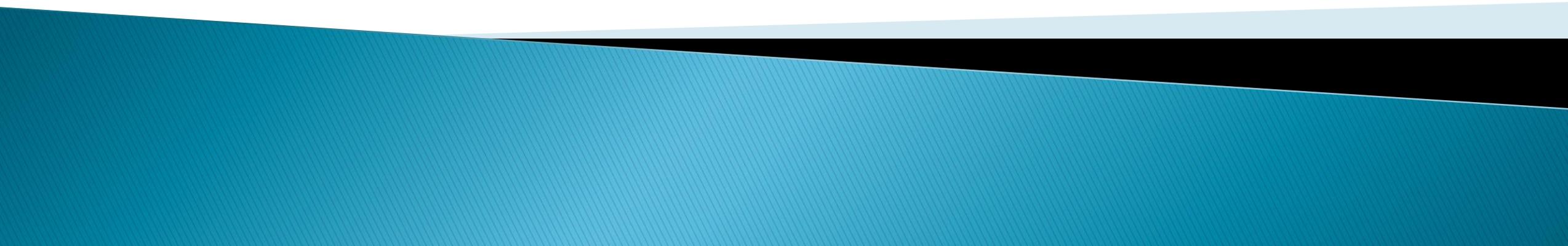
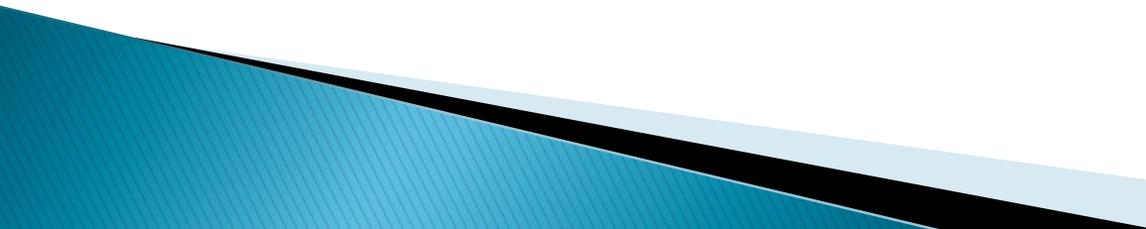


# Choosing to Live with Harm? Exploring Autonomy, Mental Incapacity and Inability to Safeguard

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# Aims for session

- ▶ Introduce myself and research
  - ▶ Present an ecological system framework to explore influences on the micro sites of practice
  - ▶ Introduce judging with care approach
  - ▶ Apply to Scottish legislation and practice
  - ▶ Leave time for questions and discussion
  
  - ▶ NB -ASP= adult support and protection
- 

# A personal and reflective account

- ▶ Qualified social worker– practice 1984–1997
- ▶ Social work educator – qualifying and post–qualifying
- ▶ Research:
  - Focus: interaction between government and citizens as expressed in law and policy; as well as between an adult who might be at risk of harm and social workers.
  - Methods: qualitative, participative and co–produced with service users and practitioners
  - PhD developed my theoretical understanding –a feminist reflexive standpoint: intervening in lives of others is a political, ethical as well as professional act.

# Adapted ecological systems approach for ASP (Bronfenbrenner, 1979)

Macro : law, governmental and societal attitudes & economy

Exo : Social services, police, health and community resources.



Chrono (UK): 1960s universal welfare state > individualised support

- ▶ **Walter Lorenz (2004): Social workers straddle a person's life world and governmental policies and expectations of citizens**



# Macro view : UK neoliberal citizenship

- ▶ Policies are based on an ideal citizen: an autonomous, rational and prudential choice maker
- ▶ It expects citizens to be:
  - self-determining agents
  - contribute economically
- ▶ It's an instrumental (practice) rather than intrinsic (status) view of citizenship
- ▶ Those who don't/can't work have lesser opportunities to participate in society and receive lesser protections

