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/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS.

IN THE FAMILY COURT
AT HAMILTON

FAM-2006-019-000465
[2016] NZFC 7935

IN THE MATTER OF	THE INTELLECTUAL DISABILITY (COMPULSORY CARE AND REHABILITATION) ACT 2003
BETWEEN	TE KOROWAI-WHARIKI Applicant
AND	ARNOLD HEYWOOD Person In Respect Of Whom the Application Is Made

Hearing: 19 September 2016

Appearances: M Cameron and W Ball for the Applicant
D Allan for the Patient

Judgment: 19 September 2016

ORAL JUDGMENT OF JUDGE D R BROWN

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[1] The fact that Mr Heywood has reflected on the situation and materially altered his position during the short adjournment I took to consider my decision does not make this judgment any less of an ache. This is a very difficult situation and there is no magic answer to it. I spent a part of the weekend reading about the situation and attempting to think my way through it and nothing made it any better really. The situation is one that simply has to be faced and I now face it.

[2] I had decided before Mr Heywood's change of position that, whereas normally with a judgment of this difficulty and complexity I would reserve my decision, it was better in this case to simply be a Judge in the old-fashioned sense and give a judgment here and now. Change in position is really reflective of the entire issue that is before me today. Mr Heywood told his lawyer in July of this year that he was not opposing the making of an order extending his present order but wanted the Court, effectively, to direct a change of his address. For today's hearing, however, Mr Heywood had changed his position from that and instructed his lawyer, Mr Allan, to argue against an extension of the order.

[3] During the break I took to consider my judgment, Mr Heywood then told Mr Allan that he was wanting to stay on the Act to enable him to feel safe but he wanted to have his care changed to a different institution. I know that Mr Allan has communicated to Mr Heywood that that is not legally possible for me because my legal role confines itself to deciding whether the order should be extended or not. I have no legal power over where Mr Heywood lives.

[4] When I gave my last judgment in this matter in July 2013 I set out very fully the background to the situation and the history of the situation, which I said I did with some reluctance. I described Mr Heywood's living situation and the issues that were before me in that judgment. I do not repeat all that material but this judgment today proceeds on the basis that the last judgment I gave, in fact, covers those issues.

[5] There is no dispute that Mr Heywood meets the formal legal definition of impairment sufficient to bring him within the operation of the Act. Mr Heywood lives in a semi-rural environment in which his care is minute and painstaking. The living situation is highly staffed and Mr Heywood's situation is very, very carefully

managed. The word that came to me repeatedly in regard to it was that his care was "very nuanced." No one complains in any way about the quality of that care and most of all the reporting psychologist, Dr Thompson, unhesitatingly agreed with that proposition. I read the care plan in its entirety and I want to simply set out a couple of paragraphs of it to indicate the level of care that Mr Heywood receives and is entitled to.

[6] Reading from the fifth page I read as follows:

> Consistency in management by his support staff assist Arnold to have a clear understanding of his boundaries. He continues to need support to discuss his issues and develop appropriate problem solving skills. A behaviour support plan identifying triggers and staff responses currently remains in place. Arnold can and will push boundaries, suggest that staff know the rules and to see if they continue to implement them which may well be done as a security check to ensure his and others safety. Arnold must have all his outings pre-planned and must be fully informed of where and what is occurring. Tea and rest times must also be identified on his day programme and he must be encouraged to follow them. Arnold can identify himself when he needs to have timeout; rest time. There may be times when staff will have to encourage Arnold to take this option.

[7] And on page 11:

> Staff will continue to provide one-on-one support when out in the community. Staff will need to prompt Arnold with cues around appropriate behaviour and his expectations of others.

[8] I could go onto describe in detail many other sections of the plan which indicate to me and confirm the level of very individualised care and attention that needs to be paid to Mr Heywood's care and is being paid to it.

[9] Even though the making of the order is not formally now opposed, I need to set out carefully the present law which deals with the dilemma that is at the centre of today's proceedings. The Court of Appeal in *RIDCA Central v VM*[1] considered carefully the dilemma that occurs and continues when an order is made initially on perhaps a comparatively minor issue and then is sought to be extended and extended again.

[1] RIDCA Central v VM 2012 NZFLR 216 (CA)

[10] Dealing with that dilemma the Court of Appeal said at paragraph 70:

> While we accept that proportionality between the terms and length of the compulsory care order and the original offence committed by the care recipient can be a relevant factor in finely balanced cases, we do not accept that such proportionality is a prerequisite to the extension of a compulsory care order. Taken to its logical conclusion, that would require a Judge to refuse to extend a compulsory care order in circumstances where he or she is satisfied that there was a substantial need to protect the public, merely because the offence actually committed by the care recipient was, of itself, minor.

