

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

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**IN THE FAMILY COURT
AT WELLINGTON**

**I TE KŌTI WHĀNAU
KI TE WHANGANUI-A-TARA**

**FAM-2015-085-001197
[2021] NZFC 5177**

IN THE MATTER OF	THE INTELLECTUAL DISABILITY (COMPULSORY CARE AND REHABILITATION) ACT 2003
BETWEEN	FORENSIC COORDINATION SERVICE Applicant
AND	[ANDRE KNIGHT] Respondent

Hearing: 20 May 2021

Appearances: R Newberry for the Patient
T John as Care Co-Ordinator
P Carlyon as Specialist Assessor
M Love-Gray as Care Manager
A Gray as District Inspector

Judgment: 4 June 2021

REASONS FOR DECISION OF JUDGE M N E O'DWYER

[1] This is an application for a further extension of the Compulsory Care Order made in the Levin District Court on 28 February 2017 for a term of two years. The application for an extension was filed by the Care Co-Ordinator, Mr John, on 25

February 2021. Mr Newberry, lawyer for Care Recipient, Mr [Knight], filed a notice of opposition on 11 March 2021. Directions were given that the expiry of the current order has to be deferred until 28 May 2021, to enable the extension application to be dealt with.

[2] Directions were given for a hearing where evidence could be heard and Mr [Knight] could be present. The matter was heard on 20 May 2021.

[3] At the conclusion of the hearing, there was insufficient time to deliver a decision in Mr [Knight]'s presence. I advised Mr [Knight] of the decision that I had reached which was to extend the Compulsory Care Order for a period of 12 months from 28 February 2021, the date the current order expires. I advised [Andre] that I would give my reasons in writing, and do so now in this decision.

The application and response

[4] The background to the Compulsory Care Order, and the application for a further extension is summarised by Mr John in the application dated 24 February 2021. At the hearing, Mr John confirmed that Mr [Knight] had been made subject to a Compulsory Care Order on 28 February 2017 under s 34(1)(b)(ii) of the Criminal Procedure (Mentally Impaired Persons) Act 2003. The Order provided that Mr [Knight] be cared for as a care recipient under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (IDCCR Act) for a period of two years from 28 February 2017.

[5] The order was extended by the Wellington Family Court on 22 March 2019 for two years from 22 February 2019. On application the expiry of the Order was deferred to 28 May 2021 when an application for extension of the order was notified to the Court.

[6] Mr John confirmed that the original Order was made following Mr [Knight]'s conviction on a charge of speaking threateningly, Summary Offences Act 1981, s 21, and common assault, Summary Offences Act 1981, s 9. The original order provided that Mr [Knight] be detained in a secure facility [Regional Intellectual Disability Supported Accommodation Service – RIDSAS] at [location deleted]. Since then he

has been moved to a secure facility at [Regional ID Secure Services (RIDSS)] in [a second location]. Mr John confirmed that Mr [Knight] continues to meet the diagnostic criteria for intellectual disability. Based on the specialist assessor's report from Mr Paul Carlyon, the recommendation was for a further two year extension.

[7] Mr Carlyon, the special assessor filed a report on 18 February 2021. Mr Carlyon recommended that an application be made for an extension for two years to permit the planned transition of Mr [Knight] to a Regional Intellectual Supported Accommodation Services (RIDSAS) placement in the community. He recommended that a transition to a community placement should be well planned and carefully implemented and supported by a focus on rehabilitation and risk management.

Mr [Knight]'s position

[8] Prior to the hearing, Mr [Knight]'s instructions to Mr Newberry had been to oppose any extension to the current community care order. In a report filed by Mr Newberry, he recorded that Mr [Knight] was very clear he wanted to challenge the proposed extension for two years and that he considered that he had been at [the RIDDS] too long in relation to the crimes that he was charged with. It was recorded that Mr [Knight] was aware that a plan was being developed for him to move from [the RIDDS] to RIDSAS community placement in [the second location] and that he understood the timeframe for the proposed transition would be three months. Mr [Knight] agreed to work with that plan and he willing to remain in [the RIDDS] as a voluntary patient if the order was not extended to give time for transition to the community to be achieved. It was also recorded that Mr [Knight] was motivated to work with a therapist and with a psychologist.

