannot apply to a person who does not have an "intellectual disability" as defined by s 7 of the Act.

[13] It is submitted that the clear intention of the Act is to require confirmation of "intellectual disability" – that is, both on entry and throughout the review process. The contention is that if such was not necessary it would "negate the need for any of the protection mechanisms of the Act". In supporting this submission reference is made to the Purposes of the Act which are set out in s 3, emphasis being properly placed upon the fact that these purposes must always provide a backdrop to interpretation of the implementation provisions.

[14] Mr Cooke submits that the Principles of the Act as set out in s 11 must also remain at the forefront in exercising powers under the Act. That exercising of power necessarily includes the mandated review process, variations and discharging of orders.

[15] Part 6 of the Act is entitled "Reviews of Conditions and Status of Care Recipients". Mr Cooke refers to a number of the provisions contained within this Part of the Act to support his submission that ongoing "intellectual disability" must be the subject of formal assessment before the Court can sanction orders pursuant to Part 6.

[16] Finally, reference is made to s 82 of the Act which governs the situation where a recipient is no longer subject to the criminal justice system. In such a case a specialist assessor must complete a certificate which confirms whether or not the

individual continues to qualify for as a care recipient. That certificate is required to include whether, in the opinion of the expert assessor :

" *(a) the care recipient still needs to be cared for as a care recipient or*
(b) the care recipient no longer needs to be cared for as a care recipient"

In that process the question must necessarily be – does the care recipient continue to suffer from an intellectual disablement?

[17] In summary, it is submitted by Mr Cooke that the entire fabric of the Act reflects the requirement that those who are subjected to its provisions are regularly monitored and "certified" as continuing to suffer from an intellectual disablement.

Discussion

[17] In deciding the correct interpretation of the relevant provisions of the Act, practical difficulties which might be experienced by NIDCA in implementing those provisions, should not have influence. Put differently, those required to administer the Act must carry out that process as the provisions of the Act demand – not in a manner considered to be pragmatic although not complying with the proper interpretation of the relevant provisions.

[18] The submissions of NIDCA suggest the latter is the approach currently taken by that organisation. Rather than analyse the purpose and accurate interpretation of the Act, submissions focus upon a perceived lack of practicality in formally assessing an individual beyond the entry date.

[19] The proper starting point in this analysis is s 3 which refers to the "Purposes" of the Act. By virtue of that section, it is clear that the Act is intended to provide a mechanism for a court to direct defined options for those persons with an intellectual disability who are charged with, or convicted of, a criminal offence. Importantly s 3 provides also that those administering the Act are required:

> *(b) to recognise and safeguard the special rights of individuals subject to this Act"*

A person's "rights" are unlikely to be protected unless there is reassurance that there is at any point in time a continuing need for the individual to be subject to the compulsory care orders provided for in the Act.

[20] The "Principles" of the Act as contained in s 11 are as follows :

> "*Every Court or person who exercises, or proposes to exercise, a power under this Act in respect of a care recipient must be guided by the principle that the care recipient should be treated so as to protect –*
>
> *(a) the health and safety of the care recipient and of others; and*
>
> *(b) the rights of the care recipient"*

This again reflects a need to ensure that the jurisdiction of the Act continues to apply when powers are exercised under the Act. It should be regarded as the "right" of any individual subjected to the Act's provisions to know that appropriate assessment has occurred to confirm his/her status under the Act. This is particularly so when that individual's own powers are necessarily limited.

[21] It is of note that at the time an initial order is made, a care co-ordinator is required pursuant to s 49 (2) (b) to advise the care recipient about:

> *"b) the care recipient's right to have his or her condition reviewed by a specialist assessor in accordance with s 77"*

This obligation underlines the significance of the order that has been made with respect to a care recipient and could be said to re-assure a recipient that his/her position remains under review.

[22] Section 8 of the Act is of particular relevance when considering the question the Court is asked to address. That section provides as follows :

Section 8 (2)(a)

> *"To avoid doubt, if –*
>
> *…..*

(c) A person does not have an intellectual disability, the provisions of this Act relating to compulsory care cannot apply to the person, whether or not the person has any other disability."

[23] Reference to "*the provisions*" of the Act must encompass Part 6 of the Act which deals with "Reviews of Condition and Status of Care Recipient". Hence when exercising any of the powers referred to under Part 6 the Court must be satisfied that "intellectual disability" still exists. Such is a necessary "step one" in the process embarked upon

[24] Section 72 mandates a six-monthly review (at the latest) of the continued appropriateness of the recipient's care and rehabilitation plan and of the order. Among the material to be provided by the care co-ordinator is:

(a) A copy of the most recent certificate under s 79 as to the care recipient's condition; and

(b) Copies of any relevant reports from the specialist assessor who gave that certificate and other specialist assessors involved in the case".

[25] Subpart 2 of Part 6 of the Act is entitled "Condition of every care recipient is to be reviewed". s 77 provides for regular formal clinical reviews of care recipients. Reviews must take place at intervals of six months (following initial assessment and entry) and not later than 14 days before a care recipient's order expires.

S 79 in turn provides inter alia that:

(2) A review of a care recipient under s 77 is concluded by the issue of a certificate as to whether ***the status of the care recipient needs to be continued or needs to be changed"***

The wording of this section clearly proposes that there must be formal reassurance that the recipient continues to have "status" under the Act and hence has an ongoing "intellectual disability".

Conclusion

[26] An analysis of the "Purpose", "Principles" and implementing provisions of the Act lead to the conclusion that in seeking to utilise the review provisions, the care co-ordinator is obliged to provide evidence to the court that the care recipient concerned continues to have status under the Act and hence has an ongoing "intellectual disability" as defined by the Act.

[27] Not only does the plain wording of the relevant sections of the Act support that conclusion but also the Act mandates the necessity to protect the rights of a recipient. Those rights would not be adequately protected unless review occurs, at reasonable intervals, of the recipient's intellectual status, hence ensuring the ongoing jurisdiction of the Act.

[28] The submission of NIDCA suggesting that it would only be in a rare case that the status of a care recipient might change can have no impact upon the need to properly implement the provisions of the Act. Rather, it is for the care co-ordinator to settle upon an appropriate way in which the requirements of the Act are met. Those requirements include the provision of an expert report confirming the individual's ongoing "intellectual disability" on the occasion of each application subsequent to the original order. Alleged difficulties referred to in the care co-ordinator's submissions are not for this Court to address, but failure to comply with the legislative requirements are.

Maureen Southwick QC
Family Court Judge