

**COURT OF APPEAL
(CIVIL DIVISION)**

7 July; 13 July 2016

RE A (A CHILD)

[2016] EWCA Civ 759

Before Lord Justice McFARLANE, and
Lady Justice KING

COMMENTARY

This case sounds a second cautionary note from the Court of Appeal against the mechanistic use of balance sheet exercises and the failure to apply the appropriate weight to more important factors when assessing best interests.

The use of a balance sheet was first recommended by Thorpe LJ in *Re A (Male Sterilisation)* [2000] 1 FLR 549 at 560. Thorpe LJ considered that the first entry on such a balance sheet should be any factor or factors of actual benefit to the patient, followed by the noting of any counterbalancing dis-benefits. He considered the judge should then enter on each sheet the potential gains and losses in each instance making some estimate of the extent of the possibility that the gain or loss might accrue. At the end of that exercise he thought that the judge should be better placed to strike a balance between the sum of the certain and possible gains against the sum of certain and possible losses. Although this case had a medical context the exercise was described as akin to a welfare appraisal.

The importance of evaluating best interests in welfare in the widest sense, not just medical but social and psychological, was strongly emphasised by Lady Hale in *Aintree University Hospital NHS Foundation Trust v James* [2013] UKSC 67; [2014] Med LR 1; [2014] 1 AC 591; [2013] 3 WLR 1299; [2014] 1 All ER 573, and this was subsequently a universally accepted approach to best interests assessments. In conjunction with the balance sheet approach, this implied that all relevant factors to a best interests decision in the widest sense should expressly be identified and weighed.

In *Re G (Care Proceedings: Welfare Evaluation)* [2013] EWCA Civ 965; [2014] 1 FLR 670 McFarlane LJ said at para 54 that what was required was a balancing exercise in which each option was evaluated to the degree of detail necessary to analyse and weigh its own internal positives and

negatives and each option is then compared, side by side, against the competing option or options. This was subsequently approved by Sir James Munby P in the Court of Appeal in *Re B-S (Children)* [2013] EWCA Civ 1146; [2014] 1 WLR 563; [2014] 1 FLR 1035 at paras 36 and 46 where the President said that the judicial task was to evaluate all the options, undertaking a global, holistic and multi-faceted evaluation of the child's welfare which took into account all the negatives and the positives, all the pros and cons, of each option.

Whilst the use of balance sheets has undoubtedly encouraged all relevant factors to be taken into account in best interests decision making, they have in many instances become lengthy expositions of risks, benefits and potential consequences of different options, both in the medical treatment cases and also in welfare cases concerning children in the Family Courts and adults in the Court of Protection. Their use is sufficiently prevalent that it is now commonplace to have both clinicians and social workers setting out their own detailed balance sheet exercises within, or exhibited to, statements.

In *Re F (A Child) (International Relocation Cases)* [2015] EWCA Civ 882 McFarlane LJ saw some danger in this trend. Whilst he recognised that a balance sheet may be of assistance to judges when determining best interests, he thought its use should be no more than an aide memoire of the key factors and how they match up against each other. He took the view that if a balance sheet was used it should be a route to judgment and not a substitution for the judgment itself. His concern was that a key step in any welfare evaluation was the attribution of weight, or lack of it, to each of the relevant considerations, and that one danger that may arise from setting out all the relevant factors in tabular format was that the attribution of weight may be lost. He saw a risk that all elements of the table might assume equal value as in a map without contours.

In this case the Court of Appeal, which again included McFarlane LJ, approved his caveat in *Re F (A Child) (International Relocation Cases)*. The difficulty encountered in this case was not, however, that all factors had assumed an equal value akin to a flat map, but that the issue of whether A was capable of experiencing pain or discomfort had assumed a disproportionate focus in the proceedings. The analogy here may be more akin to a map with misleading contours rather than none at all. A balance sheet exercise encourages all relevant options, risks and benefits, for and against a decision to be set out in detail, and in contentious proceedings those areas within the balance sheet that prove to be controversial or in dispute may receive undue emphasis. Indeed the Court of

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Appeal noted that almost all of the oral evidence and a substantial part of the judgment dealt with the issue of pain, which, it considered, did not in reality go to the heart of the decision. Practitioners may wish to take note that it is the weight or importance of any particular factor rather than its controversy that should be paramount in any best interests assessment.

On the other hand despite this over-emphasis at first instance on the issue of A's experience (or otherwise) of pain, the Court of Appeal

seemed satisfied that Parker J was not, ultimately, distracted from taking an overall view of A's best interests, recognising that on the facts A's existence was bleak, absent any quality of life and plagued only with the burden of illness and procedures that kept him alive. A wider perspective on which there was in fact unanimity between the experts in the case.

REPORTED BY CONRAD HALLIN, BARRISTER