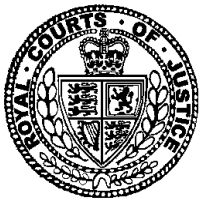

Neutral Citation Number: [2019] EWHC 2498 (Fam)

Case No: FD19P00144

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

IN THE MATTER OF AN APPLICATION UNDER THE INHERENT JURISDICTION OF THE HIGH COURT

AND IN THE MATTER OF KR, A VULNERABLE ADULT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/09/2019

**Before**:

**MRS JUSTICE LIEVEN**

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**Between:**

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|---|---|
| **THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF CROYDON** | **Applicant** |
| **- and -** | |
| **KR** | **First Respondent** |
| **And** | |
| **ST** | **Second Respondent** |

**Mr Francis Hoar** (instructed by **L B Croydon Legal Services**) for the **Applicant**
**Mr Peter Mant** (instructed by **Simpson Millar LLP**) for the **First Respondent**
**Ms Alexis Hearnden** (instructed by **GT Stewart Solicitors**) for the **Second Respondent**

Hearing dates: 4th September 2019- 5th September 2019

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

**Mrs Justice Lieven :**

1. This is an application for an injunction under the Court's inherent jurisdiction that prevents KR (the First Respondent) from living in a property together with ST, his wife (the Second Respondent). It is accepted and has been throughout the proceedings that KR has capacity to make decisions as to where he lives and who he lives with. He therefore does not fall within the scope of the Mental Capacity Act 2005. It should be noted that ST has also been assessed to have capacity in the relevant respects.

2. The Applicant, the London Borough of Croydon (the LA) were represented by Mr Hoar; the First Respondent by Mr Mant, and the Second Respondent by Ms Hearnden. I am grateful to all of them for the fair and careful way they have presented their cases.

3. The case was listed by Hayden J on 21 May 2019 for a three-day final hearing including the making of findings of fact starting on 4 September. On the first day of that hearing I heard evidence from the two LA social workers, Ms Jones and Ms Bamfield, both of whom were cross examined. At the start of the second day, Mr Hoar applied for permission under CPR r38 to withdraw the application. He made that application because in the light of the oral evidence he accepted his case could not proceed. After hearing submissions from counsel, I indicated that I would give the LA permission to withdraw, but that I would give a full judgment. I decided to do this because the issues that gave rise to the original application, and the problems that arise in relation to KR's care and his relationship with the LA, are unlikely to simply disappear. If there are any future applications in relation to KR and ST I anticipate it would be useful for a future judge to understand what has happened in these proceedings. Further, there are issues which have arisen in this case which are troubling and on which it may be helpful for me to give judgment.

4. KR is a 59-year-old man, who is seriously disabled having suffered a life changing brain injury in 2004 after an attack. He has right sided hemiplegia, brain injury and epilepsy. He is unable to self-mobilise, is confined to a wheelchair and only has

movement in one arm. He is in need of fairly constant care and is completely dependent on those who care for him. He has some speech impediment but can communicate as long as one takes the time to understand him. He has been assessed to have capacity to make decisions about his residence and welfare, and was most recently assessed in January 2019. Therefore he has had capacity in relation to those matters throughout these proceedings, and that has never been in issue.

5. KR and ST have been married for 40 years. ST herself has considerable vulnerabilities. She is recorded as having been diagnosed as having bipolar affective disorder and emotionally unstable personality disorder. She reports a history of depression and has twice in recent years been detained under s.2 of the Mental Health Act 1983 (but not s.3). She is recorded as having abused alcohol, and although she is said to deny this, there is a very clear record of problems with alcohol and this is undoubtedly part of the background to the problems which have arisen.

6. In 2004 KR was attacked and suffered life changing injuries. He spent a prolonged period in hospital and at some stage moved to CP, a care home. In 2015 he moved from CP to live with ST in a Council flat in Croydon (the property). This is a one bedroom flat. From this point onwards ST became his primary carer. Ms Bamfield, who is ST's social worker, gave evidence that given KR's needs ST has been having to sleep in the living room on a sofa whilst caring for KR, presumably ever since 2015.

7. The following summary of the facts is taken from an Agreed Chronology. In July 2016 there is a safeguarding assessment which states that KR had a bloody face and black eye and reports that KR had said that he wanted to leave and go into a care home before ST kills him. He later confirmed that he did not wish to go into a care home. There follows a sad pattern of concerns around KR's care, and allegations of domestic abuse between ST and KR, with the allegations pointing in both directions. It is right to note at this point that KR, because he cannot mobilise, is necessarily very vulnerable to any physical assault.

8. I have not heard oral evidence about the incidents before 2019 and I did not hear oral evidence from ST and KR. However, a fair summary seems to me to be that the LA had perfectly valid safeguarding concerns about KR's care, and that the couple have had a troubled and at times highly antagonistic relationship.

9. On 5 December 2018 a Care Act assessment of KR was undertaken. Also in December 2018 a new care agency, started providing services to KR. It is not entirely clear what services had been provided before that, but it appears from Ms Jones' evidence that the care agency was intended to provide a more intensive level of care. The arrangement was that carers were supposed to visit the property three times a day, seven days a week. There were from the start some problems with ST allowing access to the carers that I will return to below.

