News Update September Fam Law

**The right to free and fair legal representation: *Re Charlie Gard***

The complex and deeply moving situation involving eleven-month-old Charlie Gard has attracted debate on a global scale. Charlie was born on 4 August 2016, at full term and appeared to be healthy. However, after a month it was noted by Charlie’s parents that he was not making the progress of children of a similar age. Charlie was diagnosed with a rare inherited disease - infantile onset encephalomyopathy mitochondrial DNA depletion syndrome (MDDS). The condition causes progressive muscle weakness and brain damage. Charlie was transferred to the Great Ormond Street Hospital (GOSH) in October 2016.

Charlie became the subject of intense public and professional debate due to a conflict between the wishes of Charlie’s parents Ms Yates and Mr Gard who wanted Charlie to receive experimental therapy ‘nucleoside’ in the USA, but professionals at GOSH concluded that the therapy would not improve Charlie’s quality of life. Due to the complexity of the circumstances GOSH made an application to court on 3 March 2017, seeking permission to stop life support treatment in respect of Charlie. At a hearing on 11 April 2017 Mr Justice Francis agreed that life support treatment should end and concluded that palliative care would be in Charlie’s best interest. Charlie’s parents sought to appeal the decision and the matter was considered and dismissed by the Court of Appeal on 23 May 2017 and a further appeal to the Supreme Court on 8 June 2017 was dismissed. The matter was referred to the European Court of Human Rights on 20 June but after reviewing the case on 27 June 2017 the European Court refused to intervene.

Charlie’s parents returned to the High Court on 10 July seeking a review of the case in the light of new evidence. Following further analysis of Charlie’s situation the matter returned to court on 24 July 2017 and Charlie’s parents withdrew their request to change the original court order. Notwithstanding the deeply moving circumstances of this case, it has highlighted two fundamental issues - the needs of parents and children and the right to legal advice and representation for parents in these complex situations.

The needs of parents and children

The 1989 Children Act repealed previous child-care law and aimed to:

‘strike a balance between the rights of children to express their views on decisions made about their lives, the rights of parents to exercise their responsibilities towards the child and the duty of the state to intervene where the child’s welfare requires it’ (Department of Health, 1991, p 1).

The Act states in s 17(1) that it is the duty of every local authority (i) to safeguard and promote the welfare of children within their area who are in need; and (ii) so far is consistent with that duty to promote the level of upbringing of children by their families by providing a range of services appropriate to their needs. Guided by two cardinal principles of the Act, the welfare of the child is to be considered paramount (s 1(1)) and no order should be made by the court unless the making of an order is considered to be in the child’s best interests (s 1(5)). The law recognises that, while the welfare of the child is paramount, this has to be assessed in partnership with parents and it encourages the involvement of the family in decision-making processes.

A legal argument presented on behalf of Charlie’s parents focused of the rights of the parents to decide what is in the best interests of their child. Given that Charlie was not able to consent to treatment, the issue was raised as to whether Charlie was being unlawfully detained and that his right to liberty was being denied. There has never been any suggestion that Charlie has suffered, or is at risk of suffering, significant harm (s 1 of the Children Act 1989) while in the care of his parents. Crucially, the issue was whether there was a risk of significant harm to Charlie if the parents sought alternative treatment which professionals had assessed as not being in Charlie’s best interests. Significant harm is rightly open to interpretation and provides the focus of much legal debate in every situation. Legal submissions on behalf of GOSH in this case purported that there was a likelihood of significant harm if what the parents wanted for Charlie came into effect - the significant harm being a condition of existence which was offering the child no benefit - the conclusion being that it was inhumane to permit that condition to continue.

There is absolutely no question that complex situations such as this require a careful scrutiny of the competing needs, wishes and feelings of the parents together with what is in the best interests of the child, taking everything into consideration. The dominant paradigm in child welfare policy and practice is based on an assumption that all children can be protected and that the development of complex policies, procedures and protocols to assess risk and provide a remedy in a timely manner is pivotal in terms of outcomes for children (Lonne et al] 2009). The use of the inherent jurisdiction of the High Court can be seen as a mechanism which enables the State to intervene when issues are complex and a decision is required to ensure the protection of a child.

There has also been a significant shift in focus away from relationships within the family – principally between parents and their children. This shift departs from the evidence that places a great deal of emphasis on the emotional importance to adults, both mothers and fathers, of children as sources of meaning and stability within a context where other sources of identity are less certain. Relational ways of working both within the family and between professionals, the child and parents is pivotal. The needs of the child and parents are often seen in juxtaposition when in reality they are far more interwoven - and quite rightly should be (Holt, K. *Child Protection*, Palgrave, 2014).