# Chrono changes: Disabled citizens

- ▶ Previously won rights by Independent Living Movement have been eroded
  - ▶ Jenny Morris (2011, p.3): Westminster UK government had 'colonised and corrupted' their ideals to promote their own ideological vision: citizens as independent from the state.
  - ▶ Equally services for those with learning disabilities; mental distress and older people are under strain.
  - ▶ In such an austere climate ASP can be the only gateway into services
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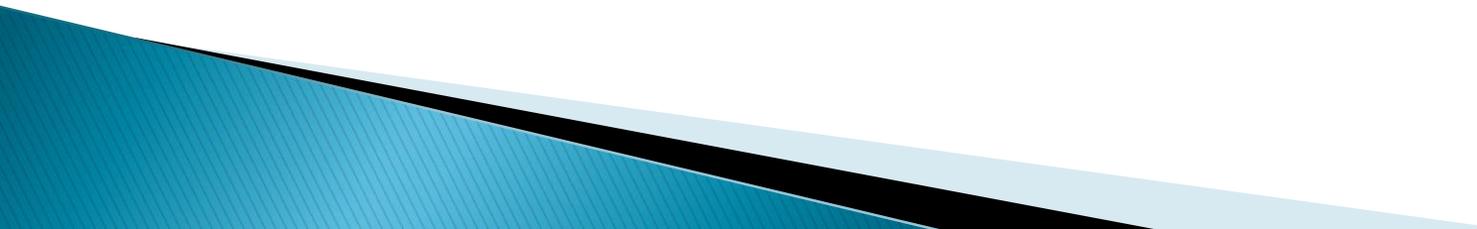
# Hegemony of autonomy

- ▶ No one is fully autonomous
  - ▶ Even the wealthy rely on others to do the 'menial' daily chores
  - ▶ Relational autonomy: autonomy is nurtured and constrained within relationships with family and professionals, within the environment etc.
  - ▶ We all support or limit the autonomy of those we know
- 

# Reclaiming the word care

- ▶ The ethic of care challenges the boundary between private and public life as defined by an individualist–liberal view of citizenship
  - ▶ Brings hidden or ignored issues into the public discourse.
  - ▶ Argues it is erroneous to view dependence as a ‘character destroying condition’ (Tronto 1983, p.162).
  - ▶ Human life is inter–dependent: people need others to flourish (Kittay 2010, Tronto 1993).
- 

## Ethics of care: Four principles

- ▶ *Attentiveness* to the person, their relationships and environment
  - ▶ *Responsibility* to provide care
  - ▶ *Competence* in giving care
  - ▶ *Responsiveness* to the care receiver's experience of receiving care (Tronto 1993)
  - ▶ Further reading: see Ash 2010, Barnes 2011, 2012
- 

# Ethic of Care and Ethic of Justice binary

## Ethic of Care

- ▶ Emotional
- ▶ Relational
- ▶ Inter-dependent
- ▶ Nurturing
- ▶ (Female)
- ▶ (Private)

## Ethic of Justice

- ▶ Dispassionate
- ▶ Rational
- ▶ Inherent/instinctive
- ▶ Autonomous
- ▶ (Male)
- ▶ (Public)

# Many theories of justice.....

- ▶ Justice as parity of participation (Fraser, 2009:16).
- ▶ Three dimensions of participation in justice:
  - Political: **Whose voices are heard and value attributed to them**
  - Economic: **Inequality** of personal resources
  - Cultural: institutional values lead to **status inequality or misrecognition**
- ▶ Fraser's focus was on globalisation but it works at an individual and agency level

# Parity of participation for adults at risk of harm?

## ▶ **Political:**

- They don't fit into neat policy/service streams
- A diverse group of people
- Politicians and press focus on adult protection when there's a 'scandal'
- Who advises governments? Practitioner voices need to be heard too

## ▶ **Economic:**

- Socially excluded; and
- Lack personal resources: finance, home, family & community

## ▶ **Cultural:**

- Self reliant citizenship and 'lifestyle choice'
- In/capacity a key ingredient in the wall between private troubles and public concerns