10. On 12 February Ms Jones discussed a potential inherent jurisdiction application with her manager. At this stage the case notes say, *"there is no evidence that [ST] is not meeting [KR's] basic needs and separation would cause distress to both [ST] and [KR]*". There was a report from a member of the public on 9 March that KR and ST had been seen in the local neighbourhood with KR not appropriately dressed (i.e. for the cold weather) and that ST was intoxicated. On 15 March KR was seen at A&E with bruising on his face and shoulders. ST said that he had climbed out of the cot and fallen on the floor when she was out. KR said he could not remember the events of the day.

11. On 18 March KR was admitted to hospital as an in-patient after having collapsed. On the same day two social workers visited the property with the police. ST was alleged to have called the police having said people had slashed their wrists in the street. ST is alleged to have kicked out at a police officer.

12. On 20 March 2019 the LA made the first application to this court without notice. Ms Jones made her first witness statement which included saying that ST had been preventing carers visiting KR at home. Cohen J made an interim order providing that ST was not to remove KR from hospital.

13. On 27 March KR was moved from hospital to CP. The following day was the return day on the injunction and at an inter partes hearing at which KR but not was represented. Williams J discharged the order made by Cohen J and replaced it with an order that ST not remove KR from CP, and that her contact with him be limited, including it being supervised at all times.

14. The agreed chronology then states as follows;

    *04.04.2019 Safeguarding assessment completed. Assessment states: "the care agency report that [ST] and [KR] do allow carers access and ask them to complete tasks". They refuse access or ask carers to leave "occasionally". (The date on which this entry was made is unclear- the assessment was undertaken between 11.03.19 and 04.04.19).*

15. On 21 May there was a hearing before Hayden J where the interim orders were continued in terms of the restrictions upon ST.

## The evidence

16. I had witness statements from Ms Jones, KR's social worker; Ms Bamfield, ST's social worker, and two witness statements from KF. I also had a short statement from KF and ST's son, DF. I heard oral evidence from Ms Jones and Ms Banfield. I also had in the court bundle 1400 pages of background documents. I understand that these were sent to KR and ST's lawyers on Friday, i.e. 3 working days before the trial started. Some of them had been previously disclosed, but it is almost impossible to tell which ones. Very few had been exhibited to the LA's witness statements. The vast majority of these documents will necessarily never have been seen by KR or ST because they come from the LA's records. Some of these documents paint a materially different picture from that in Ms Jones' witness statements, particularly in respect of the degree to which ST was obstructing the carers from CSL accessing the property and at least checking on KR. They also paint a different picture of the degree to which KR was at risk.

17. There are a number of points of concern to me about these documents. Firstly, it is not acceptable that they were only disclosed, at least in this form, so shortly before trial. The hearing date had been set down since 21 May 2019, and the late disclosure meant the bundles were both unmanageable, and in reality, unreadable. Secondly, the disclosure appears to have been in the form of simply putting all these documents in the court bundle without any attempt to agree the bundle. Again, this is not acceptable, at the least attempts must be made to agree a bundle, and the bundle should be limited to documents which will be necessary for the judge to consider.

18. Thirdly, and most importantly, I am seriously concerned about the discrepancies between what some of these background documents show and what was said in the evidence to the court, particularly in the first witness statement of Ms Jones, which was the basis of the without notice order. This case commenced with an application for an injunction without notice. It continued through a series of interim injunctions where the judges necessarily had very limited time to examine background documents, even if they had been exhibited, which in key instances they were not. It is trite law that when a without notice injunction is applied for there is a duty of full and frank disclosure and there is in any event a duty on any claimant not to mislead the court. This is just as true in proceedings like this as in the Commercial Court or Queen's Bench. Indeed it is relevant, and I will return to this below, that the injunction sought was not just draconian it was deeply intrusive into the private lives of two adults with capacity. I will refer below to the European and domestic caselaw on the importance of the State not interfering into individuals' marriage. In those circumstances the obligation for full and frank disclosure is as important if not more important, than in any other form of litigation. I appreciate local authorities are hard pressed, and poorly resourced, however the importance of ensuring the Court is possession of all the relevant facts at a without notice injunction application cannot be overstated.

19. The starkest example of the failure of the evidence presented to court to properly reflect the true factual position is as follows. In her first witness statement dated 20 March 2019, filed to support the without notice application, at para 12 Ms Jones said;

> "A new care agency started to work with KR three times a day 9:00. 12:00 and 17:00 and this has worked well intermittently. This is the first agency that has been able to persist with the situation and from 3-week period of recent records ST allowed the carers in on average 3 calls a week out of a potential 39 recorded calls see exhibit DL5. The carers go to each visit and if ST shouts and turns them away they go to the window and check on KR, they report that he may wave from his bed and they then leave and return for the next visit. When asked, KR states that he wants the carers to continue and that he wants to go out with his carers when the hoist is fitted."

20. This is a paragraph that would cause any judge deep concern about the safety of a seriously disabled man who was on the face of the evidence being isolated from his carers on a very large number of occasions. Surprisingly, the bundle I was given did not actually contain the exhibits to the witness statements, but I was handed DL5 in court. That was a note which was produced at a meeting that Ms Jones had had with the manager of CSL. What this note made clear was that twice every week CSL had produced no information about the number of visits, and whether ST had prevented access or not. This immediately undermined the evidence referred to above that on average ST had only let in the carers three times each week. There were 6 wholly unaccounted for visits, where there was no evidence that ST had refused access. Ms Jones could not explain why there were two unaccounted for days. Further on close scrutiny during cross examination it became clear that the average of access only being allowed three times a week was not even sustainable on the days on which there was information.

