

SHERIFFDOM OF LoTHIAN AND BORDERS AT JEDBURGH

[2019] SC JED 85

JED-AW13-19

JUDGMENT OF SHERIFF JANYS M SCOTT QC

In the application for a Guardianship Order by

STUART EASINGWOOD, Chief Social Work Officer, Scottish Borders Council

In respect of the Adult AB

Act: Robertson, Scottish Borders Council

Alt: Millard, Millard Law

Jedburgh, 23 October 2019

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

1. AB was born in 2001. Her life to date has been characterised by chaos, abuse and neglect. She is by nature self-effacing, with the result that her difficulties went unnoticed for years.
2. AB has a borderline learning disability in that her IQ has been assessed at 70, but this is not a mental disorder. She has extreme difficulties in communication and social contact which have been variously interpreted as indicating autistic spectrum disorder and complex post-traumatic stress disorder, both of which are mental disorders. It is more likely that she suffers from post-traumatic stress disorder and that this can be treated, provided she is in a safe and stable living environment. Her traumatic memories can then be addressed, following which there are prospects of her social reintegration.

3. In her current condition, her mental disorder renders AB incapable of understanding the decisions she takes.
4. In August 2018 AB was charged with vandalism and breach of the peace at her mother's address. This brought her to the attention of social work. The offences were remitted to the children's hearing which made a compulsory supervision order, allowing social worker RS to try to work with her. RS was troubled by AB's extreme vulnerability and her inability to protect herself.
5. Until March 2019 AB was living in her own tenancy in Town X. She was preyed upon there by a number of males. She was incapable of understanding that these men were using and abusing her. She referred to one as her "partner" and another as her "boyfriend". There was at least one other involved with her. They used her accommodation to live in. They assaulted her, causing bruises, cigarette burns, cuts and infected wounds. They used her for sex. They took her money. She was regularly escorted to an ATM machine to withdraw her benefits and hand these over. She was given drugs and alcohol. Her 'partner' administered drugs to her intravenously. He also prevented her from seeing or contacting RS who was trying to assist her. He destroyed a phone RS had given her to use in emergencies. On occasions he physically blocked her or pulled her away when RS tried to speak to her.
6. AB's mother secured an order banning AB from her home. On about 11 March 2019 AB was taken to her mother's house by one of the men with whom she was associating, in order to steal her mother's television. She was arrested and remanded to secure accommodation. Her placement in secure accommodation ceased to have effect on AB attaining the age of 18.

7. The local authority made this application in anticipation of AB's 18th birthday.

Interim orders were made as a result of which AB has been living in a flat in Town Y, where she has 24 hour supervision and monitoring. If she tried to leave the flat she would be brought back. If the guardianship order is made it is proposed that this regime would continue.

8. AB's preference would be to leave the place she is living. She has expressed a wish to return to Town X, to live on her own but to resume her old 'friendships' and to consume drugs and alcohol. She wants to be left alone to make her own decisions.
9. AB cannot return to her flat in Town X as her tenancy is no longer available. She would have nowhere to live. If she were given accommodation it is unlikely that she would be left to live on her own. It is likely that the old associates would find her and resume their abuse. Were she now to be given drug dosages of the strength administered before she was accommodated, these would be likely to kill her as she is no longer accustomed to consuming any drugs or any alcohol. Her preferences are at best unrealistic and at worst threaten her life. She is not currently capable of understanding that this is the case.
10. There are some signs that AB's wishes are changing. Her mother has moved away from Town X. She has had some positive contact with her mother. She has recently expressed a wish to live in the area in which her mother now lives.
11. AB has some insight into why she has been taking drugs and drinking alcohol. She has done this to dull her own extreme anxieties. There is however now a prospect of treatment to alleviate the PTSD which is a source of her ongoing distress. She has seen a psychiatrist and been allocated a community psychiatric nurse in the area where she now lives. She is not resistant to treatment. While she is not currently

capable of appreciating that there is a better way of addressing her difficulties it is now possible that treatment will achieve the end result of alleviation of anxiety that she seeks.

