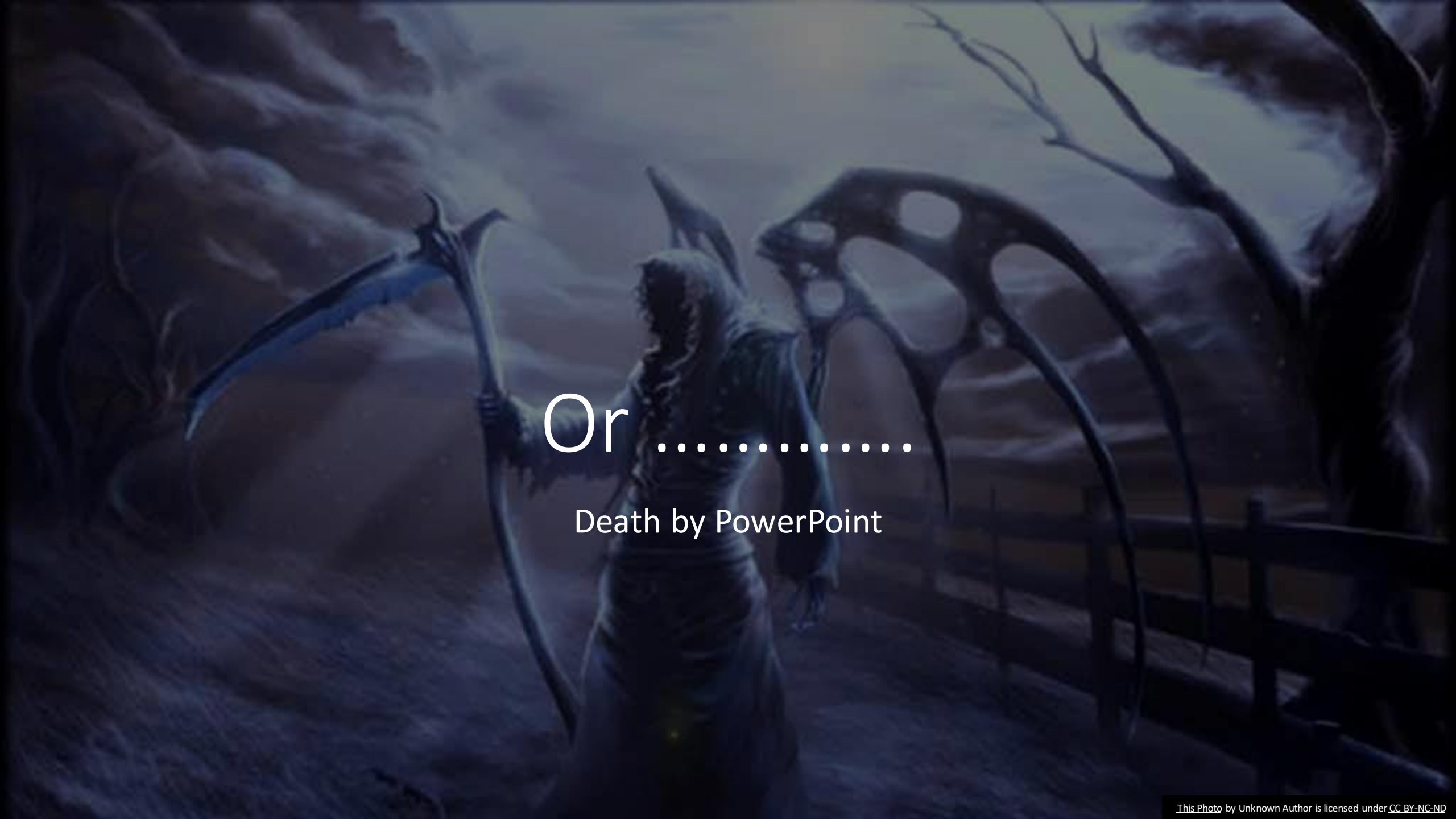
MCA Conference 2020

Legal Update by Sue Farmer



Or ……

Death by PowerPoint

Tribute to Graham Enderby who died 20/1/2020

In 1997 Graham and his wife began a challenge that would end up in the European Court of Human Rights.

Ended up in the landmark Bournewood Ruling leading to Deprivation of Liberty Safeguards.