# Judging with care (Sevenhuijsen, 1998)

- ▶ Operates at all levels—government, agency, interpersonal
- ▶ ‘a process through which the values derived from an ethic of care can be applied to the process of balancing equality with difference’ (pg15)
- ▶ A bridge between binary dichotomous debates
  - Individual autonomy/’paternalistic’ welfare
  - Unwilling as opposed to unable to safeguard
  - In/capacity
- ▶ Opening up dialogue not arguing that one way of seeing/doing things is the only way

# Judging with care in Scotland

- ▶ Legal framework acknowledges the gap between social care and mental capacity/ mental health legislation



# Scottish adult support and protection legal framework



# Scottish legal definition of incapacity

Adults with Incapacity Scotland Act 2000 S1(6)

A person is unable to make a decision for him/herself if, due to mental disorder or inability to communicate because of physical disability, he/she is incapable of:

- **acting**; or
- making decisions; or
- communicating decisions; or
- understanding decisions; or
- retaining the memory of decisions.

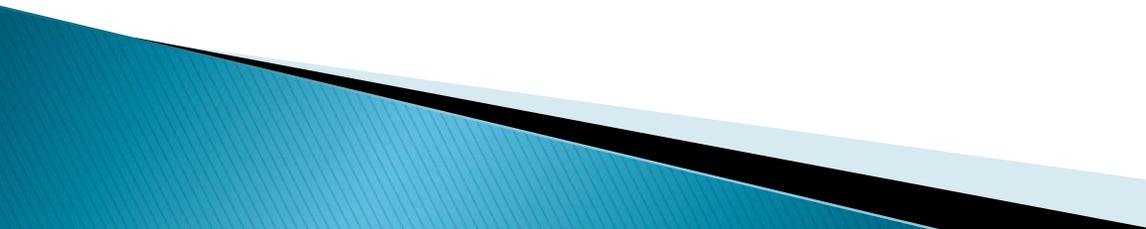
# Mental in/capacity: the barrier between private and public life

- ▶ Still a lingering view in Scotland that incapacity is the same inability to safeguard
  - ▶ WHY?
  - ▶ Makes decision-making easier: a Yes/ No binary
  - ▶ Becomes a gate keeping tool
  - ▶ In practice though there's uncertainty : Maybe/ Aye/No
- 

# Assessing capacity

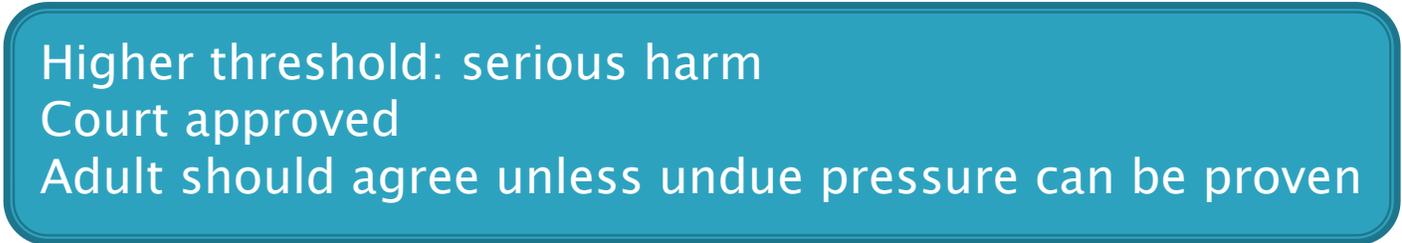
- ▶ Capacity in law is a 'cliff edge' but in reality a more complex process
- ▶ Difference between **cognitive** and **executorial** capacity ( ability to put decision into action)
- ▶ Need to assess in everyday life and not just in clinical appointments or one off visits
- ▶ Variables affecting an individual's cognitive functioning abilities
  - physical & mental health,
  - environment,
  - nourishment,
  - life history
  - trauma
- ▶ Fluctuates over time and between different types of decisions/ issues