[9] At the hearing on 20 May, Mr Newberry advised that Mr [Knight] had altered his position. After further consideration he was able to consent to an extension of the Compulsory Care Order for a period of 12 months from 27 February 2021. He saw this as a reasonable time for him to transition to accommodation in [the second location], to work with a psychologist and other therapists as recommended by his care team and to demonstrate that risks that had been identified could be managed. He would then wish to be a voluntary client under the IDCCR Act.

[10] I heard evidence from Mr John, the Care Co-Ordinator, Mr Carlyon, the specialist assessor, and Ms Love-Gray, Mr [Knight]'s Care Manager. I heard briefly from Mr [Knight] himself and considered submissions.

The law

[11] Jurisdiction to extend the Compulsory Care Order is found in s 85 of the IDCCR Act. The purpose of the IDCCR Act is set out in s 3:

3 Purposes

The purposes of this Act are—

- (a) to provide 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; and
- (b) to recognise and safeguard the special rights of individuals subject to this Act; and
- (c) 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 this Act.

[12] The purposes of the Act do not include the purposes of protecting the community. Mr Newberry has referred me to authoritative decisions that have clarified and confirmed that the concept of community protection arises pursuant to s 11 of the IDCCR Act.

[13] Section 11 sets out the principles governing the exercise of powers under the Act:

11 Principles governing exercise of powers under this Act

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* (emphasis added); and
- (b) the rights of the care recipient.

[14] Mr Newberry referred me to the leading case of *RIDCA Central v VM*.¹ He accepted that the Court of Appeal had observed that balancing community protection against individual rights is relevant to initial orders being made notwithstanding that s 11 does not make it mandatory for the Court to balance community protection against individual rights. The Court of Appeal said:

[35] The focus of the principle set out in s 11(b) is on more fundamental rights, particularly rights ensuring basic freedoms of the kind described in the New Zealand Bill of Rights Act 1990 ... such as the right to freedom of movement, the right not to be arbitrarily arrested or detained, and the right to be free from discrimination on the grounds of disability.

[15] The Court of Appeal also noted that the measures available under the IDCCR Act for dealing with intellectually disabled offenders recognised that the measures will also apply in some circumstances to intellectually disabled persons who are no longer subject to the criminal justice system. The Court of Appeal said that indicates “a nuanced approach” to the application of these measures. A nuanced approach is called for to the application of these measures.

[16] The High Court has said that the purpose and legislative scheme of the Act provides a:

Humane, fair and compassionate system for care and rehabilitation.²

[17] Mr Newberry submitted that the Court’s task in considering the application to extend the order, for a period of two years and Mr [Knight]’s willingness to agree to an extension for 12 months is a task of balancing Mr [Knight]’s liberty interests against the interests of the community in protecting the health and safety of Mr [Knight] and others.

[18] The Court’s jurisdiction to extend a compulsory care order arises under s 85 which provides:

85 Extension of compulsory care order

(1) The Family Court may, on the application of the co-ordinator, extend the term of a care recipient’s compulsory care order.

¹ *RIDCA Central v VM* [2011] NZCA 659

² *J v Attorney-General* [2018] NZHC 1209, at [535].

(2) If the court extends a compulsory care order for a care recipient no longer subject to the criminal justice system, the court must consider and determine whether the care recipient must receive supervised care or secure care.

(3) The court may order that a care recipient no longer subject to the criminal justice system receive secure care only if it considers that supervised care would pose a serious danger to the health or safety of the care recipient or of others.

[19] The Act provides that Compulsory Care Orders are for a limited period of time and to be continued they must be extended by Court order. The power to extend is set out in s 85 and there are no criteria by which the Court is required to determine the application for extension. The Court of Appeal in *RICCA v VM* above have commented that this contrasts to the detailed and extensive criteria to be taken into account in the making of decisions and the Court must therefore look at the legislative scheme more broadly and in particular, s 11 of the Act and the principles when considering an application for an extension. This requires a focus on the health and safety of the care recipient, and others, and the rights of the care recipient. It is also noted that in s 85, the Court must apply its mind to the type of order sought, namely secure care or supervised care. By s 85(3) the Court may order an extension to receive secure care only if it considers that supervised care would pose a serious danger to the health or safety of the care recipient or others. The emphasis there is on the least restrictive regime, taking into account health and safety factors for the care recipient and the community.