“Right to the end of his life he stood shoulder to shoulder with his wife Wendy, they were tireless champions of the Rights of Disabled People against overweening professional power”

H has now celebrated his 70th Birthday and was at Grahams side when he died.

BBC Radio 4 Test Case, The legacy of Bournewood https://www.bbc.co.uk/programmes/b091tx5x

- Please make time to listen to this but have a cup of tea and a box of tissues to hand

Royal Borough of Greenwich v CDM [2019] EWCOP 32 (Newton J)

CDM 64-year-old woman – diagnosed with emotionally unstable personality disorder and diabetes , she was subject to DoLS.

In particular CDMs ability to manage her diabetes with a)the ability to manage and control blood sugar and b) the willingness to accept treatment when required

“Judge said that “when making appropriate decisions she has capacity but when making manifestly inappropriate decisions she lacks capacity”

In the Judgement Newton J reached the very clear conclusion that:

On the assessment of capacity to make decisions about diabetes management, in all its health consequences, the matter is a global decision, arising from the inter dependence of diet; testing her blood glucose levels and ketone levels ; administration of insulin; and, admission to hospital when necessary in the light of blood glucose levels. And

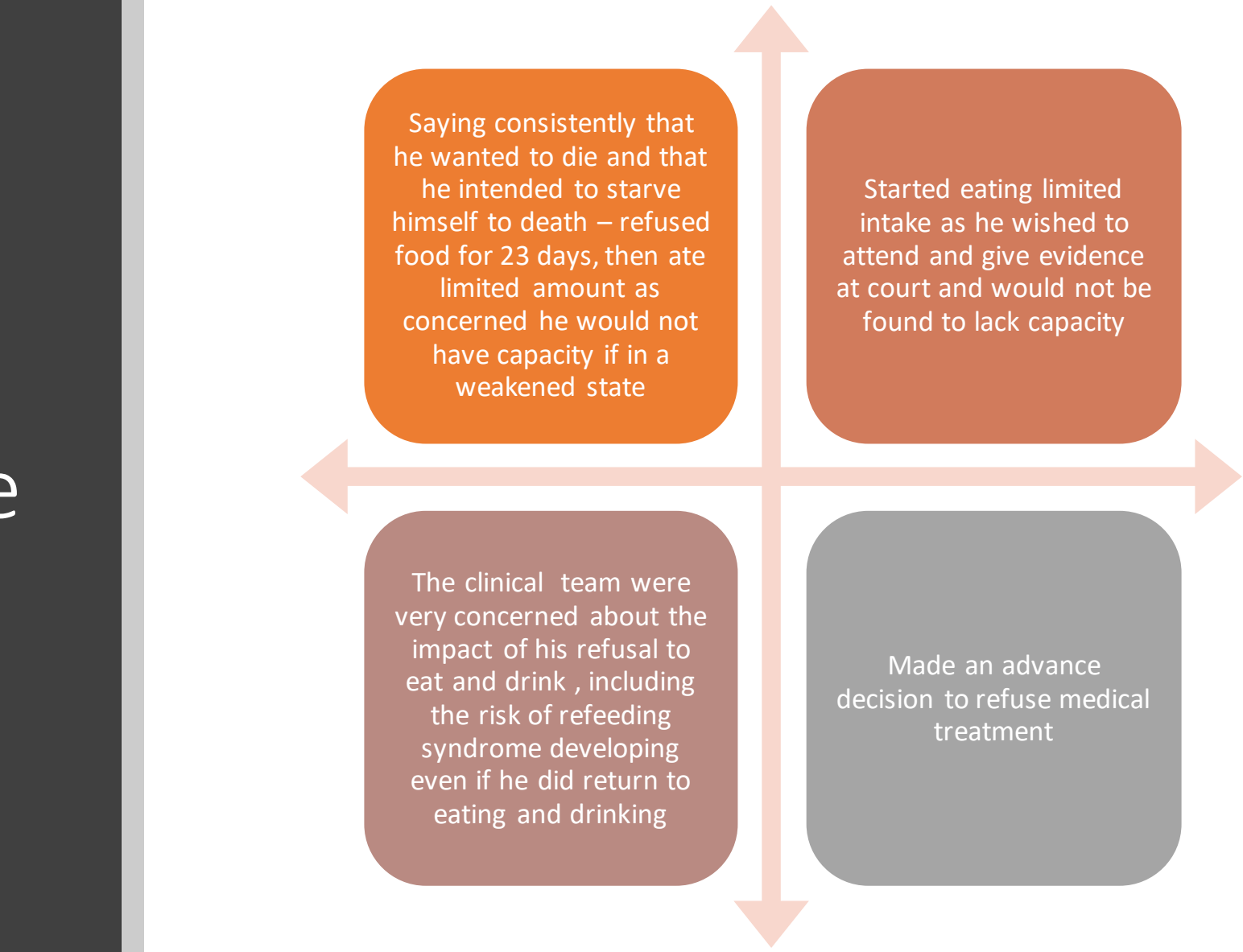
That CDM lacks capacity to make those decisions, having regard to the enduring nature of her personality disorder which is lifelong and therefore unlikely to change.