## Scottish legal definition of “Adults at Risk” S.3.1

- ▶ **Unable to safeguard** own well being, property, rights or other interests
  - ▶ **Are at risk of harm**, and
  - ▶ Because they are affected by disability, mental disorder, illness or physical or mental infirmity, are **more vulnerable** to being harmed than adults who are not so affected
- 

# Practitioner adult support and protection legal powers and duties

- ▶ Duties to report a concern
- ▶ Duty to make initial inquiries and undertake full investigations
- ▶ Powers of investigation:
  - Request to see the adult at risk of harm on their own
  - Access to records
  - Arrange for health assessment if adult agrees
- ▶ Protection orders
  - Assessment
  - Removal
  - Banning
- ▶ Advise adult of right to advocacy



Higher threshold: serious harm  
Court approved  
Adult should agree unless undue pressure can be proven

# Is the ASPSA compatible with human rights?

- ▶ One legal perspective that it is not due A 8–the right to respect for private and family life.
- ▶ Yet A 3 states no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment;

## **Convention of Rights for Persons with Disabilities**

- ▶ A12 (2): persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life
- ▶ A16(1): states should ‘protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse’
- ▶ Rights are not a Top Trumps game: it’s about judging with care

# Defining unable to safeguard

- ▶ “Unable’ .....is defined in the Oxford English Dictionary as **‘Lacking the skill, means or opportunity to do something’**. A distinction should therefore be drawn between an adult who lacks these skills and is unable to safeguard themselves, and one who is deemed to have the **skill, means or opportunity to keep themselves safe, but chooses not to do so**. An **inability to safeguard oneself is not the same as an adult not having capacity**. An adult may be considered **unwilling rather than unable** to safeguard themselves and so may not be considered an adult at risk.’
- ▶ Scottish Government, Revised ASPSA Code of Practice 2014:12/13

# Introducing 'Nora'

- ▶ Woman is in her 60s
- ▶ Physically able
- ▶ No question of lacking mental capacity
- ▶ A quiet and shy woman
- ▶ Son moved in and had has 'disabilities' he also misused substances, and he began to assert coercive control.
- ▶ Nora would go to bed hope '*she wouldn't wake up in the morning*'
- ▶ Nora did not use social care services
- ▶ Another relative made a referral to social work services

## (Trying) to define ability to safeguard (Mackay 2017)

- ▶ **Ability: skills + means + opportunity**
- ▶ **Skills:** ‘more than cognitive capacity; and they might include the ability to–
  - concentrate,
  - think things through
  - resist the undue influence of others
- ▶ Their self-awareness about how one’s history, relationships and identity might influence choices and actions.

## Social workers visit and speak to Nora:

- ▶ Understanding who is visiting and why
  - ▶ Hearing and understanding questions
  - ▶ Able to ask questions back
  - ▶ Coming to an understanding
  - ▶ Time to think what to say
  - ▶ Expressing own views
- ▶ *I didn't just say right I'm going...I had to think what would happen and all the other things were jumbling inside my head... and it was leaving my house, it was the thought of leaving it and then my son wasn't going to be there when I got back....*

SWer/Nora communication

Nora's dilemma's (Mackay, 2017:41)

# Compromised decisional capacity

*I wasn't allowed to open my curtains...but it was all different things. He used to wake me up during the night because he was coming down from the thing...and he would get angry*

*I just felt I was in a hole and couldn't get out...It was dreadful. And it got to the stage that... I just used to go to bed at night and just hope I didn't wake up in the morning.*

Coercive control/undue pressure

Impact of trauma

# Means

- ▶ Extends beyond available information, advice and services;
- ▶ Personal resources:
  - confidence
  - strength of character
  - resilience
- ▶ Sources of support that the person might have around them
  - neighbours, friends and family
  - community groups: are they known about, accessible?
  - GPs, nurses, shop staff