21. There was also a paragraph in Ms Jones' first witness statement which said that the MARAC professionals meeting had agreed that there was a "very real risk of accidental fatality". However, when the minutes of the meeting were examined in Court (after the disclosure referred to above), they did not support this sentence.

22. I am sure that Ms Jones was not seeking to mislead anyone, but there was a lack of attention to the background documents, and a failure to present the full picture which is very concerning.

23. The effect of this situation was that the evidence before Cohen J painted a significantly more troubling picture of the degree to which ST was preventing carers seeing KR, and therefore suggesting that KR was at much greater risk, than the true evidence suggested. It is not obvious that Cohen J would have granted the draconian order sought if he had known that ST was not stopping carers anywhere near as often as the LA had suggested, or that only a few weeks earlier the care agency had reported that ST did allow them access.

24. Ms Jones filed four witness statements in the proceedings. She continued in those statements to assert that KR was vulnerable within the meaning of SA, and that the orders sought were proportionate. She said in her fourth statement that she was of the view that KR "will suffer serious harm or fatality", and that he was under the undue influence or control of ST if he lived with her. However, in oral evidence she accepted that there was no reason to believe that KR's opinion that he wanted to live with ST was not "freely given". She also accepted that she had no evidence that ST had physically abused KR, or that she had stopped him seeing a doctor.

25. I have two witness statements from KR, dated 8 July and 27 August. Although there was no witness statement before Williams J, the judge was handed an attendance note of a meeting between KR and his solicitor on 27 March 2019. He also spoke briefly to KR. It therefore follows that there was no evidence from KR in front of Cohen J. The witness statements are both moving documents, which give a good sense of KR's feelings about his exceptionally difficult situation. In both statements he says in terms that he wants to live with ST. He makes clear that he likes CP and it provides him with a good standard of care. However, he does not want to live in a care home, certainly not for the rest of his life and he wants to go home. In the second witness statement he speaks very honestly about the problems that ST has had with alcohol and how he does not like it when she becomes drunk and can be very difficult. However, he also acknowledges that in the past he has behaved very badly to her, including having assaulted her. He fully acknowledges that when ST is drinking there is a high risk he will not get the care he needs and that he could get ill and even die. He acknowledges these risks but remains clear that he wants to be at home with ST. He denies that ST has physically harmed him.

26. In relation to undue influence he accepts that ST sometimes threatens to harm herself, and that he does sometimes say what he thinks she wants him to. He says that they are both dependent on each other. He says;

> *"Perhaps I do place more importance or weight on ST's wishes and feelings but I think this is only normal, as she is my wife. I want to have the choice to live my life as I want."*

27. In the second witness statement KR sets out that he had a conversation with ST on 6 August when she had said that she had had enough of him and no longer wanted to be with him. It is obvious from the witness statement that he found this very distressing.

28. KR's witness statements seem to me to be a very honest, and insightful reflection of the situation he is in. They were drawn up with the assistance of an experienced solicitor and I have no doubt that despite the fact he was not cross examined, they reflect his true and considered position.

29. I have not had evidence from ST However, she was in court on the second day of the hearing. Ms Hearnden said on instructions that ST felt the LA had taken her husband away from her.

30. I also had a short witness statement from DF, the couple's son. He lives in the USA and has a senior job in an international company. He speaks of his mother's care for his father and how much she has done for him over the years. He urges the court not to make an order preventing them living together.

## The law

31. There are two areas of the law which are relevant to this case – that on the use and extent of the Court's inherent jurisdiction, and that in relation to article 8 ECHR.

### *Inherent jurisdiction*

32. I will start with the inherent jurisdiction and the three key cases for these purposes, *SA (Vulnerable Adult with Capacity: Marriage)* [2006] 1 FLR 867, *A Local Authority*

*v DL* [2012] 3 All ER 1064; and *Southend on Sea v Meyers* [2019] EWHC 399 (Fam). As is explained in all these cases the inherent jurisdiction is there to cover lacunae in the law, where an individual needs the protection of the Court.

33. SA concerned a 17-year-old girl who was profoundly deaf, unable to speak and functioned at the intellectual age of a 13/14-year-old. The local authority was concerned that her family might take her to Pakistan and force her to marry against her wishes. As she was 17 she could be made a ward of court, but the main issue was what would happen to her once she became an adult.

34. Munby J (as he then was) held at [37] that the Court exercised a jurisdiction in relation to incompetent adults which was indistinguishable from the parents patiae or wardship jurisdiction for children. He found that the jurisdiction could be exercised in relation to a wide range of matters beyond that of medical treatment [44]. He referred to the fact that the jurisdiction is exercisable on an interim basis whilst proper inquiries are made, but also that it extends further than that [47-48]. He then conducted an extensive review of the caselaw.

