

SHERIFFDOM OF LOTHIAN AND BORDERS AT LIVINGSTON

[2019] SC LIV 62

LIV-AW19-16

JUDGMENT OF SHERIFF SUSAN A CRAIG

In the application for a Guardianship Order

By West Lothian Council

In re the Adult KB

**Act: Fowler**

**Alt: Johnstone, Curator ad litem**

**Adult: In Person together with Support Worker: JW**

Livingston, 27 January 2017

The Sheriff, having heard parties and evidence having been led and concluded, makes the following findings in fact:

- 1 The Adult, KB, has an IQ of 48 and has moderate learning difficulties which have a severe impairment on her abilities.
- 2 There will be no improvement and she will have that level of impairment for life.
- 3 The Adult has no ability to recognise dangers, has no insight and cannot process information.
- 4 She does not have the capacity to make informed decisions and she lacks a functioning memory.

5 The Adult has a very low score in relation to her working memory and without that she cannot, and will never be able to, weigh up information and come to a reasoned decision.

6 She is highly vulnerable to exploitation and has been so exploited.

7 She has been raped on several occasions.

8 Those risks remain notwithstanding intensive levels of intervention and education designed to reduce risk.

9 That education has had no effect whatsoever, the Adult having no ability to retain or recall information designed to protect her.

10 The Adult's current accommodation is unsuitable. She cannot cope independently and requires to live somewhere that provides 24 hour care.

11 In the absence of such care the Adult is lonely and isolated. She seeks out relationships with others but is unable to assess whether they place her at any form of risk, socially as well as sexually.

12 Isolation and a lack of appropriate accommodation place the Adult at increased risk of exploitation.

13 She is prone to secrecy and lacks candour when asked by professionals.

**Makes the following findings in Fact and Law:**

1 The Adult is incapable in relation to decisions about or acting to safeguard or promote her interests in her personal welfare, and is likely to continue to be so incapable.

2 There are no other means that would be sufficient to enable the Adult's interests in her personal welfare to be safeguarded or promoted.

**Therefore** Appoints [NAME] Chief Social Work Officer, West Lothian Council, West Lothian Civic Centre, Howden South Road, Livingston, EH54 6FF to be guardian to KB, Adult, date of birth [REDACTED], residing at [REDACTED] for a period of 3 years from this date in terms of part 6 of the Adults with Incapacity (Scotland) Act 2000 with the following functions and duties:

- (a) The power to decide where the Adult should reside, to require her to reside in that location, to convey her there and to return her to that location in the event of her absenting herself therefrom;
- (b) The power to decide upon and provide the appropriate level of care, including nursing and additional care, to the Adult in relation to health and social issues;
- (c) The power to decide with whom the Adult has contact;
- (d) The power to monitor, supervise and restrict the Adult's use of electronic devices such as mobile phones and laptops;
- (e) The power to monitor, supervise and restrict the Adult's use of the internet;
- (f) The power to have the access to which the Adult would be entitled to confidential documents, medical and dental records, and personal information held by her general practitioner, dentist or any hospital where she has received, is receiving or will receive care, or by any other body or organisation, relating to health, treatment and personal welfare of the Adult;
- (g) The power to take the Adult on holiday or authorise any other person to take the Adult on holiday;

Authorises the public guardian to issue a certificate of appointment; and Decerns.

**NOTE**

[1] This was an anxious case involving an Adult who enjoyed the experience and sensation of a sexual relationship but had no capacity to consent. As a result she placed herself at risk, forming potentially dangerous relationships with those who were only too willing to seek out and exploit that desire.

[2] The matter called as an evidential hearing in an application by West Lothian Council for a Guardianship Order in terms of section 57 of the Adults with Incapacity (Scotland) Act 2000 in respect of an Adult, KB. Welfare powers were sought, including powers to regulate with whom the Adult has contact and where she was to live.

[3] The application was brought on the basis that the Adult was, and would continue to be, incapable of taking decisions about or of acting to safeguard and promote her interests. Appropriate reports had been lodged in support of the application and it was not in dispute that the Adult, who had an IQ of 48, met the criteria in terms of section 58 of the Act. What was in dispute was whether some of the powers were necessary for the protection of the Adult's personal welfare; she said they were not.

[4] There were a number of preliminary hearings where the issues in dispute were identified and focused and orders made in relation to the hearing itself. The curator ad litem, Mr Johnston, liaised with the Adult and her advocacy worker, Ms W A note setting out the Adult's views had been lodged. She attended the hearing and confirmed that note would form her evidence in the case. She also spoke on her own behalf, reiterating her position that she would take better care of herself in the future.