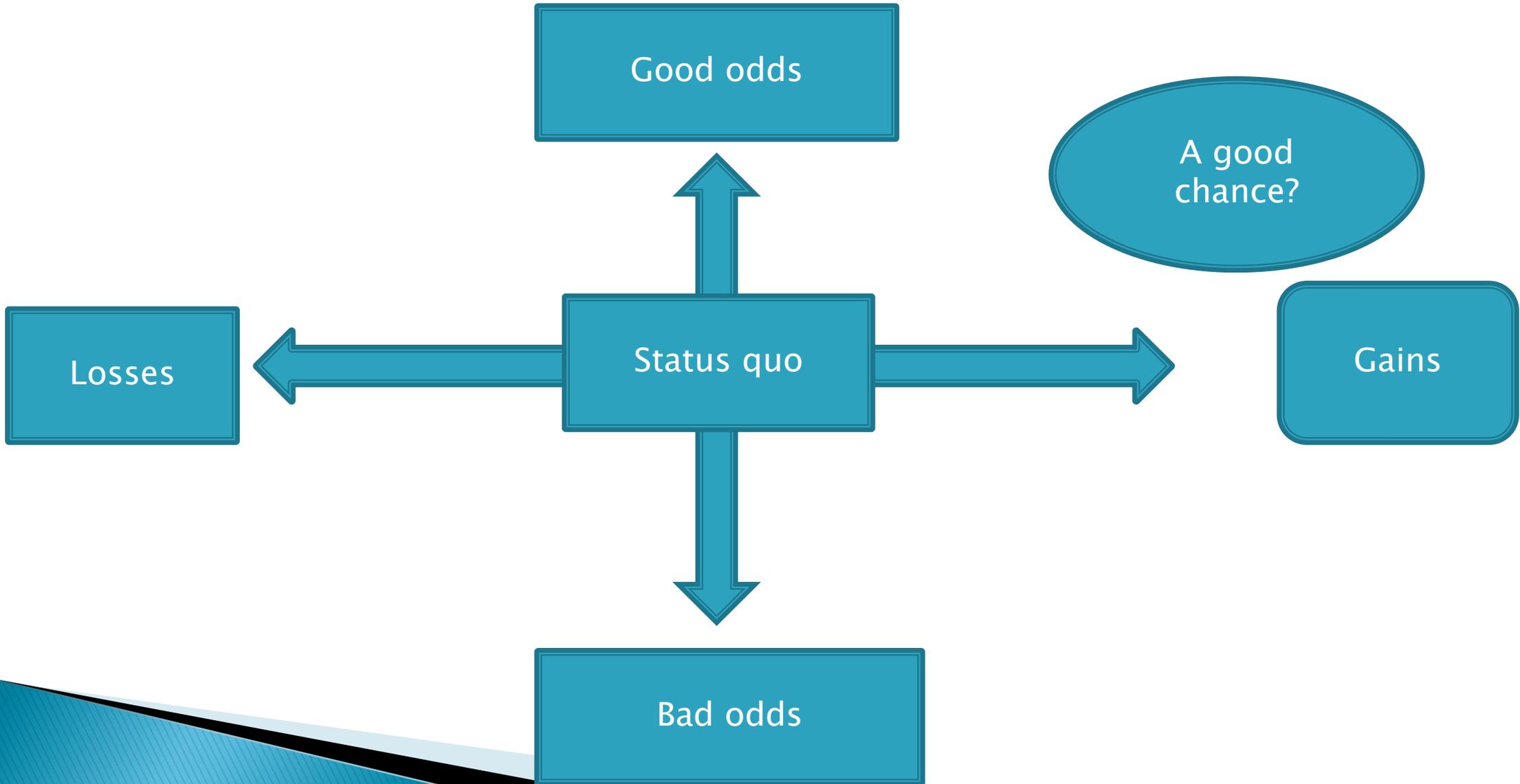
# Nora's 'means'

- ▶ Nora described herself as: *'not forward enough'*.
- ▶ She wasn't a 'resourceful citizen'
- ▶ She did not know how or who to seek help from: couldn't *'have went for it because I didn't know what to do'*.
- ▶ No obvious sources of support
- ▶ Loved her son but wanted abuse to stop
- ▶ *'I couldn't do that ...put him out on the street.'*