[20] It is relevant to consider the words of Justice Mallon in *L v RIDCA Central*³ where in paragraph [19] Justice Mallon said:

[19] ... the longer the period a person is compelled to be in care for, the greater the risk of harm to the person or to others there must be to justify the compulsion order. Further, if an intellectually disabled person is to be kept under compulsory care for a period longer than any form of detention (or restrictions upon liberty) imposed on a person without that disability but with the a comparable risk of harm to themselves or to others, there would need to be a very good reason to justify that.

[21] Summarising the approach that has been developed under the case law, it is clear that the longer a care recipient has been subject to a Compulsory Care Order, extension orders will require continuing and sometimes increasing justification. The

³ *L v RIDCA Central* (HC Wellington, CIV-2010-485-1279, 21 September 2010)

community protection interest will need to be greater to outweigh the increased weight given to the liberty of the care recipient.

[22] I was referred to the decision of Judge Somerville, *SNRB v WLH*⁴

[8] I was referred to Simon France J's decision in *V M v RIDCA Central (Regional Intellectual Disability Care Agency)* ^[3]. The following principles can be extracted from that judgment:

(a) The extension of a compulsory care order under s 85 involves extra factors that would not necessarily be involved when the initial order was made.

(b) A compulsory care order is a form of detention and involves the use, by the State, of its coercive powers.

(c) The Court must be satisfied that the care recipient continues to pose the level of risk that merits ongoing coercive powers.

(d) It is not enough that, objectively, it would be good for the person to remain subject to a care order.

(e) The determination of the level of care required involves an assessment of the level of risk that the care recipient poses, either to themselves or others.

(f) A care recipient cannot be subject to repeated extensions simply because their risk level remains static.

(g) Although there should not be any specific focus on the maximum penalty for the original offence which initially provided the Court with jurisdiction for confinement, there should be a broad sense of proportionality, with more serious offending warranting longer periods of detention.

(h) There should also be a sense of direction in the care programme.

Background facts

[23] It is relevant to record Mr [Knight]'s history as a care recipient under a secure order before the outcome of his convictions in February 2017 in the Levin District Court. On 31 July 2014, Mr [Knight] was made a care recipient (secure) for 18 months following convictions on charges under the Films, Videos and Publications Classification Act, in relation to possession of pornographic images of children engaged in sexual activity. The records show that Mr [Knight] was transferred to [RIDSAS] from [RIDDS] in March 2016 as a civil client. That occurred because the

⁴ *SNRB v WLH* [2012] NZFC 168

Order that had been made on 31 July 2014 expired on 31 January 2016. An application for an extension had been filed but it was not referred to a Judge until 1 February 2016. It was later held that the Compulsory Care Order had expired on 31 January 2016 and therefore no extension could be considered. Mr [Knight] was then placed as a civil client in [a Community Placement] in [location deleted].

[24] In February 2017 Mr [Knight] was convicted of two offences in the Levin District Court. Both offences were pursuant to the Summary Offences Act. On the charge of the Summary Offences assault, the maximum term of imprisonment is six months or a fine not exceeding \$4,000. On the charge of speaking threateningly under s 21 of the Summary Offences Act, the maximum term of imprisonment is three months and the maximum fine is \$2,000.00.

[25] Mr [Knight] has been detained under a Compulsory Care Order from 27 February 2017, that is a period of four years three month, and should the extension be granted for a period of two years, the total detention under the original order and extensions would be for a period of six years.

Evidence on continuing need for a compulsory care order

[26] I heard evidence from Mr John, the Care Co-ordinator, Ms Love-Gray, Mr [Knight]'s Care Manager, and Mr Paul Carlyon, the Specialist Assessor. I found the evidence helpful in determining the length of extension of the Compulsory Care Order. In Mr Carlyon's report, he referred to previous reports that had been filed for Mr [Knight]'s history. He noted that Mr [Knight] was made the subject of a Secure Compulsory Care Recipient Order for two years after offending that had been committed at the [RIDSAS] residence in the community. Mr [Knight] had become angry and he threatened to assault a staff member. Two days later, Mr [Knight] assaulted staff members at the [RIDSAS] residence and charges were laid ultimately leading to the convictions. He was initially detained at the [RIDSAS] service, but his deteriorating behaviour led to him moving to [the RIDDS] secure unit in May 2017. Mr [Knight] has remained at [the RIDDS] for over four years.

