INSTRUCTIONS TO VOLUNTEER LAWYERS

*Thank you very much for agreeing to volunteer as part of the Unit 3: Workshop on the HEAL: Post Primary Students in Wales Project. Below are a set of instructions and guidance for the day.*

A. FACTUAL SCENARIO FOR MOOT

The appellant is a Maryam Begum, parent of Amara Begum who is a 15-year-old child who has suffered a fatal car accident involving a catastrophic brain injury and is now in a permanently vegetative stage and irreversible coma. The accident occurred on Monday 5th May 2023. Amara has her 16th Birthday on Saturday 10th May 2023.

Doctors at the hospital have confirmed that Amara’s heart and respiratory systems have stopped working, although they cannot confirm that her brain stem has stopped working. Doctors have confirmed that all life-prolonging measures are now exhausted or foregone, there is no alternative left but to proceed to death determination. Both the doctors and the parents are in agreement that it is in the best interests of Amara to be taken off the ventilator and allowed to pass-away.

New Legislation has recently been passed by the Welsh Parliament, which extends opt-out consent to children who are aged 16 and 17. At 18 years old a child becomes an adult.

It is the hospital’s policy following the passing of presumed consent legislation to continue to keep children on a ventilatory until their organs can be harvested. Ventilation is used to prolong the lives of dying donors by mechanical ventilation of their lungs. This is for the benefit of a potential donor, and not the person donating organs.

Amara did not specifically register a decision about whether she would donate her organs or not prior to her accident. Although, she mentioned to her family members that she thought that she ‘might like to’ donate her organs when she passed away, as they had been learning about it in school.

Amara has type AB negative blood, the rarest of the eight main blood types.

The appellant and family are members of the Muslim community. Although organ donation is permitted and supported by Islamic law, many members of the community believe that this should not take place until clinical brain death has been declared as they believe that this is when the ‘spirit’ leaves the body. Maryam shares this belief and wishes to wait for this to happen. Maryam refuses to give consent to the harvesting of Amara’s organs.

Rebecca, a 14-year-old patient at the same hospital as Amara, is on the waiting list for an experimental transplant. She has been completely paralysed since she was 11 after an accident at school. She suffers with pain everyday and requires assistance breathing. Rebecca has type AB negative blood. Doctors at Cardiff Hospital have designed an experimental transplantation procedure to replace part of Rebecca’s spine. Rebecca has been given 4 months to live if she does not have a transplant. Doctors have informed Maryam that Amara is a perfect match for this experimental procedure.

*Maryam does not want Amara to donate part of her spine. She wants Amara to pass away peacefully. Dr Khan representing the Cardiff and Vale NHS Foundation Trust wants the donation to proceed.*

B. POTENTIAL ISSUES

Factual Issues

* What are Amara’s wishes?
* Does it matter that Amara is almost 16 years old?
* Does Amara have the required level of understanding to consent to treatment?
* Does Amara reach the enhanced standard of understanding necessary for consent to ‘experimental treatment’?
* Is transplantation in Amara’s best interests?

Legal Issues

* Does the current legislation on presumed consent apply to Amara?
* Does there have to be express consent due to Amara’s age?
* Does *Gillick* competence apply in this situation?
* Was Amara *Gillick* competent to consent to the transplant?
* Does it matter that this is an ‘experimental’ treatment i.e. does this alter the standard of understanding necessary for consent to treatment?
* Can Maryam ‘veto’ consent to the treatment under the new legislation?

C. KEY CASES

Volunteer lawyers will be provided the text of the key cases relating to this factual scenario. Students will be given summaries of the facts of the case, the issues, and the key elements of the judgements.

1. *Gillick v West Norfolk and Wisbech AHA* [1985] UKHL 7 (17th October 1985)

This case sets out the test for legal competence on minors (0-16 years of age). The leading judgement in this case is by Lord Fraser, who sets out the Fraser Guidelines. The judgement of Lord Scarman would be useful to Maryam, as this sets a higher standard of consent.

1. *Re W (A Minor) (Medical Treatment: Courts Jurisdiction)* [1993] Fam 64

This case distinguishes *Gillick*, by stating that a child who is competent, can consent but not refuse treatment. A parent can therefore consent on the child’s behalf. However, a parent may not be able to veto a positive consent unless the procedure is not specifically in the child’s best interests.

1. *Bell v Tavistock and Portman NHS Foundation Trust* [2021] EWCA Civ 1363

This case relates to capacity to consent to ‘experimental’ treatment. The High Court ruled that children below the age of 10 could never consent to experimental treatment. The High Court also found that the more complex or experimental the treatment the less likely even older children would be able to understand and therefore consent to treatment. This was reversed by the Court of Appeal, who found that assumptions should not be made about children based on age. An assessment of Gillick competence should be conducted on each individual child. The standard of understanding was dependent on the specific circumstances and complexity of the decision to be made.