12. AB does not open mail. Letters make her anxious. As a result she does not keep appointments communicated by letter. She has stated she would value assistance from someone to open her mail for her.

13. AB's mother and her father both support the guardianship application, as do her maternal aunts.

Makes the following findings in fact and law:

- (1) AB is incapable in relation to decisions about, or of acting to safeguard or promote her interests in, her personal welfare and is likely to continue to be so incapable, at least in the immediate future.
- (2) There are no means other than a guardianship order that would be sufficient to enable AB's interests in her personal welfare to be safeguarded and promoted.

Therefore Appoints Stuart Easingwood, Chief Social Work Officer, Scottish Borders Council, Council Headquarters, Newtown St Boswells, Melrose, TD6 0SA to be guardian to AB, Adult, date of birth 25 May 2001, residing in Town Y, for a period of 6 months 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 AB shall reside on a temporary or permanent basis;
- (b) The power to return AB to her place of residence;

- (c) The power to open, read, attend to and as appropriate reply to any mail or other communications addressed to or received by AB or to make arrangements for such mail to be dealt with, including the power to sign any necessary correspondence on her behalf that relates either solely or mainly to her welfare.

Authorises the public guardian to issue a certificate of appointment; Finds no expenses due to or by either of the parties to this application; and Decerns.

NOTE

[1] This was an anxious case in which the Chief Social Work Officer, represented by Mr Robertson, sought welfare guardianship with powers which would have the effect of depriving a vulnerable adult of her liberty in order to protect her against almost inevitable harm should the powers not be granted. The application was opposed by the adult herself, represented by Miss Millard. AB asserted her own right to self-determination.

The evidence

[2] I heard proof on 9 October 2019, with evidence from two psychiatrists, a mental health officer and a social worker, all of whom swore affidavits in advance, and answered questions in oral evidence. AB herself swore an affidavit, which was accepted as her evidence. She did not attend the proof.

[3] *Dr S*, consultant psychiatrist, saw AB on 5 occasions, at (*address of secure accommodation*) and then at the flat where she was living in Town Y. She initially diagnosed autism, but by the time of her last visit in August 2019 had come to the view that AB also displayed the symptoms of complex PTSD. She was concerned that AB had violent and paranoid thoughts and had been self-harming. She had not carried out any cognitive

assessment. She described AB as clear about her decision that she wished to return to live in Town X, but having difficulty in understanding that the older males she had been associating with did not have her best interests at heart, and that in taking her money and giving her drugs they were not acting as her 'friends'. Dr S confirmed that AB lacked the capacity to understand the implications of her decisions, rather than lacking the capacity to act, make decisions or communicate her decisions. She confirmed that AB was currently subject to constant monitoring and that were she to leave the flat in Town Y the police would be called and she would be brought back. She had experienced difficulties making appointments with AB, until she had copied correspondence to the manager of the establishment. It was hard to know how long AB would be subject to incapacity as the brain continues to grow and develop until a person attains the age of 25. Treatment for PTSD proceeded in three phases. These were stabilisation, reprogramming of memory and then reintegration. This could take less than a year. Reversion to drug use would be detrimental to AB's mental health.

[4] *Dr C* is also a psychiatrist. She had seen AB only once, in May 2019, but she had been involved with AB's mother for 12 years and was well acquainted with AB's background. She was certain that AB was suffering from complex PTSD rather than autism, but she described similar symptoms to those described by Dr S. Her evidence was that AB took alcohol and drugs to numb her feelings about the trauma she had suffered, and was unable to understand the impact of alcohol and drugs on her physical and mental health, hence she was unable to make an informed decision about such matters. If AB were in a safe and stable position then that would be the first stage of addressing her PTSD. She would then be able to move on to dealing with the condition, to be followed by reintegration. Ten weekly sessions with a trained person, such as a community psychiatric nurse would in

normal circumstances be sufficient to deal with PTSD. In the meantime AB's desire to use drugs and alcohol and her acting as no prudent person would act were symptoms of her mental disorder.