- Newton J states:- “that there may be occasions when CDM has the capacity to make micro-decisions in respect of her diabetes and occasions when she does not, i.e. that her capacity does in fact fluctuate. However, if the court accepts the expert’s opinions, as I do, and approaches the matter on the basis of their conclusions, logically, legally and practically**, it is a macro-decision, and CDM lacks capacity to take the macro-decision, the issue of fluctuating capacity simply does not arise”.**

JK and A Local Health Board [2019] EWHC67 (Fam)

- Concerns the intersection between MCA, the MHA and inherent jurisdiction...
- JK, a 55 year old man with ASD (diagnosed late in life)
- On remand for the alleged offence of murdering a close relative in September 2019
- Transferred to psychiatric hospital – detained under the MHA 1983 under Section 48 MHA 1983

Shortly after arriving at the prison JK was



Court was asked to decide:

- Does JK have capacity to refuse food?
- Is the proposed treatment 'medical treatment' under s.63 MHA?
- Does the proposed treatment (force feeding), treatment that falls within s.63?
- If not – can the court authorise using inherent jurisdiction?
- Is JK a vulnerable person - within the meaning of SA (Vulnerable Adult with Capacity: Marriage) [2006] 1 FLR 867

The Health Board applied to the Court in respect of future treatment that:

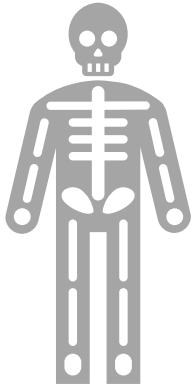
- a declaration that it would be lawful for treatment to be provided pursuant to Sec 63 MHA such that he could be force fed
- Sec 63 MHA-Treatment not requiring consent
- in the alternative, a declarations under the inherent jurisdiction that such treatment would be lawful and a declaration that under MCA 2005 that the advanced decision made by JK could be disregarded as the result of actions by him were inconsistent

Inherent Jurisdiction disregarded by the time of the hearing

No power under Inherent Jurisdiction

The basis for the concession was that JK was not a "vulnerable " within the meaning of SA (Vulnerable Adult Capacity: Marriage) (2006), inherent jurisdiction could be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder, was either under constraint, subject to coercion or undue influence or otherwise deprived of the capacity to make the relevant decision, disabled from making a free choice, or incapacitated from giving or expressing a real and genuine consent

Additionally, the existing legislation could produce a legal solution so there is no legal "gap"



The judgment concluded that:

JK had capacity to litigate and had capacity to refuse food and subsequent treatment under the MCA 2005

With regard to compulsory treatment the court decided that:

S.63 MHA does not consider best interests only if treatment is appropriate

The treating clinicians would have to decide whether to force feed or not. The question of whether the treatment is appropriate, is as much ethical as it is legal.

In deciding on whether to treat, clinicians would also have to have in mind JKs Advance Decision to refuse treatment, even if this is not legally binding, because treatment is being delivered within the framework of the MHA 1983.

