EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

NOTE: ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980.

IN THE FAMILY COURT
AT TAURANGA

FAM-2016-070-000090
[2017] NZFC 6586

IN THE MATTER OF	THE ALCOHOLISM AND DRUG ADDICTION ACT 1966
BETWEEN	BAY OF PLENTY DISTRICT HEALTH BOARD Applicant
AND	[REECE ABERNATHY] Respondent

Hearing:	18 August 2017
Appearances:	Dr B Mijatovic and N Malcolm for the Applicant Respondent appears in person S Stewart as Lawyer to Assist
Judgment:	24 August 2017

JUDGMENT OF JUDGE E B PARSONS
[as to reasons]

---

[1] An application to revoke leave under s20 of the Alcoholism and Drug Addiction Act 1966 ("the Act") came before me for determination by way of a submissions only hearing on 18 August 2017.

[2] The s 20 application was made on 16 August 2017 by Dr Mijatovic, Psychiatrist from Tauranga Hospital in relation to Mr [Abernathy]. Section 20(2) of

the Act provides the grounds upon which the leave granted to someone under the Act pursuant to s17(1)(c) can be revoked.

[3] On receipt of the application, I appointed Ms Stewart as counsel to assist[1] to ensure natural justice was observed and Mr [Abernathy] provided with the opportunity to consult and instruct a lawyer without delay[2], to ensure Mr [Abernathy's] right to be heard was protected, as well as to assist the Court in ensuring all matters that required consideration were brought to the Court's attention. Mr [Abernathy] had indicated he opposed the application for revocation of his leave being granted.

[4] At court on 18 August were the applicant, the respondent in person (Mr [Abernathy]) and counsel to assist.

[5] The matter was ultimately dealt with by consent with the application being adjourned to 18 September 2017 pursuant to s20(5)[3] on the basis of Mr [Abernathy's] leave continuing on terms and conditions.

[6] Given the gravity of the potential ramifications of such applications (with the revocation of any leave resulting in the renewed detention of applicants and deprivation of liberty), I indicated to counsel and Mr [Abernathy] that I would issue a full decision setting out my reasons subsequent to that adjournment. This decision sets out my reasons.

Background

[7] On 17 February 2016 an order for detention was made on the basis of a voluntary application made by [Reece Abernathy]. The order remains effective for a

---

[1] This appointment was made under my inherent powers to regulate the court and in reliance upon rr13-16 of the Family Court Rules 2002 – the Act does not provide any specific provision to appoint counsel to assist – given the Act came into force some 25 years prior to NZBORA it was critical to ensure that Mr [Abernathy's] rights as set out in this judgment were protected independently of his own representation as well as all matters that required consideration brought to the Court's attention. I assessed it would have been a breach of his rights to fail to have such counsel appointed.

[2] As assured pursuant to s23(1)(b) New Zealand Bill of Rights Act 1990

[3] Section 20(5) of the Act states "On any application under subsection (2) of this section the [[District Court Judge]] may, in his (sic) discretion, adjourn the determination of the application from time to time, for periods not exceeding one month at any one time and not exceeding 2 months in the aggregate, and may from time to time make such order as he (sic) thinks fit."

period of two years after the date of a patient's first reception at a designated institution[4].

[8] In this case Mr [Abernathy's] reception at [the health facility] in [location deleted] was 2 March 2016. The period of computation includes any leave taken during that period.[5]

[9] While Mr [Abernathy] had voluntarily requested that the order for detention be made, it also required that, at the time of assessment, a Judge had to be independently satisfied of a number of things. These included being satisfied that Mr [Abernathy] could be classified as an alcoholic[6], and also that he fully understood the nature and effect of order. At the time of the making of the order the Judge had made it clear in his oral decision that while the application itself was voluntary, once the order was made there was nothing then voluntary about it beyond that point[7].

[10] Mr [Abernathy] is recorded as acknowledging that he would not have the right to simply leave the programme or discharge himself without authorisation, and that the order enabled the provider to apply for a warrant for arrest if he left the programme without such authorisation[8]. The significant limits upon his freedom imposed by the order were very clearly signalled and spelled out to him at that time.