[5] GH, mental health officer, had limited contact with AB. He had seen her once, in May 2019 when he had discussed the guardianship application and the powers sought. AB had been in agreement that someone should open and deal with her mail, but that was all. The local authority sought the power to decide where AB would reside as she would otherwise return to Town X, where she would indulge in risk-taking behaviour in relation to the persons with whom she associated and in relation to taking drugs. AB was compliant in relation to medical treatment, if an appointment was made for her. She had not sought out alcohol and drugs while living at the flat in Town Y. GH did not think that powers under the Adult Support and Protection (Scotland) Act 2007 would suffice in this case. He saw the guardianship powers sought as protective, rather than a deprivation of liberty, although he accepted that if AB removed herself from the flat where she was living, she would be brought back. For the most part GH deferred to RS for information about AB. He had no positive plans for AB, were she to be the subject of a guardianship order.

[6] RS, youth justice social worker, had been involved since August 2018 when AB came to the attention of the criminal justice system. He had asked for her offences to be remitted to the children's hearing. He gave a graphic account of AB's vulnerability and her abuse at the hands of the males controlling her. He also gave an account of the lengths he had gone to in order to try and assist her. He had visited her daily, but was not always allowed to see her. He had resorted to standing by the ATM where he knew her 'partner' would bring her to draw her benefits and hand them over, so that he had a chance of speaking to her. He had provided a phone with emergency numbers, which her 'partner' destroyed. He had

seen her bruised and cut, with an infected wound and cigarette burns inflicted by her 'partner'. He had the clearest understanding of any of the witnesses, and was highly motivated to address AB's difficulties. While AB had insight into her own use of benzodiazepines, in so far as she used these to make herself feel better, she did not have insight into the use being made of her by men who moved into her flat, took her money, assaulted her and gave her drugs. She regarded them as her 'friends'. RS feared for AB's life, such was the violence and drug use to which she had been exposed. He had advised against the order banning her from her mother's home as he had not thought her capable of understanding the order or its consequences. In the event breach of that order had led to her remand in secure accommodation.

[7] RS was clear. If AB returned to Town X she would be unable to protect herself. She had not taken drugs for six months and would now be at serious risk of dying from an overdose were she to be injected with an amount she had previously been accustomed to. She was not prepared in any way for ordinary basic tasks of everyday living, such as cooking and laundry. She remained traumatised and vulnerable. Despite her attaining the age of 18 and falling beyond his remit as a youth justice worker, he had been permitted to continue to work with her until November 2019. He quite clearly cared what happened to her. She was able to talk to him, and even to display some humour. He had worked on improving her relationship with her mother, who had moved to Town Z. AB was now keen to live in Town Z, rather than Town X. She had seen a psychiatrist and been allocated a community psychiatric nurse. As from November 2019 a new worker would be involved. RS expressed some determination to making sure that the local authority were committed to a care plan for AB before he relinquished responsibility for her.

[8] Miss Millard presented AB's affidavit. She had visited AB every three weeks since March and had established a good working relationship with her. This was apparent from the affidavit stating AB's wishes clearly and forcefully. AB opposes the guardianship. She does not like living in the flat in Town Y where there are always people with her. She wants to return to Town X and live on her own. She is scared that if she does not see her friends they will leave her. She asserts that she should be allowed to decide when to drink alcohol and how much. She is insulted by the proposition that the social work department should decide on her medical and dental treatment. She thought she could keep herself safe. She was not planning to get into another relationship. Just because she did not make the same decisions as other people would make did not mean that someone else should make her decisions for her. She did not think she had autism.