[27] Mr John, the Care Co-ordinator, explained that [the RIDDS] is a unit for people who have intellectual disability and have been convicted of offences. He accepted that

Mr [Knight] will be experiencing [the RIDDS] as being detained with his liberty restricted. Mr John recommended a process of transition for Mr [Knight] to less secure accommodation. His view is that it is likely to be a long process but a process that has now begun under Mr [Knight]'s care plan. He said that the process of planning for Mr [Knight]'s transition to community care has also begun and that will involve a plan for managing the risks.

[28] Mr Carlyon, the Specialist Assessor's report is dated 18 February 2021. He is familiar with Mr [Knight] having previously reviewed his care plan and for the purpose of the review, he met Mr [Knight], attended a case review and conducted a comprehensive interview.

[29] It is important to note that Mr [Knight] was open with Mr Carlyon about matters that placed him in a negative light. He accepted that he had possessed a cellphone despite that being prohibited and that he used the phone to routinely, access pornography. He explained the type of pornography, including child sexual exploitation material that he accessed. He was open about viewing material that included bestiality and other inappropriate and offensive sexual imagery. He spoke openly to Mr Carlyon about sexual fantasies. He told Mr Carlyon he felt obsessed and addicted and unable to control his own behaviour. He looked forward to psychology sessions to be able to discuss sexual matters with his psychologist and admitted that he would be sexually aroused during those conversations. Mr [Knight] spoke to Mr Carlyon about revenge acts and thoughts of sexual assault on children. Mr Carlyon recorded that Mr [Knight] knows that sexual contact between children and adults was morally and legally wrong.

[30] Mr Carlyon reported that Mr [Knight] had a goal of community placement. He understood that he needed support to manage his sexual interest which he described as getting worse. He was aware of practical needs regarding suitable community accommodation. He told Mr Carlyon that he felt antagonised and bullied by other people at [the RIDDS].

[31] Mr Carlyon recorded that Mr [Knight] did not share any information to suggest that he posed an imminent risk of causing harm to himself or others. He noted that Mr

[Knight] lived in [the RIDDS] subject to close staff supervision which lessened the risk of him behaving in impulsive, risky ways.

[32] In summarising the current situation for Mr [Knight], Mr Carlyon said that Mr Oxnan, the clinical psychologist reported that the care team recommended that Mr [Knight] could transition to care in the community if it was adequately planned and supported. At the review in late January 2021, staff from [the RIDDS] suggested a smooth and optimal transition could three months. Ms Love-Gray, the Care Manager reported, that Mr [Knight] was less rigid and was open to considering various options. The care team reported that Mr [Knight] was more independent, happier and more relaxed than previously. He showed more understanding of the challenges he faces and his own vulnerabilities. They reported that Mr [Knight] is aware that he is lonely, needing intimacy and sensitive to being rejected or misunderstood. Mr [Knight] also participated in more groups although not consistently.

[33] Ms Scanlon, a clinical psychologist, had begun individual psychological treatment with Mr [Knight] in August 2020. She had expressed the opinion that Mr [Knight]'s living circumstances in [the RIDDS] and his environment were "a poor fit." She recommended that it was important for Mr [Knight] to normalise pro-social and healthy sexual desire and develop an alternative view of his pattern of challenging behaviours. Ms Scanlon was clear that leaving [the RIDDS] and relocating to a suitable community placement should be a priority. Mr Carlyon made recommendations for how a pro-social sexual interest for Mr [Knight] might be developed.

[34] Considering the risk of further offending, it is clear from Mr Carlyon's report and his evidence that a risk of assault or aggressiveness towards staff members has reduced. Although there have been some incidents of verbal abuse and property damage and non-compliance with rules (for example obtaining a mobile phone), these aspects were not presented as the principal reason for continued compulsory care.

Risk of further offending

[35] Mr Carlyon confirmed that the principal risk that Mr [Knight] presents is a risk of non-contact sexual offending, in particular accessing objectionable material. He

noted that Mr [Knight] does not have any convictions for contact sexual offending and that his opportunities and wish to engage in healthy heterosexual relationships have not been possible given his legal status. Mr Carlyon reported that it is an essential and unresolved need for Mr [Knight] and one that the care team is acutely aware of.