The current position is that health Board are drawing up a detailed treatment plan and are in discussions with appropriate clinical experts. If JK reverts to refusing to eat , and the Health Board decides to pursue Sec 63 MHA that he should be force fed , then the matter will need to be restored to Court

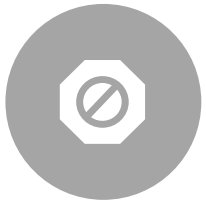
- This could be done via a Judicial Review

A Local Authority vs JB 2019 – relations and contact with others

- JB is a 38 year old man with Autism living in supported accommodation
- Restricted access to social media
- Restricted access to local community and third - party contact
- Restrictions in place to stop sexually inappropriate behaviour towards women, no conviction or charges have ever been brought against JB
- Wants a girlfriend and to be able to pursue a relationship including a sexual one
- It was accepted that even in the context of a relationship JB would need to live in a supported setting

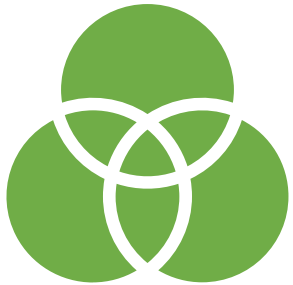
Care Plan imposed significant restrictions

On ability to socialise freely with whomever he chooses



These were imposed primarily in order to prevent him from behaving sexually inappropriate manner towards women

JB has been assessed as a moderate risk of sexually offending to women



JB argued this was an interference with his Article 8 Rights –Private and family life

Public Protection verses fundamental rights

- In particular the risk was of JB “sexually" touching these women without consent. In terms of vulnerable women who do not have the capacity to consent to sexual relations, there is a risk of [JB] not recognising or respecting this fact, resulting in the potential for rape to occur.”

- JB had the ability to consent to sexual relations albeit that he does not understand or weigh “highly pertinent factors in ensuring he engages in lawful sexual activity.”

The local authority argued that an understanding that sexual activity is a consensual act on the part of any potential partner is necessary

The Official Solicitor argued that as a matter of public policy the MCA should not be used as the means of imposing on a protected party restrictions which are designed either to avoid the risk of criminal offending or for the protection of the public at large

The OS said its impermissible attempt to include within the text for capacity to consent to sexual relations a requirement to understand, retain use and weigh potentially sophisticated aspects of domestic criminal law thus raising the bar from the deliberately low level at which it has been set.

The Judge said to hold otherwise is to fail to recognise the distinction between the concept of having the mental capacity to consent to sexual relations and exercising that capacity. Roberts J considered that Section 3 MCA 2005 does not look to outcome or to the fact that the absence of consent from a sexual partner may expose P to the rigors of the criminal justice system.

Both Parties agreed that

- “whilst it is permissible to weigh the risk of P entering the criminal justice system and/or being the target of some form of vigilante violence as part of a best interests analysis, what is not permissible is the imposition of a restriction on his liberty in order to prevent the possibility of offending insofar as it purely risked harm to those other than P. In this context the protection of others falls squarely within the Mental Health Act 1983 as opposed to the MCA 2005.”

16 and 17 year olds deprived of their liberty

“Baby Bournewood”

In the matter of D (A Child) – a game of ping pong…..

- D aged 14 - ADHD, Asperger’s and Tourette’s syndrome with a mild Learning Disability

- Living in parental home - admitted to hospital for MDT assessment and treatment. Unit in hospital grounds and on-site school. External doors locked, 30 mins physical checks on D. Outside of the site, accompanied on 1:1 by staff amounting to a DoL

High Court

- High Court found the living situation to amount to a DoL, however judged the arrangements to be "within the zone of parental responsibility". Upon reaching 16, D had been moved to a residential placement and under Court of Protection and the regime of parental responsibility.

Court of Protection

- Birmingham City Council to CoP for determination that DoL could be authorised through parental consent. If no parental consent then CoP would need to authorise.
- CoP determined parental consent could not be used to authorise the DoL.

Court of Appeal

- Court of Appeal said CoP had wrongly held that PR could not consent to a DoL for 16 /17 year olds who lack capacity.
- Court of Appeal said PR ends when " Gillick capacity /competency achieved. So…..if a 16/17 year old lacked capacity they held that parental consent to the DoL was lawful AND ok.

Case then heard in the Supreme Court…

Who decided on the matter of whether it is within the scope of PR to consent to living arrangements for a 16 or 17-year-old child which would otherwise amount to a deprivation of liberty within the meaning of the right to liberty (Article 5, as set out in the HRA)?

The Supreme Court concluded that it is not within the scope of PR for parents of a 16/17-year-old to consent to living arrangements which deprive that young person of their liberty.

Lady Hale…

- Gillick test is not directly relevant here as it relates to consent to treatment and not deprivation of liberty.

- Relying on PR “would be a startling proposition that it lies within the scope of parental responsibility for a parent to license the state to violate the most fundamental human rights of a child:

- a parent could not, for example, authorise the state to inflict what would otherwise be torture or inhuman or degrading treatment or punishment upon his child.”