35. At [77-79] he made the following comments on the extent of the jurisdiction;

> *"77. It would be unwise, and indeed inappropriate, for me even to attempt to define who might fall into this group in relation to whom the court can properly exercise its inherent jurisdiction. I disavow any such intention. It suffices for present purposes to say that, in my judgment, the authorities to which I have referred demonstrate that the inherent jurisdiction can be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, is, or is reasonably believed to be, either (i) under constraint or (ii) subject to coercion or undue influence or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent.*
>
> *78.I should elaborate this a little: i) Constraint: It does not matter for this purpose whether the constraint amounts to actual incarceration. The jurisdiction is exercisable whenever a vulnerable adult is confined, controlled or under restraint, even if the restraint is only of the kind referred to by Eastham J in Re C (Mental Patient: Contact) [1993] 1 FLR 940 . It is enough*

*that there is some significant curtailment of the freedom to do those things which in this country free men and women are entitled to do.*

*ii) Coercion or undue influence: What I have in mind here are the kind of vitiating circumstances referred to by the Court of Appeal in In re T (Adult: Refusal of Treatment) [1993] Fam 95 , where a vulnerable adult's capacity or will to decide has been sapped and overborne by the improper influence of another. In this connection I would only add, with reference to the observations of Sir James Hannen P in Wingrove v Wingrove (1885) 11 PD 81 , of the Court of Appeal in In re T (Adult: Refusal of Treatment) [1993] Fam 95 , and of Hedley J in In re Z (Local Authority: Duty) [2004] EWHC 2817 (Fam), [2005] 1 WLR 959 , that where the influence is that of a parent or other close and dominating relative, and where the arguments and persuasion are based upon personal affection or duty, religious beliefs, powerful social or cultural conventions, or asserted social, familial or domestic obligations, the influence may, as Butler-Sloss LJ put it, be subtle, insidious, pervasive and powerful. In such cases, moreover, very little pressure may suffice to bring about the desired result.*

*iii) Other disabling circumstances: What I have in mind here are the many other circumstances that may so reduce a vulnerable adult's understanding and reasoning powers as to prevent him forming or expressing a real and genuine consent, for example, the effects of deception, misinformation, physical disability, illness, weakness (physical, mental or moral), tiredness, shock, fatigue, depression, pain or drugs. No doubt there are others.*

*79.I am not suggesting that these are separate categories of case. They are not. Nor am I suggesting that the jurisdiction can only be invoked if the facts can be forced into one or other of these headings. Quite the contrary. Often, indeed, the facts of a particular case will exhibit a number of these features. There is, however, in my judgment, a common thread to all this. The inherent jurisdiction can be invoked wherever a vulnerable adult is, or is reasonably believed to be, for some reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent. The cause may be, but is not for this purpose limited to, mental disorder or mental illness. A vulnerable adult who does not suffer from any kind of mental incapacity may nonetheless be entitled to the protection of the inherent jurisdiction if he is, or*

> *is reasonably believed to be, incapacitated from making the relevant decision by reason of such things as constraint, coercion, undue influence or other vitiating factors."*

36. At [102] Munby J referred to article 8, but in the context of an application and previous caselaw about the court intervening to protect an individual being coerced into marriage. At [106] he said;

> *"106.A mere stranger or officious busybody cannot set the court in motion. But it is quite clear that in the case of the wardship jurisdiction, as in the case of the inherent jurisdiction in relation to adults (as also, indeed, in the case of an application for habeas corpus: see Sharpe at page 222), anyone with a genuine and legitimate interest in the welfare of the individual in question has locus standi to bring proceedings. The reason is obvious. If the law were otherwise it might be powerless to give practical help to the weak and helpless, not least in circumstances where, as often happens in such cases, the very people they need to be protected from are their own relatives."*

Re DL

37. DL was a man in his 50s who lived with his elderly parents. The LA had documented incidents when DL had committed physical assaults and verbal threats against his parents, and had exercised a very high degree of coercive control over them and over when and if at all carers could visit them. By the time of the full hearing, the father had moved into a care home. The mother and DL continued to live together, and it was accepted the mother had capacity in relation to where and with whom she lived. It is relevant to note, that the injunction sought and granted in DL constrained what DL could do in the house, but did not require him to leave the house, or prevent him and his mother living together. The injunction was therefore significantly less onerous, and amounted to much less interference with article 8 rights, than is the case in the present case.

38. The Court of Appeal, dismissing the appeal, held that the inherent jurisdiction had survived the passing of the Mental Capacity Act 2005 and that continued in the *SA* situation of an adult with capacity but whose decision making had been impaired.

39. On the relationship between the protection of the individual's autonomy and the role of the inherent jurisdiction, McFarlane LJ (as he then was) said:

> *"54. The appellant's submissions rightly place a premium upon an individual's autonomy to make his own decisions. However, this point, rather than being one against the existence of the inherent jurisdiction in these cases, is in my view a strong argument in favour of it. The jurisdiction, as described by Munby J and as applied by Theis J in this case, is in part aimed at enhancing or liberating the autonomy of a vulnerable adult whose autonomy has been compromised by a reason other than mental incapacity because they are (to adopt the list in paragraph 77 of Re SA): a) Under constraint; or*
>
> *b) Subject to coercion or undue influence; or*
>
> *c) For some other reason deprived of the capacity to make the relevant decision or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent.*
>
> *…*
>
> *63.My conclusion that the inherent jurisdiction remains available for use in cases to which it may apply that fall outside the MCA 2005 is not merely arrived at on the negative basis that the words of the statute are self-limiting and there is no reference within it to the inherent jurisdiction. There is, in my view, a sound and strong public policy justification for this to be so. The existence of 'elder abuse', as described by Professor Williams, is sadly all too easy to contemplate. Indeed the use of the term 'elder' in that label may inadvertently limit it to a particular age group whereas, as the cases demonstrate, the will of a vulnerable adult of any age may, in certain circumstances, be overborne. Where the facts justify it, such individuals require and deserve the protection of the authorities and the law so that they may regain the very autonomy that the appellant rightly prizes. The young woman in Re G (above) who would, as Bennett J described, lose her mental capacity if she were once again exposed to the unbridled and adverse influence of her father is a striking example of precisely this point.*
>
> *…*
>
> *67.Further, in terms of the manner in which the jurisdiction should be exercised, I would expressly commend the approach*