[11] Mr [Abernathy] subsequently applied for, and was granted leave, by a District Court Judge on 23 May 2016. This was some one year and three months ago after application was made by the supervisory committee of [the health facility] who requested that leave from the Court. The order made on 23 May 2016 granting leave contained no terms or conditions pursuant to s 17 of the Act.

---

[4] Section 10 Alcoholism and Drug Addiction Act 1966

[5] Section 11(2) Alcoholism and Drug Addiction Act 1966. Application for voluntary application to be then made pursuant to s 8 of the Act.

[6] The term "alcoholic" rather than person suffering from alcohol addiction is the term used within the act and defined within s2 Interpretation section – "**alcoholic** means a person whose persistent and excessive indulgence in alcohol is causing or is likely to cause serious injury to his health or is a source of harm, suffering, or serious annoyance to others or renders him incapable of properly managing himself or his affairs"

[7] Judgment of Judge Geoghegan dated 17 February 2016

[8] Sections 9, 16, 20 ADAA 1966

[12] At the time Mr [Abernathy] was granted leave he had been abstinent for two and a half months and had participated mainly well with the programmes at [the health facility]. At that time he had recently found out that his father in [country deleted] had been diagnosed with [details deleted]. This understandably unsettled him and he wished to be able to travel back to [country deleted] to see his father – which he subsequently did. He had also at that time started attending a [organisation name deleted] day time programme.

[13] Unfortunately for Mr [Abernathy] things have not gone well since that time resulting in the application being filed for a s 20(2) revocation of leave granted in May last year. Mr [Abernathy] opposed the leave being revoked.

Preliminary Issue - Section 17 Leave granted by District Court Judge – ultra vires

[14] Although leave for Mr [Abernathy] was granted by a District Court judge on 23 May 2016, it is not for a District Judge to grant leave. That is because pursuant to ss17 and 19 of the Act, the granting and varying of leave (as opposed to a discharge) is the sole purview of the Minister of Health[9] or of the supervising committee of the institution[10] (if there is one) or the person in charge of a hospital[11].

[15] That order for leave was not appealed nor judicially reviewed, so remains an order, albeit not, in my view, validly made.

[16] Section 20(5) provides jurisdiction to adjourn s20 revocation applications and also to "*make such order as a judge thinks fit for the care of the patient*"[12]. However given that the granting of leave and hence imposition of any leave conditions/terms is reposed only in those set out in ss17 and 19, I do not accept that a District Court judge can subsequently vary or change conditions or terms of leave. Such decisions are

---

[9] The Minister is defined as the Minister of Health in the Interpretation section of the Act – s2

[10] A supervising committee is defined in s2 of the Act as meaning a supervising committee appointed for the institution under s7 which states that the minster may appoint a supervising committee for an institution and shall be constituted by a District Court judge, the superintendent of the institution and the medical practitioner attending the institution and 1 other person.

[11] In the event that a discharge (rather than leave) is sought and denied, then only a High Court judge may determine whether the that person may be discharged or not.

[12] Section 20(5) of the Act

clinical and medical decisions and not something that a judge could be said to have any expertise with.

[17] Section 19 of the Act is clear in relation to who can vary or revoke any such terms and conditions. It states that:

> Where a patient is on leave of absence under paragraph (c) of subsection (1) of section 17, **the Minister**, **committee**, or **superintendent** who released the patient on leave of absence, may, on the application of the patient, vary or revoke all or any of the terms and conditions on which the patient has been released and where a patient is on leave of absence under subsection(3) of section 18, any Judge may, on application of the patient, make an order varying or revoking all or nay of the conditions on which the patient has been released.
>
> [My emphasis.]

The Law

[18] Section 20(2) provides jurisdiction for a Constable or any other reputable person (here Dr B Mijatovic) to apply to revoke the leave. A reputable person is not defined within the Act itself. I accept that Dr Mijatovic can be considered a reputable person within the context of this application being the allocated psychiatrist treating Mr [Abernathy].