[5] That was at the heart of the dispute. The Adult did not consider it necessary to have powers regulating where she lived or with whom she could socialise. She agreed some of the people she had met had not been kind to her but, she said, she was lonely and liked how

sex made her feel. She said she intended to cooperate with professionals although accepted she had disagreed with them in the past when they tried to regulate such matters. Candidly, she accepted that she might do so again. However she felt her mood had improved sufficiently to minimise any difficulties such that they could be managed without the need for formal powers.

[6] The issues therefore focused around the question of socialising and accommodation. I was satisfied on the evidence that the Adult lacked capacity in terms of section 58(1) of the Act. There was no challenge to that and the curator accepted there was a sufficiency for the application to proceed.

[7] In addition to the Adult, I heard from Dr JS, a psychiatrist specialising in learning difficulties, RMcD, Mental Health Officer with West Lothian Council and RMcA, the Adult's social worker. The evidence of the Adult's GP, Dr FS, was agreed by way of a Joint Minute. That also agreed certain of the powers were necessary and should be granted in any event. I also had regard to the reports that were lodged in support of the application.

[8] Dr JS had assessed the Adult as having an IQ of 48, explaining that IQs at 45 or below are untestable. That amounted to moderate learning difficulties which had a severe impairment on her abilities. There would be no improvement and she would have that level of impairment for life.

[9] In her assessment Dr JS considered the Adult had no ability to recognise dangers, had no insight and could not process information. She did not have the capacity to make an informed decision and lacked, in particular, a functioning memory. The Adult had a very low score in relation to her working memory and without that she could not, and would never be able to, weigh up information and come to a reasoned decision.

[10] Notwithstanding her inability to consent, she had had sex on a number of occasions. She enjoyed how that made her feel and sought out relationships that would allow her to have sex. That made her highly vulnerable to exploitation.

[11] As far as her current accommodation was concerned, it was not suitable for the Adult, explained Dr JS. She could not cope independently and required to live somewhere that provides 24 hour care. A residential care home would have to be found for her. In the absence of such care the Adult becomes isolated and anxious which just further serves to add to the risk to her as she tries to form relationships. These are often unsuitable and risky.

[12] Dr JS was very clear that the orders sought were both necessary and amounted to the least necessary intervention in the Adult's interests. Her view was that the powers should have been sought years ago and if they were not granted that would be to the Adult's "absolute detriment". She said there were few cases clearer than this one and the Adult was very much at risk if she was not protected by the orders.

[13] That evidence was supported and endorsed by Ms McD and Ms McA. They added there were continuing concerns about the Adult having relationships with individuals that placed her in a situation of risk. She had formed friendships that caused them concern as she would not allow them to assess the risk posed. In the absence of the Orders sought all they could do is ask for the Adult's cooperation.

[14] Notwithstanding the views the Adult had expressed about her intention to cooperate she did not always do so. She had recently stolen money which she used to buy a mobile phone and had started using Facebook. She was unable to recognise how vulnerable she was in relation to any contacts, taking everyone she met at face value and not recognising that she might be exploited. That the perpetrator of the rapes was currently on remand did not remove the risk to the Adult posed by her lack of capacity to assess risk, they said.

[15] I was satisfied on the evidence that the Adult lacks the capacity to assess risk in the context of social relationships, including sexual relationships, and that she was highly vulnerable to exploitation. She had been so exploited (she had been raped on several occasions and was the complainer in an ongoing High Court prosecution) and remained at risk notwithstanding intensive levels of intervention and education designed to reduce those risks. That education had no effect whatsoever, the Adult having no ability to retain or recall information designed to protect her.

[16] She is lonely and seeks out relationships with others. She is unable to assess whether those place her at any form of risk, socially as well as sexually, is prone to secrecy and lacks candour when asked by professionals.

[17] Each of the witnesses were asked to comment on the views expressed by the Adult ie that the orders were unnecessary. While acknowledging she had consistently expressed that view, they each gave evidence that the Adult was unable to keep herself safe or, for that matter, recognise that that was so. Accordingly, while I had regard to the Adult's views in all the circumstances I was persuaded the powers sought by the applicant were required, met the statutory requirements and were the least intervention required, in the spirit of the guiding principles.

[18] Mr Johnston, quite properly, explained that as curator he was not in a position to argue against the granting of the application. He had tested the evidence - in particular the evidence of the Adult's improved compliance - and accepted that the professional's views were that there was still unmanaged risk absent the orders.

[19] There is a clear need for the protection of the powers sought and that they were proportionate in all the circumstances and necessary to protect her.

[20] While the Adult's level of incapacity will not improve over her lifetime I granted the orders for the length sought, ie 3 years. Dr JS supported an order of that length.

[21] While I gave an extempore judgment at the conclusion of the evidential hearing I was asked to produce this note for the purposes of clarity.