# Opportunity

- ▶ Dictionary definition: ‘as a **favourable occasion or a good chance.**’
- ▶ In some ways it overlaps with means
- ▶ Also speaks to the more hidden psychological aspects:
  - a belief that change for the better might be possible,
  - that they are worth the effort; and
  - that they trust someone enough to believe that they will walk alongside them along an uncertain path.’
- ▶ Social workers gave Nora a good chance

# A good chance?: zones of gains & losses



# Supporting decisional capacity /ability

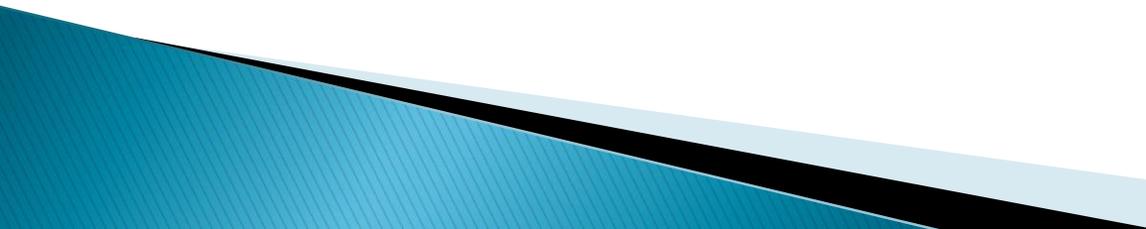
- ▶ *They didn't rush me or anything. I could take my time. They never made me decide anything quick. They would say think about it... And that's what helped me*

## **Social workers 'executed' her decision**

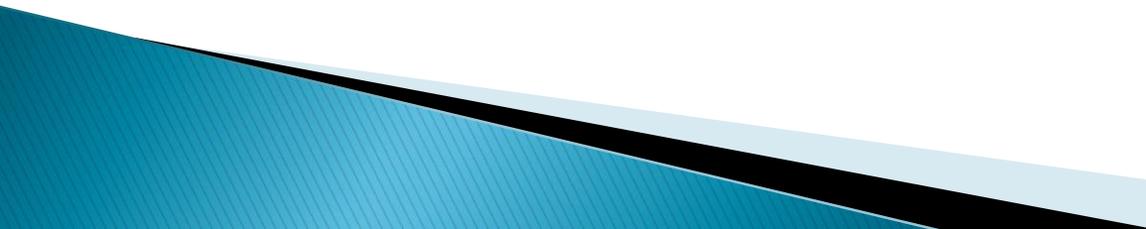
- ▶ *what they done, was put me in a small house for two weeks then they took my son away (to a homeless unit)...It made me feel guilty cos I'd put him into that. ....*
- ▶ *It was marvellous (in the safe place). It was like a holiday...Because it got me away...I just felt I had time to think.*

# Nora's autonomy was supported by

Compassionate relationship building by practitioners who were attentive, competent and responsive:

- Taking time
  - Acknowledging the conflicts and dilemmas she faced as a mother
  - Helped her overcome inner fears and threats
  - Recognised her compromised decisional abilities
  - Helped her trust social workers –just enough
  - Gave her acceptable viable options: support for son as well as safe house for her
- 

# Practitioners judging with care

- ▶ Importance of worker attitudes and approach
  - ▶ Why should someone subject to potential harm trust an unknown practitioner enough to let them in their house or to share their thoughts and experiences?
  - ▶ Some investigations/ assessments have to take longer because you have to build up trust
  - ▶ Gaining a good understanding of a person's understanding and motivations is key to discerning the difference between choosing not to safeguard themselves from being unable to safeguard
  - ▶ It's a process not an event
- 

# Things I'm now thinking about

- ▶ How do we improve supported decision-making for all?
  - ▶ Implications of acknowledging that legal capacity is different to mental capacity
  - ▶ How do we become better at opening up discussions about nature of capacity and inability to safeguard with other professions, agencies and at the macro level?
  - ▶ How can more adults at risk have their voices heard in the places where these debates take place?
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