[36] Mr Carlyon recommended that Mr [Knight] needed continuing compulsory care to address his rehabilitation needs. He said that if Mr [Knight] became increasingly sexually pre-occupied, given his history of sexually deviant interest, it could not rule out that Mr [Knight] may seek to sexually gratify himself by engaging in a contact sexual offence. He said that could be directed towards a child or other vulnerable person or alternatively, towards a mature adult female. He said he had no confidence that despite Mr [Knight]'s long term involvement in rehabilitation, that he had internalised skills and knowledge from the programmes and would be able to apply it.

[37] In answer to Mr Newberry however, Mr Carlyon confirmed that he was recommending a transition to community care and that it needed to be well planned and supported. He said Mr [Knight]'s risk of sexually inappropriate behaviour requires careful support and supervision.

[38] Mr Carlyon confirmed Mr [Knight] was responding better to a new treatment plan that had been implemented with a view to progressing towards community care. He agreed with Mr Newberry that Mr [Knight]'s motivation to comply and work towards a successful transition to community care was an important element in the success of the transition. He noted that it could be counter-productive to hold Mr [Knight] for a period beyond 12 months as his motivation could decline.

Discussion

[39] I accept Mr Newberry's submission that a balance has to be struck between Mr [Knight]'s liberty interests and the interests of the community in protecting the health and safety of others.

[40] With regard to Mr [Knight]'s liberty interests, it is important that Mr [Knight] has been detained for four years following criminal convictions for offending of a

minor nature. It is also relevant that Mr [Knight] has been a care recipient under a Secure Care Order in a secure facility for over four years.

[41] He submitted that an extension beyond 12 months ran the risk of reducing Mr [Knight]'s motivation and confidence and faith in his clinical team. In September 2019 Mr Newberry had noted that the clinical team then working with Mr [Knight] were aiming to have him sufficiently rehabilitated so that a transition to the community could take place in a safe way at the end of the extension period. He was concerned at that stage that insufficient progress would be made.

[42] He submitted that now, progress had only recently begun despite the advise from the psychologist, Mr Oxnan in late 2020 that a process should not take more than three months.

[43] In considering whether to extend this order for a period of 12 months or 24 months from February 2021, I am required under the Act, to assess the risks that have been identified to the health and safety of others. The principal risks arise from Mr [Knight]'s unhealthy interest in objectionable sexual imagery. This risk does not relate to the convictions in 2017 but they do reflect the convictions in 2014 and more relevantly, a persistent difficulty that Mr [Knight] has experienced in achieving a healthy sexual expression.

[44] There are signals in the report that point to the prospects of Mr [Knight] achieving pro-social and healthy sexual desire and expression. It is reported that he is working positively with his psychologist and with a therapist. He is working positively with Ms Love-Gray, his care manager. He is highly motivated to move from [the RIDDS] to a community placement. He has had the experience of living in a community placement before and it breaking down in 2017 as a result of his aggression and minor assault. It is clear from the care plan and Mr Carlyon's report that work is now being done with Mr [Knight] as to how he can focus in a more pro-social and healthy way on his sexual interests and in developing more satisfying relationships.

[45] From Mr Carlyon's report, this should be an important focus of the work under this care plan. The reports show that Mr [Knight] is highly motivated to move to

community care and is also aware that he could be returned to secure care if he were to offend again and that level of care was required.

Decision

[46] Balancing the liberty interest against the community interest in this I am satisfied that the Compulsory Secure Care Order should be extended as a secure order for a further 12 months from 28 February 2021. On the evidence before me, this should provide sufficient time to achieve a transition for Mr [Knight] to community care and a careful care plan addressing risks. The care plan will be reviewed within this period, Mr [Knight]'s progress will be assessed, together with the resources provided to him under the plan to meet his needs and the needs of the community when Mr [Knight] is transitioned to a community placement.

Order

[47] I confirm the following order:

- (1) The Compulsory Care Order made on 28 February 2017 shall be extended for a term of one year from 28 February 2021 at a secure level of care.
- (2) The order is to be dated 20 May 2021 as the date the order was made.

Judge M N E O'Dwyer
Family Court Judge