> *described by Macur J in LBL v RYJ and VJ [2010] EWHC 2665 (COP) , paragraph 62, which I have set out at paragraph 33 above. The facilitative, rather than dictatorial, approach of the court that is described there would seem to me to be entirely on all fours with the re-establishment of the individual's autonomy of decision making in a manner which enhances, rather than breaches, their ECHR Article 8 rights."*

40. Paragraph 67 suggests that the primary, although probably not the only, purpose of the inherent jurisdiction in this type of case is to allow the individual to be able to regain their autonomy of decision making.

Meyers

41. Mr Meyers was a 98-year-old man who had been living in his own home with his son. At an interim hearing Hayden J had made orders preventing Mr Meyers from living at home and from living with his son. The proceedings had been going on since 2017 and it is clear from the judgment that the local authority had made copious efforts to support Mr Meyers in his own home and that it had become impossible to do so because of the son's behaviour, see [10 and 11]. The evidence as to the conditions that Mr Meyers had been living in could hardly have been more extreme, see [15]. However, he remained adamant that he did not wish to live in the care home and wished to return home to live with his son.

42. Hayden J granted the injunction sought requiring Mr Meyers to remain in the care home, and said at [40] and [42];

> *"40. The history of this case demonstrates that Mr Meyers' attitude to his son vacillates and is essentially ambivalent. I do not doubt that there is strong paternal love, alongside a real dependency on KF as the only family Mr Meyers perceives to be left to him. I have not seen any evidence of KF forcing his father, either physically or verbally to act against his will but I am clear that the intensity of this relationship occludes Mr Meyers's ability to take rational and informed decisions. Mr Meyers, is, as I have said, determined to keep well and strong. His ambition to reach 100 years of age is keenly felt. The life force beats strongly within him. Return to the bungalow, whilst*

*his son remains living there and in the absence of an appropriate package of care, as the Local Authority correctly submits, jeopardises Mr Meyers life in a real and not merely theoretical sense. When Mr Meyers left the bungalow he was malnourished, dehydrated and hallucinating in consequence of an infection. He nonetheless managed to raise the alarm. Next time he might not be so fortunate. Though he says he is, in effect, prepared to take the risk (" I would rather die as a result of [KF] than live a life without [him]") I cannot easily reconcile this with Mr Meyers' lusty and vigorous attitude to life generally.*

*41.KF is needy, irrational, frequently out of control as well as manifestly emotionally dependent on a father who, despite the alarming history of this case, he obviously loves. KF's influence on his father is insidious and pervasive. It triggers Mr Meyers's sense of duty, guilt, love and responsibility. These, in my assessment, are pronounced facets of Mr Meyers's character, reflected in a different way in his sense of duty, love for his country and pride in his medals. In this particular context however, these admirable features of his personality have become confused and distorted in a relationship in which the two men have become so enmeshed that the autonomy of each has been compromised. In reality, KF exerts an influence over his father which is malign in its effect if not in its intention. The consequence is to disable Mr Meyers from making a truly informed decision which impacts directly on his health and survival.*

*42.I am profoundly sympathetic not only to Mr Meyers's challenging circumstances but to his eloquent assertion of his right to take his own decisions, even though objectively they may be regarded as foolhardy. As I emphasised in Redbridge London Borough Counsel v A (supra), I instinctively recoil from intervening in the decision making of a capacious adult. However well motivated the State may be in seeking, paternalistically, to protect people from their own unwise decisions, it is a dangerous course which has the potential to threaten fundamental rights and freedoms. Again, as I said in Redbridge London Borough Counsel v A, the inherent jurisdiction is not ubiquitous and should be utilised sparingly. Here Mr Meyers' life requires to be protected and I consider that, ultimately, the State has an obligation to do so.*

> *Additionally, it is important to recognise that the treatment of Mr Meyers has not merely been neglectful but abusive and corrosive of his dignity. To the extent that the Court's decision encroaches on Mr Meyers' personal autonomy it is, I believe, a justified and proportionate intervention. The preservation of a human life will always weigh heavily when evaluating issues of this kind."*

43. Very recently Cobb J has analysed the use of the inherent jurisdiction in two cases; *Wakefield MBC v DN* [2019] EWHC 2306 and *Redcar and Cleveland BC v PR* [2019] EWHC 2305. I adopt with gratitude what he said at [24] in *Wakefield*;