The law

[9] The order in this case is sought under the Adults with Incapacity (Scotland) Act 2000 (the "2000 Act"). Section 58 of the 2000 Act provides:

"(1) Where the sheriff is satisfied in considering an application under section 57 that—

- (a) the adult is incapable in relation to decisions about, or of acting to safeguard or promote his interests in, his property, financial affairs or personal welfare, and is likely to continue to be so incapable; and
- (b) no other means provided by or under this Act would be sufficient to enable the adult's interests in his property, financial affairs or personal welfare to be safeguarded or promoted, he may grant the application."

[10] For the purposes of the 2000 Act "incapable" means incapable of—

- a. acting; or
- b. making decisions; or
- c. communicating decisions; or
- d. understanding decisions; or

- e. retaining the memory of decisions,
... by reason of mental disorder

“Mental disorder” is defined by reference to the Mental Health (Care and Treatment) (Scotland) Act 2003, section 328. A person is not suffering from mental disorder by reason only that she acts as no prudent person would act.

[11] In making any order for appointment of a guardian I am obliged to satisfy the general principles in section 1 of the 2000 Act. These include:

“(2) There shall be no intervention in the affairs of an adult unless the person responsible for authorising or effecting the intervention is satisfied that the intervention will benefit the adult and that such benefit cannot reasonably be achieved without the intervention.

(3) Where it is determined that an intervention as mentioned in subsection (1) is to be made, such intervention shall be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention.

(4) In determining if an intervention is to be made and, if so, what intervention is to be made, account shall be taken of—

- (a) the present and past wishes and feelings of the adult so far as they can be ascertained ...
- (b) ...
- (c) the views of any other person appearing to the person responsible for authorising or effecting the intervention to have an interest in the welfare of the adult or in the proposed intervention, where these views have been made known to the person responsible, in so far as reasonable and practical to do so.”

[12] The local authority’s proposal is that AB lives in the flat in Town Y, under twenty-four hour supervision and that she is not free to leave. Were she to leave, she would be brought back. This is a situation to which article 5 of ECHR applies (see *HL v United Kingdom* (2004) 40 EHRR 761 and *Surrey County Council v P, Cheshire West and Chester Council v P* [2014] AC 896). It is irrelevant that her confinement is for a benevolent purpose, or that it is comfortable and she is well-provided for. She is entitled to the protection of article 5.

This reads:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

....

(d) the lawful detention ... of persons of unsound mind ...”

[13] The United Nations Convention on the Rights of Persons with Disabilities also bears on the situation. In particular Article 19 provides that:

“States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

(a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement...

Decision

[14] AB cannot be said to suffer from a mental disorder simply because her decisions are ‘imprudent’, but she does have symptoms of complex PTSD, which is a mental disorder. Dr S considered that she has an autistic spectrum disorder, but agrees in any event that she has complex PTSD. Dr C did not agree with the diagnosis of autism. I am not able to discount autism, but the agreed diagnosis of complex PTSD is important because it is a condition that can be addressed. This could potentially be done over time, but the period for treatment is not likely to be less than six months. Treatment for PTSD has the potential to resolve AB’s mental disorder. That means that any order I make cannot extend over a lengthy period, but should itself be limited having regard to the possible progress in treating her PTSD.

[15] There is evidence that AB has a borderline learning disability in that her IQ has been assessed at 70. An IQ of over 69 does not fall to be treated as a mental disorder. Neither psychiatrist who gave evidence had carried out a cognitive assessment. Both were referring

to an assessment carried out in the summer of 2018 by Dr W, consultant clinical psychologist. Dr W did not give evidence. There was no current assessment of learning difficulty and no opportunity to question Dr W. I have not therefore treated the learning disability as the primary source of the problem. I have based this judgment on the agreed diagnosis of complex PTSD.

[16] Looking at the nature of AB's capacities, she is capable of making decisions and communicating decisions. There is no evidence of problems with her memory. Mr Robertson suggested that she is incapable of acting, but the evidence was against him on that submission. I concluded that she was able to act. The problem is that she cannot understand the consequences of her decisions. As a result she is liable to act in ways that expose her to serious risk. In these circumstances I have found that AB suffers from incapacity because she is, at this time, incapable of understanding certain decisions.