For Practice……

- This means that even if a parent or person with PR consents to the living arrangements for a 16/17 lacking capacity to consent to those arrangements themselves and they amount to a DoL, CoP authorisation will now have to be sought. If CoP is not sought, the arrangements will not be lawful.

- This may well be included under the new Liberty Protection Scheme.

Guys & St Thomas' Hospital NHS Foundation Trust and her Litigation Friend the Official Solicitor July 2019

- X in advanced stages of pregnancy
- History of difficult relationships, possible substance and alcohol abuse as well as mental health difficulties
- During pregnancy had a 6-week inpatient admission
- X had various previous diagnosis including:
- Psychotic Symptoms
- Acute transient Psychotic Disorder
- Bipolar Disorder
- Schizoaffective Disorder
- Personality Disorder

Previous scans had raised concerns that there was reduced fetal growth .

The clinical team became concerned that the baby was compromised and there was a high risk of a still birth

At 40 weeks the baby was small, blood flow and fluid around baby compromised

Doctors wanted an induction of labour and/or caesarian due to the risks and the difficulties

23/7/2019 X was assessed as lacking capacity regarding birth decisions

24/7/2019 Dr Y –Evidence of psychotic symptoms, strongly fixed religious beliefs that were contradictory, and she lacked insight

Initial telephone hearing where X did not have legal representation, but she did read the documentation

X wanted the baby delivered safe and well but strongly wants a natural delivery without medical interventions

The Judge made an interim order that she lacked capacity and that the clinical team could intervene if necessary, until the next hearing 8 hours later

In the morning X was represented by the Official Solicitor (OS)

X agreed to an induction of labour but remained clear that she wanted a natural delivery, but she wanted a healthy baby, she felt conflicted

The OS stated that there was not enough evidence that X lacked capacity

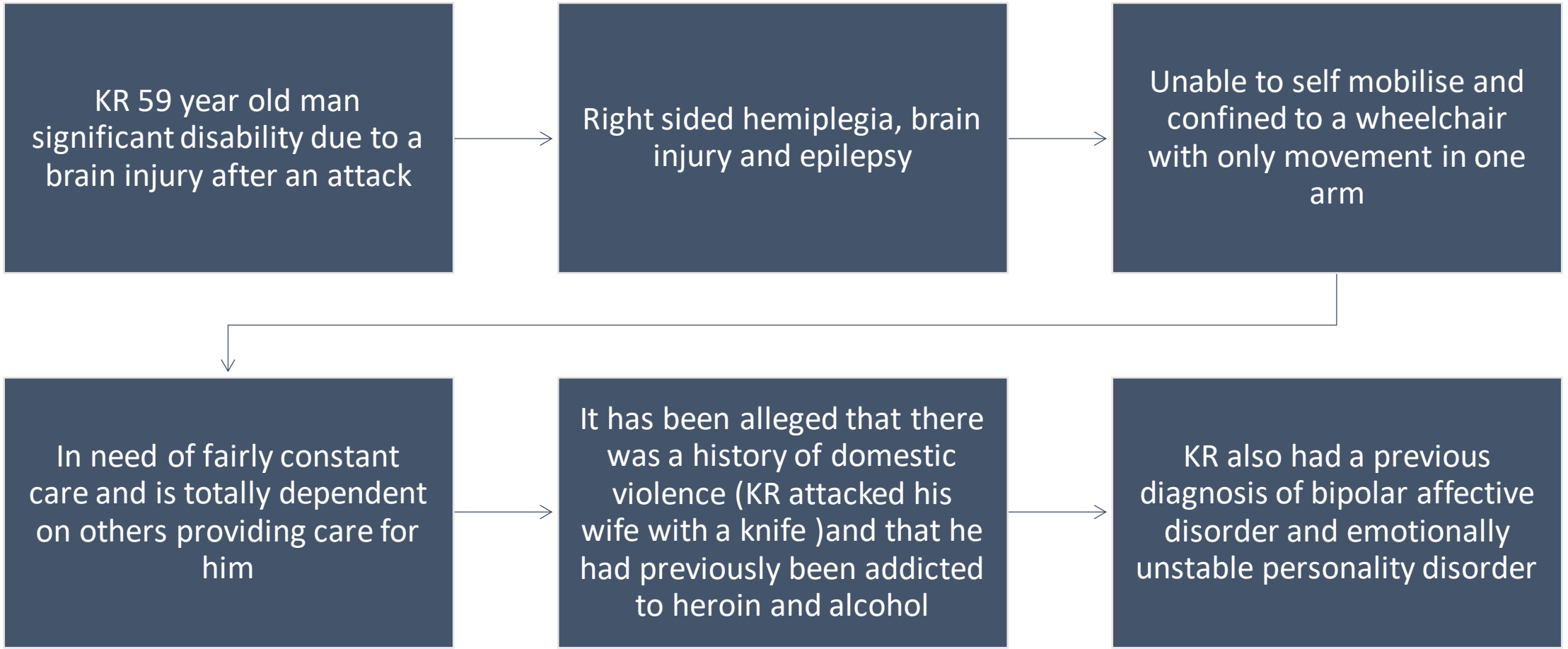
The Judge disagreed and made an order that X lacked capacity and that, should medical interventions be necessary, they could go ahead to ensure that the baby was delivered safely