> *"24. The arguments presented to me on these facts have caused me to consider with care the circumstances in which the inherent jurisdiction can indeed be deployed for someone who is 'vulnerable'. The evolving caselaw was neatly and helpfully summarised neatly by Baker LJ when refusing permission to appeal in the case of Southend-on-Sea v Meyers[2018],and reproduced by Hayden J in his later judgment at [2019] EWHC 399 (Fam) at [28]. I do not propose to reproduce that summary once again here, but it plainly a most useful reference point in cases of this kind. For the purposes of deciding this case, on these facts, I have focused on some of the key messages from the Court of Appeal's decision in Re DL,and the predecessor authorities, thus:*
>
> *(i) "[T]he inherent jurisdiction can be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, is, or is reasonably believed to be, either (i) under constraint or (ii) subject to coercion or undue influence or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or 8Particularly citing Singer J in Re SK [2004] EWHC 3202 (Fam)*
>
> *(emphasis by underlining added) (Munby J in Re SA at [77]: this description was expressly endorsed by McFarlane in Re DL at [53]);*
>
> *ii)The inherent jurisdiction should be "targeted solely at those adults whose ability to make decisions for themselves has been compromised by matters other than those covered by the 2005Act"(McFarlane LJ in Re DL at [53])*

> *iii)The inherent jurisdiction can be used to "supplement the protection afforded by the Mental Capacity Act 2005 for those who, whilst 'capacious' for the purposes of the Act, are 'incapacitated' by external forces—whatever they may be—outside their control from reaching a decision"(Macur J as she then was in LBL v RYJ [2010] EWCOP2665 [2011] 1 FLR 1279 at [62]). Macur J added (op cit.), materially: "...the relevant case law establishes the ability of the Court, via its inherent jurisdiction, to facilitate the process of unencumbered decision-making by those who they have determined have capacity free of external pressure or physical restraint in making those decisions"(also at [62]: emphasis added).*
>
> *iv)The inherent jurisdiction can be used to authorise intrusions into the human rights of the individual (esp. Under article8ECHR) where it is necessary and proportionate to protect the health and well-being: see McFarlane LJ in Re DL at [66] and Davis LJ (ibid.) at [76]."*

44. At [47] Cobb J said as follows on the scope of the inherent jurisdiction;

> *As I have had cause to discuss in Redcar & Cleveland Borough Council v PR & others [2019] EWHC 2305 (Fam) , especially at [14]/[16]/[38]/[46], if the evidence indicates a prima facie case of vulnerability, and justifies the necessity and proportionality of an order, it is entirely proper for the inherent jurisdiction to be invoked as an interim measure while proper inquiries are made, and while the court ascertains whether or not an adult is in fact in such a condition as to justify the court's intervention. That amply covers the situation which has obtained here between the making of the first order and this order. My concern is that the 'interim' order has endured somewhat longer than appropriate.*

## Article 8 ECHR

45. The parties in this case appear to have focused primarily on article 5 (the right to liberty), perhaps because that is necessarily the critical article in cases concerning Deprivation of Liberty orders. However, it appears to me that the answer to this case, and the correct analytical framework arises much more clearly under article 8. In order for article 5 to be in play the orders sought would have to be restricting KR's

liberty. However, the LA do not seek KR to be required to live at CP, they merely require him not to live with ST. Although in practice KR given his condition would have little or no choice certainly in the short run, but to live at CP if the order was made, the order itself would not be a removal of his liberty. As such I do not think that this is a case where article 5 is in truth the issue. This entirely accords with Cobb J's judgment in ***PR*** [2019] EWHC 2305 (Fam).

46. Article 8 states;

> *"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

47. The European Court of Human Rights (ECtHR) said in *Hokkannen v Finland* (19823/92) at [55]; "*The essential object of Article 8 (art 8) is to protect the individual against arbitrary interference by the public authorities"*. That protection of the individual's autonomy against interference by the State is absolutely central to the present case.

48. The relationship between article 8 and marriage was considered by Lady Hale in ***R (Bibi) v Secretary of State for the Home Department*** [2015] 1 WLR 5055 at [25];

> *"25. "Everyone has the right to respect for his private and family life, his home and his correspondence": article 8.1 of the Convention. In Abdulaziz, Cabales and Balkandali v United Kingdom (1985) 7 EHRR 471, para 62, the European Court of Human Rights observed that "Whatever else the word 'family' may mean, it must at any rate include the relationship that arises from a lawful and genuine marriage … even if a family life … has not yet been fully established". Not only that,*

> *"'family life', in the case of a married couple, normally comprises cohabitation. The latter proposition is reinforced by the existence of article 12, for it is scarcely conceivable that the right to found a family should not encompass the right to live together". Hence, as this court held in Aguilar Quila [2012] 1 AC 621, married couples have a right to live together."*

49. In *R (Quila) v Secretary of state for the Home Department* [2012] 1 AC 621 the Supreme Court was considering a challenge to an Immigration Rule that prevented a young married couple living together in the UK, because the wife had not attained the age of 18 and was thus ineligible under the Rule for a spousal visa. A rule that required a married couple not to be able to live together was described by Lord Wilson at [32] and Lady Hale at [72] as a "colossal interference" in their rights to respect for their family life. It should be noted that this was in the context of a couple aged 17 and 18 who had only been married for a very short time. It must follow that the interference in the present case in a marriage of 40 years, is as colossal if not more so. That does not mean that the State can never separate a married couple, but it must do so with full consideration of the scale of interference in that couples' rights.