[17] That does not however justify simply overriding her wishes. I have considered carefully the views expressed in her affidavit. She is an adult, not a child, and her desire for self-determination cannot be overruled simply because she is currently suffering from a mental disorder. However, her views are not completely settled. She is changing her mind about where she wants to live, now expressing a preference to live near to her mother, rather near to the 'friends' in Town X. She cannot return to her flat in Town X as that is no longer available. Her wish to live by herself would in any event be likely to be overridden were she to go back to Town X, as she has been subjected to people moving in with her and they are likely to do so again. Those people abused her. Her attachment to alcohol and drugs is indicative of a deeper wish to escape from extreme anxiety, but that anxiety is a symptom of the complex PTSD from which she is suffering. If she remains in a stable environment it will

be possible to address the PTSD and alleviate the anxiety at a deeper and more satisfactory level.

[18] In these circumstances it is consistent with the 2000 Act to make an order giving the Chief Social Work Officer the power to decide where AB will live and to return her to her place of residence. I am conscious that this is not only contrary to her expressed wishes, but it is also a deprivation of her liberty and an interference with her right to choose her place of residence. In recognition of her rights I propose to grant the order for only six months. This is with a view to keeping to a minimum the period over which she is deprived of her liberty. During the period of six months it will be possible to start to address her complex PTSD. It may even be possible to complete the treatment. This limited period will allow the court to review the deprivation of her liberty in early course, consistent with the article 5 requirement for a "procedure prescribed by law".

[19] I do not consider that all the powers sought in the application are required. I have limited the powers granted to those shown to be necessary and the least restrictive in the circumstances. I am granting the basic power to decide where AB shall reside and to return her there. These powers were granted on an interim basis and have been sufficient to safeguard and promote her interests in terms of the 2000 Act to date. The power to convey her to her place of residence was exercised at the outset when the interim order was made and is no longer required.

[20] The application seeks a power to decide with whom she should consort. I do not consider that power necessary. None of her previous associates had sought her out in the place she currently resides. She is protected from them by her living conditions. A power is sought to decide what care arrangements and multi-agency support best meet AB's needs. The local authority should, in any event, be taking a decision on what support to offer. They

do not need a power to do so. Further, AB is not resistant to the care and support arrangements provided for her in the context of her current residence. A power is sought to restrict her access to and consumption of alcohol. That power is also unnecessary, given the broader power to control her residence. She does not have access to alcohol. The application seeks a power of access to AB's personal data, but in the course of submission Mr Robertson indicated that this power was no longer pursued.

[21] I have not granted the requested power to consent to medical or dental treatment on AB's behalf and to convey her to and from appointments. There was no evidence that she has required any assistance to date in consenting to medical or dental treatment. She has attended for a medical appointment with a psychiatrist. There is no need for a power in connection with medical or dental treatment generally. The only other power eventually sought on behalf of the local authority was the power to open and attend to AB's mail. She agreed that this would be a good idea. It would, in particular, facilitate her attending appointments that she might otherwise miss. Given the importance of addressing her PTSD these appointments will be of benefit to her.

[22] It is of vital importance that the order is used to formulate and progress a plan for AB to be treated for her PTSD and to return to live in the community, in a place of her own choosing, if at all possible. There can be a narrow line between provision under the 2000 Act and provision under the Adult Support and Protection (Scotland) Act 2007. If her condition improves, there may be scope to protect her under the 2007 Act. In the meantime I am satisfied that the order I have made will benefit AB and that such benefit cannot be made unless the order is granted.

[23] No expenses were sought by either party. An order for expenses would be inconsistent with the constructive approach taken by both parties to this difficult and

anxious decision. I have included in my interlocutor provision that there should be no expenses due to or by either party.