PS..... The following day X delivered her baby naturally without surgical intervention

Mayor and Burgesses of the London Borough of Croydon v KR and ST (2019)

Croydon Council brought proceedings under Inherent Jurisdiction when it become concerned about the husband (KR) living with his wife (ST) in what was described as highly dysfunctional circumstances

KR and ST live in a one bedroom flat which means that KR has to sleep on the sofa


KR 59 year old man significant disability due to a brain injury after an attack
Right sided hemiplegia, brain injury and epilepsy
Unable to self mobilise and confined to a wheelchair with only movement in one arm
In need of fairly constant care and is totally dependent on others providing care for him
It has been alleged that there was a history of domestic violence (KR attacked his wife with a knife)and that he had previously been addicted to heroin and alcohol
KR also had a previous diagnosis of bipolar affective disorder and emotionally unstable personality disorder

- KR was assessed as having capacity to make decisions about residence and care and this was never an issue during the proceedings
- Increasing concerns as carers could not always access the property
- There were concerns that the couple were being preyed on by local criminals/drug users
- The local authority felt that ST could not keep KR safe but that she exposed him to harm by allegedly being drunk when pushing his wheelchair to the shops.

- After KR was admitted to hospital the local authority made an without notice application to the High Court under Inherent Jurisdiction for an order preventing ST from removing him from hospital
- A week later KR agreed to move to a nursing home for a period of respite
- The order to prevent ST from removing him from hospital and replaced it with an order not to remove him from the nursing home and that contact with her could be limited and supervised at all times.

Final Hearing before Lieven J

LA asked for an order that KR could not live with ST but in the alternative would seek protective orders against ST

The evidence before the Court could not sustain the initial picture painted by the local authority about lack of access to the property and that KR was not “overborne “ with external factors

On the second day the LA applied for permission to withdraw the case which was granted

However……

The Judge went on to address the following questions

Did KR fall within Inherent Jurisdiction ?

If yes , were the terms of the order justified ?

Were there less intrusive means of protection of KRs health

Findings

KR was vulnerable in the sense of physical disability but he had capacity and was fully able to express his views

While it was possible that he fell within Inherent Jurisdiction when the initial application was made , he had been living away from ST for 6 months by the time the application reached court. In his witness statements he was clear that he wanted to leave the care home and return to live with ST

It could fall into an “unwise decision” under MCA 2005

Article 5 verse Article 8 Rights

No evidence of coercion or undue influence in this case

The matter did not fall within the scope of inherent jurisdiction as a vulnerable adult

No evidence that KR remained under the undue influence of ST to a degree that would justify the use of inherent jurisdiction

That the LA was purely focussed on Article 5 Rights and failed to consider Article 8 Rights to Private and Family Life

- “the protection of the individual’s autonomy against interference by the State is absolutely central to the present case,” and that the proposed interference with the Article 8 rights of KR and his wife in a marriage of 40 years was colossal
- It is obvious to me that before seeking a highly draconian order and making such a colossal interference in this couple’s article 8 rights it was incumbent on the LA to ensure that they had suitable accommodation. That simply has not been done..
- In these circumstances I find that making the order sought would not have been necessary or proportionate.

Thank you for listening, any questions?

Thank you for coming!

- Please complete evaluation form and then your certificate will be emailed