D. LEGAL INSTRUCTIONS TO THE LAWYERS

Instructions to Lawyers for Maryam

* Maryam does not want Amara to donate
* Amara did indicate when she was alive that she might be willing to donate her organs after learning about it in school
* Amara never signed the organ donation register. She was not specific about what organs she wanted to donate, and never considered experimental donation
* Amara would not understand the information needed to give consent to this form of experimental donation – she would therefore not have been *Gillick* competence.
* Amara was a Muslim, and would not want to donate her organs before brain death
* It is in Amara’s best interests to be taken off the ventilator and to pass away peacefully.

Instructions to Lawyers for Cardiff and Vale NHS Trust

* Dr Khan representing the NHS Trust wants the donation to occur
* Dr Khan thinks that as Amara is almost 16 that her consent should be presumed
* He has been researching experimental spinal donation for the last 30 years and is 99% sure that such a transplantation would succeed
* Alternatively, Dr Khan believes based on conversations with Maryam that Amara would have consented to the transplantation
* Dr Khan argues that Amara would have known all the important information necessary for transplantation as she learned about organ donation in school
* Dr Khan believes that as a Muslim, donation would be in Amara’s best interests as the Quran states that “If anyone saves a life, it is as if he saves the lives of all humankind.” In 1995 the Muslim Law (Sharia) Council UK issued a fatwa, saying organ donation is permitted after the heart has stopped.

After a preliminary hearing, the following order was made giving direction for a combined fact-finding and final hearing:

1. Witness statements would stand in chief for both parties. Both parties will have an opportunity to cross-examine, Maryam and Dr Khan respectively.
2. As this is an emergency hearing, expert evidence will not be needed.
3. Both parties have agreed the relevant case-law relied upon, which will be contained in their bundle.
4. Skeleton arguments addressing legal issues will be submitted to the Court by 12.00 noon on the day of the hearing.

E. GUIDANCE FOR ACTIVITY PARTICIPATION

Volunteer lawyers will be involved in supporting students in activities with students throughout the day. You may prepare as you wish beforehand, for example by reading the relevant cases or drafting potential questions for cross-examination (XX) but adequate time will be given during the day to complete the relevant activities.

Activity 1: Preparation for Client Conferencing

On the day of the event, students will receive a similar bundle to that of the volunteer lawyers, albeit in a simplified form. The role of the lawyers to guide the student through the bundle, explain the role of the various documents and how they might be helpful. The volunteers should highlight the key factual and legal issues described above.

The first activity requires preparation for a conference with the instructing client (either Ms Begum or Dr Khan). The client is played by a professional actor. The conference will allow the student and volunteer lawyer the opportunity to clarify facts of the case, gain further instruction if necessary, and begin thinking about the potential legal arguments that could be made at trial.

In preparation for the client conference, the volunteer lawyer should work with the student to highlight issues to be addressed, and to construct questions which can be put to the client. The volunteer lawyer will find it useful to write notes during the conference as an aide memoir to assist with Activity 3 (construction of the skeleton argument).

Activity 2: Client Conference

The volunteer will support the student in asking questions of the client. The volunteer can take the lead on questioning, allow the student to lead, or share the questioning. This will be dependent on the engagement and willingness of the student.

Activity 3: Preparation of Cross Examination and Drafting Skeleton

The volunteer will guide the student through the witness statement highlighting the pertinent facts. Particularly, the volunteer should focus on areas of the witness statement which are legally relevant, or factually unclear as a basis for cross-examination. The volunteers will construct a list of potential questions that they will put to the witness during cross-examination.

The volunteer will assist the student in filling in the draft skeleton argument contained in the bundle. This should highlight the key legal points that they will make during legal arguments.

Activity 4: Moot

The volunteers will act as Barristers or Solicitor-Advocates at a joint-fact finding/final hearing. A member of Cardiff University Staff will be acting as a judge. Normal court procedures will apply. Students will sitting by or behind the volunteer acting as instructing solicitors. Students will be taking notes of the answers given by the witness.

The volunteer will take the lead in cross-examining the respective witness. Questions should tailored to the client instruction, legal arguments and wider case-theory. The volunteers can confer with the students.

After a brief recess, volunteers will be given the opportunity to make legal arguments. This can be based purely on the case and ‘invented’ statute, but can also integrate evidence contained in the witness statements or adduced during cross-examination.

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*Thanks again for agreeing to volunteer. If you have any questions or wish to discuss further please feel free to contact:*

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