[11] Summarising the Court's position at paragraph 90, the Court said:

> We do not accept that the length of time for which a person has already been subject to a compulsory care order can be ignored when assessing his or her liberty interest. This can be illustrated by a case where the assessment of the community protection interest against the care recipient's liberty interest was finely balanced at the first renewal of a compulsory care order. If, three years later, a further extension is sought and the community protection interest remains essentially the same, the balance against the extension may be tipped by the fact that the care recipient's liberty interest has become more compelling because he or she has already endured a significant period of reduced liberty. We do not see this as material other than in finely balanced cases. Where a care recipient constituted a significant danger to the public and compulsory care was necessary for community protection, the liberty interest of the care recipient, even if he or she had been in care for a long period, would not outweigh the community protection interest.

[12] I have to say plainly here that I am satisfied that this order should be extended both for the community's interest and for Mr Heywood's. I say that because, in fact, I have learnt from the material presented to me that even though at every conscious level Mr Heywood is determined that he will avoid the issue of fire-setting again, there have been observed behaviours which suggest that the preoccupation and excitement that underlie that issue still remain and are observable. Those matters of observation are set out in Dr Thompson's report of 19 April 2016 and led the doctor and myself to conclude that even though Mr Heywood has striven, and is still striving, to deal at a conscious level with those issues, they are still an operating factor in his life.

[13] Secondly I need to record, without offence I hope to Mr Heywood, that when these behaviours have occurred in the past they have often been associated with a decline in his mental health. That has led to Mr Heywood hearing voices and those issues are an ever present reality that is dealt with by Mr Heywood's everyday care.

It is necessary to keep the level of Mr Heywood's stress down because that is one of the issues that is a contributor to declines in Mr Heywood's functioning and health.

[14] The reporting psychologist, Dr Thompson, said at the end of his report:

> In making a recommendation as to whether an extension to his current order is sought, I am aware of the increasing tension between his liberty interest and the risk he is considered to pose to the community. My opinion is that in the absence of compulsory care and rehabilitation, Mr Heywood will be at a high risk of perpetrating an offence that would have a severe level of consequence for any victim. I also believe that allowing his order to expire as scheduled is highly likely to disrupt the continuity of his current care leading to a deterioration in his mental well-being. Therefore, irrespective of his risk of re-offending allowing his order to expire would be of little overall benefit to him other than temporarily giving him the increased sense of autonomy and control in his life he has understandably missed.

[15] Mr Heywood has effectively addressed that last statement by Dr Thompson by his decision over the adjournment to instruct Mr Allan to agree to the extension of the order and that the decision I would have made in any event would mean that the order was to be necessarily extended, both for the community's sake and for Mr Heywood's.

[16] I turn to the issue, which is Mr Heywood's primary concern, which is where he is required to live. I need to say to Mr Heywood that I have looked carefully at the description of how he is living at the present time and I need to say that I think that everything that is possible is being done to assist him at the present time and I am impressed by what is being done and what Mr Heywood has achieved within it. I do not have any sense that a change of address would have some magical benefit. In fact I wonder whether a change of address would, in fact, cause a destabilisation of his situation which Mr Heywood does not want himself. But, having said that, legally I have no control over the issue but I make it plain that I make this judgment on the assumption that this issue will remain a live issue for those looking after Mr Heywood. When a judge comes to a case like that a judge becomes keenly aware how major these decisions are for a human being who is with us in this situation through no fault of his own basically.

[17] I also need to emphasise that the Act provides in s 55 that every care recipient is entitled to the company of others and in s 56 that:

> Every care recipient is entitled, at reasonable times and at reasonable intervals, to receive visitors and to communicate orally with persons outside the facility, except where the care manager has reasonable grounds for believing that a visit or communication would be detrimental to the interests of the care recipient and to his or her care.

[18] I suspect that that is not really an issue but I add that into this judgment to make it plain that that is what the rule says. Independently of Mr Heywood's agreement, but accepting it too, I believe that there would be significant unacceptable risk if Mr Heywood was taken off the Act at the present time. The risk would both be to Mr Heywood and to members of the public. I decline to do that.

[19] I therefore now make an order extending Mr Heywood's order at the same level of care as at the present time and I think that the term of the order should be three years.

[20] I want to thank Mr Heywood for his involvement here today and I want him to hear from me that I am impressed by the number of things that he does and I am pleased with some of the achievements he has made.

D R Brown
Family Court Judge