50. The next question under article 8 is whether that interference is justified under article 8(2). This turns on whether the interference in KR's rights is on the facts of the case necessary and proportionate. As is explained in numerous cases, including *Bibi* there are four stages to a proportionality balance under art 8(2), see Lady Hale at [29];

> *"29. Although Strasbourg analyses these cases in terms of a "fair balance", in this country we have, at least since the decisions in Huang v Secretary of State for the Home Department [2007] 2 AC 167 and Aguilar Quila, spelled out the principles in conventional proportionality terms. As Lord Wilson JSC put it in Aguilar Quila [2012] 1 AC 621, para 45, following Lord Bingham of Cornhill in Huang at para 19, four questions generally arise:*
>
> *(a)is the legislative objective sufficiently important to justify limiting a fundamental, right? (b) are the measures which have been designed to meet it rationally connected to it?; (c) are they no more than are necessary to accomplish it?; and (d) do they strike a fair balance between the rights of the individual and the interests of the community?"*

*Bibi* again concerned a challenge to an Immigration Rule, but the principles set out there are about the correct approach to a proportionality balance under article 8(2) and must apply in the same way to a challenge to an individual decision.

51. In any case involving an interference with an article 8 right it will be necessary for the Court to consider whether the State has properly had regard to the potential for "less intrusive measures". Plainly the greater the interference the more closely less intrusive means will need to be scrutinised. In *Moser v* Austria (123643/02) the Strasbourg Court was considering a situation where a child was taken into care because of the parent's lack of appropriate accommodation and financial means [69]. The Court said;

> *"In the Court's view, a case like the present one called for a particularly careful examination of possible alternatives to taking the second applicant into public care. The Government argues in essence that the courts examined alternative measures and dismissed them as not being practicable. Moreover, they alleged that the first applicant herself failed to co-operate. The applicants, for their part, maintained that no alternatives whatsoever were proposed or assessed by the authorities."*

52. Although this is a case in which the individual has capacity and therefore the Mental Capacity Act does not apply, there are points in the MCA and its accompanying statutory Code which in my view are useful when considering an application such as this. Two points from the Act itself are particularly relevant – a person is not to be treated as unable to make a decision because he makes an unwise decision (s.1(4)) and a lack of capacity cannot be established merely because of a person's age or a condition or aspect of his behaviour (s.2(3)). The importance of accepting that "*Everybody has their own values, beliefs, preferences and attitudes"* is emphasised at para 2.10 of the Statutory MCA 2005 Code of Practice.

## The parties' cases

53. Given that the LA applied to withdraw the case on day two, I did not hear closing submissions. However, I did have detailed Skeleton Arguments from all counsel, so it is clear what their positions were.

54. The LA's argument was that KR was vulnerable within the meaning of *SA* and was under the undue influence of ST. Mr Hoar pointed to the fact that KR's views as to whether he wanted to stay at CP or live with ST had fluctuated, and that he had on occasion, when ST had not been around, been quite clear that he was frightened to go home and enjoyed being at CP and the care he received there. The LA argued that KR was plainly at risk when he lived with ST, and said that his position was highly analogous with that of Mr Meyers.

55. Mr Hoar indicated in opening that his primary position was for an order that KR could not live with ST; but that in the alternative he would seek protective orders against ST, more similar to those granted in *DL*. However, the hearing did not get to the stage where Mr Hoar had submitted a draft of such alternative and less intrusive orders.

56. Mr Mant argued that KR was not vulnerable and the inherent jurisdiction did not apply. KR had made a decision with capacity. Further, even if it was arguable that it had applied when the application was originally made, its use should be limited to providing KR with a safe space away from ST in which to make his decision. That had now been done and KR was clear that he wanted to leave CP and live with ST. Mr Mant argued that the use of the inherent jurisdiction in this type of case was limited to the provision of such thinking space, as contemplated by Macur J in *LBL*, and to the degree that *Meyers* suggests that a wider and more permanent order could be made it was wrongly decided. On the evidence Mr Mant focused in the cross examination on the fact that the LA had not explored other options. He went through the risks that Ms Jones had referred to, and argued that those risks were seriously overstated and could be appropriately mitigated by other measures.

57. Ms Hearnden's position was similar to that of Mr Mant, but appropriately focused on the harm done to ST through this application and the litigation. One of the matters she highlighted was that ST's previously good relationship with Ms Bamfield had effectively been destroyed by the course of action the LA had taken.

## Conclusions

58. I need to address the following questions;
    a. Does KR fall within the inherent jurisdiction as set out in *SA*?
    b. If yes, are the terms of the order justified under article 8(2)?
    c. In answering (b) are there less intrusive means which would achieve the legitimate aim of protection of KR's health under article 8(2)?

59. KR is undoubtedly vulnerable in the sense that he is severely disabled and very much within the physical control of his carers. However, he has capacity, and although he has some communication problems he appears to fully understand what is going on around him, and is able to express his views clearly and forcefully.

60. The fact that he is physically vulnerable cannot possibly be sufficient to incur the use of the inherent jurisdiction. In my view the principles that are articulated in the Mental Capacity Act Code about assumptions about capacity not being made on the basis simply of age and physical disability must apply equally strongly when it comes to determining whether an individual is vulnerable within the meaning of *SA*. There is some evidence that KR's views as to where he wants to live fluctuate, and may change when he is with or has just been with ST. However, it is important to be careful to distinguish between the entirely natural and common influence that one close family member will have over another, and the "undue influence" or "coercion" identified in *SA* and *DL*. If a dysfunctional family relationship is to fall within these principles then the evidence has to show that the vulnerable individual is incapable of making their own decision.

61. It is possible that this test was met in March 2019 when the initial application was made. KR had had a seizure and was in a particularly weak physical state, and possibly particularly vulnerable mentally to influence by ST. There was evidence before Cohen J on 20 March 2019 that ST had encouraged KR to be non-compliant on the Hospital ward and had seemed to interfere with his conversations with staff. KR did say at this stage that he wanted to go into respite care.