[19] There are disjunctive grounds that need to be established to trigger the exercise of my discretion to consider revoking the leave. The disjunctive grounds are (a) that the patient who is absent on leave has either been taking or using in excess alcohol or other defined substances or (b) has contravened or failed to comply with terms/conditions of release on leave.

[20] Given there were no terms or conditions of release stipulated with the leave granted in May last year, my sole ground for consideration before the exercise of my residual discretion is whether or not there is evidence that Mr [Abernathy] has been taking or using alcohol in excess (s 20(2))[13].

---

[13] No terms or conditions of release were sought by [the health facility], and none were imposed by the Court (albeit without jurisdiction to grant leave at all). Given the leave order was not judicially reviewed

Cases Considered relating to originating applications for Detention (ss8 and 9)

[21] His Honour Judge Coyle noted in *Lowering v Walsh* at [24]: [14]

> The power to make an order for detention is a discretionary power vested in a Judge. In exercising that discretion, in my view, there is a high onus on the Court to be satisfied that the making of such an order is the only available option and that the exercise of the discretion should therefore be exercised cautiously.

[22] I acknowledge immediately that the Act dealing with these applications predates the New Zealand Bill of Rights Act 1990 by some 25 years. This is recognised by Justice Mallon who identifies in the case of *VC v NC* that the relevant rights to be considered include: [15]

(a) The right to have freedom of movement;

(b) The right not to arbitrarily detained or arrested;

(c) The right to natural justice; and

(d) The right to refuse to undergo any medical treatment.

[23] While the cases I have referred to above relate to originating applications and are therefore distinguishable from matters that need to be considered on a revocation of leave application, I consider that the views expressed by the Law Commission that compulsory treatment for alcohol and drug dependent people is only justified in certain circumstances[16] must still be paid regard to on a revocation application. However it is to be noted that there has already been an assessment that a person's dependence has

---

nor appealed, I have accepted that it exists as an order for the purposes of consideration of this application for its revocation.

[14] *Lowering v Walsh* [2014] NZFC 9600

[15] *VC v NC* [2015] NZHC 2014 at [11]

[16] The Law Commission's view is that compulsory treatment for alcohol and drug dependence is only justified in the following circumstances: a person's impairment has seriously impaired his or her capacity to make choices about ongoing substance use and personal welfare; and care and treatment is necessary to protect the person from significant harm; and the person is likely to benefit from treatment, and the person has refused treatment.

seriously impaired their capacity to make choices about their welfare and ongoing substance use at the time the original order for detention was made.

[24] Where leave is granted, or revocation of leave applied for it has already been established that the treatment is necessary to protect that person from significant harm. It has already been assessed that the person will benefit from treatment and there has already been an assessment of the Bill of Rights freedoms assured under the New Zealand Bill of Rights Act. An application for s20 leave occurs within the treatment options during that 2 years treatment and detainment period. The leave is a clinical decision made by those treating a patient, whereas the original detention is an order made by a Judge on the evidence before the Court for that institution to be handed the care of the person. This care includes the right to grant leave for certain periods and on grounds and conditions that the organisation deems necessary.

[25] What also needs to be assessed in terms of a s20 revocation application is whether there is, at the time of assessment, any other less restrictive means reasonably available for dealing with the person.

Evidence of taking or using alcohol in excess

[26] The written evidence filed by Dr Mijatovic from the Bay of Plenty District Health Board is that Mr [Abernathy] drank excessively immediately upon his release from [the health facility] in May/June 2016 and has continued to drink excessively since then. The evidence is that he has as at three weeks ago been known to be drinking continuously two to three bottles of vodka a day. Mr [Abernathy] was recently admitted to a psychiatric hospital for medical alcohol detoxification, however he has since disengaged and refused to be seen or attend planned appointments since. I consider that evidence of Mr [Abernathy's] excessive drinking last year without recent evidence of excessive alcohol use would not satisfy me that my discretion ought to be triggered.

[27] There needs to be, in my view, evidence of excess drinking proximate to the application and the seeking of the revocation of leave. That evidence is available here

with the excessive alcohol use of Mr [Abernathy] drinking two to three bottles of vodka a day continuously relating to a timeframe of three weeks ago.