The right to legal advice and representation for parents

Following the introduction of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) legal aid in England and Wales has been removed in the majority of civil matters. The impact of these changes to private law matters but also in cases where the state has intervened as was the case in *Re H* [2014] EWFC B127 (14 August 2014), FLR will have both intended and unintended consequences for parents who are unable to resolve their disputes without the oversight of the court. Furthermore, effective advocacy for parents throughout proceedings is crucial in ensuring justice is achieved for parents and their children. In a climate of austerity, ensuring that parents are subject to fair decision-making processes at all stages has never been so important. There has never been a more pressing need for good advocacy in an attempt to mitigate against highly regulated and instrumental procedures and to provide effective outcomes for children (Holt, K.E., Kelly, N., Doherty, P. & Broadhurst, K. (2013) *Access to Justice for families?* Legal advocacy for parents where children are on the ‘edge of care’: an English case study. *Journal of Social Welfare and Family Law).*

The changes introduced by LASPO have resulted in parents being unsupported when they are attempting to resolve disputes at court. The situation regarding Charlie Gard highlights the injustice of a system that allows a parent who faces a life-changing decision being made about their child having to present their own case when a public authority has legal representation. There is an urgent and pressing need for all professionals working within the family justice system to challenge the impact of both economic and social poverty and its complex links with knowledge, power and access to justice (Castell, S. (2007) *Understanding attitudes to poverty in the UK: Getting the Public’s Attention.* Joseph Rowntree Foundation). Challenging the injustice for families in this context is crucial if we are to reverse the trend for a less tolerant approach to welfare, and to retain the principles of the rule of law and natural justice that underpin the English legal system (Lord Nueberger, ‘Judges and Policy: A delicate balance’, 18 June 2013). **As** Mr Justice Francis stated in *Re Charlie Gard* [2017] EWHC 1909 (Fam) on 24 July:

‘I wish to thank all of the lawyers in this case who have assisted the court but, in particular, the team who have worked for the parents because they have done it not for financial reward but have given their services free. It is not for judges to make political points and I do not now seek to do so. However, it does seem to me that when Parliament changed the law in relation to legal aid and significantly restricted the availability of legal aid, yet continued to make legal aid available in care cases where the state is seeking orders against parents, it cannot have intended that parents in the position that these parents have been in should have no access to legal advice or representation. To most like-minded people, a National Health Service Trust is as much an arm of the state as is a local authority. I can think of few more profound cases than ones where a trust is applying to the court for a declaration that a life- support machine should be switched off in respect of a child. Mercifully, Mr Gard and Ms Yates have secured the services of highly qualified and experienced legal team whose lawyers have been willing to give their services pro bono. I am aware that there are many parents around the country in similar positions where their cases have been less public and where they have had to struggle to represent themselves. I cannot imagine that anyone ever intended parents to be in this position.’ (para 17)

In a country which has withdrawn legal aid for the majority of family work, and where the costs of defending oneself against a State which is seeking to make important and life changing decisions about one’s child’s future, it is the same skilled, knowledgeable and experienced professionals who are relied upon to provide support to parents at time of crisis. We should indeed be proud of a legal profession that is prepared to undertake this work in some instances for free. In *Re D (A Child)* [2014] EWFC 39, FLR, the President of the Family Division, Sir James Munby, stated:

‘What I have to grapple with is the profoundly disturbing fact that the parents do not qualify for legal aid, but lack the financial resources to pay for legal representation in circumstances where to speak plainly, it is unthinkable that they should have to face the local authority’s application without proper representation.’

The reality of losing a child without being able, due to parents’ own difficulties, to represent themselves is surely a breach of their rights under Arts 6 and 8. The government drive to reduce the financial burden on the State of litigation costs underpins both LASPO and the Children and Families Act 2014. These changes together with decisions from the Supreme Court and Court of Appeal provide a sharp reminder of the power of the State, and the reality of powerlessness for a parent who is not in a position to fund litigation privately. These changes are introduced subtly without question or opposition and then become entrenched features which shape the future.

Conclusion

The current situation in respect of fair and free access to legal representation in the most complex situations portrays a picture which is shameful and unjust. Which is ironic given the mantra that we are a society which purports to hold the welfare of children as paramount; we are prepared to leave children’s futures in the balance and by leaving parents to struggle with do it yourself advocacy.. The Gard case has received global attention. In other jurisdictions professionals and the public look to the English legal system as an example of a fair, free and just approach which preserves and respects natural justice for children and their families. This case highlights a system that is in crisis and there must be an urgent review of legislation.

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