62. It is possible on the evidence at that time, although I do not need to decide this, that he was in the situation where he needed a "safe space" away from ST in order to make a decision as to where he wanted to live. As such he would fall into the principles set out by Cobb J in ***Wakefield MDC v DN*** at [47] about the inherent jurisdiction being used on an interim basis while further inquiries are made.

63. However, by the time the matter came before me KR had been living away from ST for a period of almost 6 months. His evidence was clear in his two witness statements that he wanted to leave the care home and live with ST. The witness statements suggested that he had carefully weighed up the pros and cons of living with ST, and come up with a well thought out position. This might fall within what the Mental Capacity Act calls an unwise decision, but if an adult without capacity is allowed to make an unwise decision so too must someone facing an application under the inherent jurisdiction. I do not reject the possibility that in extremely exceptional cases the inherent jurisdiction might be used for long term or permanent orders forcing the vulnerable adult not to live with the person(s) he wants to, as was the case in ***Meyers***. However, that must be a truly exceptional case. As was contemplated by Macur J in ***LBL***, and apparently supported by McFarlane LJ in ***DL*** at [67], the normal use of the inherent jurisdiction is to secure for the individual, who is subject to the alleged coercion or undue influence, a space in which their true decision making can be re-established. If the inherent jurisdiction is used beyond this then the level of interference in the individual's article 8 rights will become increasingly difficult to justify.

64. The Local Authority relied on ***Meyers***, where it was equally clear that Mr Meyers had capacity and had strongly expressed his wish to go home and live with his son, yet the final order was still made. In my view there are two key differences from ***Meyers***, which I will consider through the analytical framework of article 8. Firstly, there is the scale of the interference in stopping a couple, who have been married for 40 years and both of whom have capacity, from living together. It is hard to imagine the State interfering more intrusively in a person's private life. Secondly, on the article 8(2) justification, Hayden J was very clear in ***Meyers*** that if Mr Meyers returned home then he would be likely to die because of the conditions he was living in and his son's refusal to allow carers to look after him. It is therefore possible to analyse the case as

one where the State had a positive obligation under article 2 to intervene to preserve life. In any event, *Meyers* was a truly exceptional case, where the evidence that the local authority had taken every possible step to protect Mr Meyers, including trying to control the actions of his son, was overwhelming. That is not the case here, as I will explain below.

65. For all these reasons, by the time this matter came before me, the evidence did not support a conclusion that KR fell within the scope of the inherent jurisdiction as a vulnerable adult. The evidence did not support a conclusion that KR remained under the undue influence of ST to a degree which would justify the use of the inherent jurisdiction.

66. I turn next to the article 8(2) balance, and the factors which strongly indicate that no order should be made, even if the inherent jurisdiction is applicable. The factors which are relevant here are the level of risk to KR and whether there are less intrusive means that could have been employed by the LA. The evidence in the present case as to risk to KR is very much less strong than was the case in ***Meyers***. As Ms Jones largely accepted in cross examination, the evidence of risk of fatality to KR does not hold up to scrutiny. Ms Jones raised two risks. She argued that KR could be left alone by ST for prolonged periods and thus not be given food and water and that raised a risk of fatality; and that ST might assault him. The first posited risk was simply unrealistic. ST was letting the carers in generally at least once a day, and if she did leave him for a long period the carers were coming around three times a day and thus could take emergency measures (i.e. call the police) if he had been left for an unreasonable period and they could not access the property. I do not doubt that at times ST can be very difficult, and that there is a risk that she might leave KR particularly if she was drinking. But this risk was controlled by the carers visiting regularly.

67. Further, and crucially, Ms Jones said that the Council were concerned about KR being left alone and completely isolated, and because ST had refused a careline phone he would be unable to tell anyone of his situation. The very obvious solution to this problem was to give KR a cheap mobile phone so that he could communicate. According to Ms Jones this idea was rejected because it might set a “precedent” and

thus incur unreasonable cost. It is difficult overstate how misjudged this approach was, given the colossal interference that the LA then saw fit to pursue through this litigation, not to mention the cost of that litigation.

68. In terms of risk to KR from ST, I accept that this is a couple with a history of domestic violence. Historically KR accepts that he did hit ST, but it is obvious now that given his physical disability he is more at risk from ST. There was some evidence from bruising that ST may have assaulted KR but this is certainly not clear. In any event it would only be in the most exceptional case that the State would seek to forcibly prevent a couple from living together where there was a history of domestic violence, in circumstances where both genuinely said they wanted to live together.

69. Further, this is again a point where the LA have plainly failed to properly consider less intrusive means to mitigate the alleged risk. The couple live in a one bedroom flat and due to KR's disability ST has been having to sleep on a sofa in the living room ever since KR returned home in 2015. ST is obviously under extreme strain living in these circumstances and being KR's primary carer. I asked what steps had been made to find them more suitable accommodation, but Ms Bamfield told me there were no supported flats available, and they were simply on the LA's waiting list for a two bedroom flat. 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.

70. In conclusion I therefore find that the risks on the facts of this case do not justify the interference under article 8(2). Further I find that the LA has not properly considered whether there are less intrusive means by which KR could be properly protected. In these circumstances I find that making the order sought would not have been necessary or proportionate.