[28] There is a corroborative medical evidence of the negative effects of excessive alcohol consumption on Mr [Abernathy] before the Courts. Mr [Abernathy] has been assessed as having increasing alcohol-related medical problems including poorly controlled diabetes, chronic pancreatitis, liver damage, recurrent falls, bruises and fractured ribs with pneumothorax and subsequent pneumonia all in recent months.

[29] Here an order for detention has already been made that remains valid until the two year expiry of February 2018. Therefore the originating assessment of whether or not Mr [Abernathy] is an "alcoholic" or not has already been satisfied, as has the need for an order for detention. Here the limited issue to be analysed within this statutory framework under s 20(2) is whether or not the step one factual determination of Mr [Abernathy] having consumed excess alcohol is established or not on the balance of probabilities.

[30] I am satisfied that there is sufficient proximate evidence to establish that Mr [Abernathy] has indeed been consuming excessive alcohol. The evidence of 2 to 3 bottles of vodka consumption by Mr [Abernathy] per day is, by any assessment, excessive. The corroborating medical evidence on the negative medical impacts upon him is supportive of this.

[31] I therefore accept that there is evidence available to find that Mr [Abernathy] has being using alcohol in excess while on leave from [the health facility].

[32] Once the factual finding of excessive alcohol consumption is established, what remains is the exercise of the residual discretion.

[33] While the revocation of leave is distinct from the making of an order on an originated application (in that the restriction of a person's freedom of movement has already been curtailed by the order for detention), I consider the same caution needs to be exercised within a s 20 analysis of revocation of leave that still involves an invasion of a person's rights and deprivation of liberty.

[34] I am of the view that on an application for revocation of leave (where there has already been a determination of an application for detention) the considerations of the rights assured under the New Zealand Bill of Rights Act are imported but in a muted fashion as compared to when they have to be a primary consideration at the stage of an originating application.

[35] In this particular case Ms Stewart has submitted that this application be adjourned pursuant to s 20(5) which provides jurisdiction for such an application to be adjourned for a period of a maximum of one month (and subsequently for a cumulative period of a maximum of two months on any one application).

[36] Dr Mijatovic consented to the adjournment on the basis of terms and conditions of the leave being imposed – the terms and conditions suggested were accepted by Mr [Abernathy].

Any other less restrictive intervention short of revocation of leave available?

[37] In this case Mr [Abernathy] has indicated that he has been abstinent of recent times. He is consenting to a variation of the leave by the imposition of the following conditions together with the provision to bring the matter back to Court on 24 hours notice should there be a breach of any of the conditions.

[38] The conditions that have been agreed to are as follows:

(a) Firstly Mr [Abernathy] is to remain abstinent at all times;

(b) Mr [Abernathy] is to attend all appointments allocated and notified to him of his treatment team being Dr Mijatovic, Mr [Abernathy's] counsellor and any group therapy advised and confirmed.

(c) Mr [Abernathy] is to continue to take Antabuse prescribed and undertake observed consumption on Monday, Wednesday and Fridays;

(d) Mr [Abernathy] is to undertaken random breathalyser tests on demand.

[39] Dr Mijatovic has also been granted leave to bring the matter back before me on 24 hours notice if required (or anyone else in her role).

[40] The leave conditions have been varied by consent in that the terms that are agreed to now attach to Mr [Abernathy's] leave have been sought to be set out and stipulated by the head of the hospital directing those conditions[17]. This is to ensure compliance with s 17.

[41] If there is any breach of these conditions and/or evidence of excessive alcohol consumption it has been made very clear to Mr [Abernathy] that upon receipt of such evidence the matter will come back before me for a fresh consideration in terms of the existing application for revocation of leave.

[42] The matter is otherwise adjourned for further consideration on 18 September 2017 at 10.00am before me.

E B Parsons
Family Court Judge

[17] [The Clinical Director] of Mental Health Addiction Services, Bay of Plenty has set the leave terms and conditions that Mr [Abernathy] has agreed to.