



## **Activity 2: Considering the welfare issues**

### **The welfare assessment – Lord Justice Ward**

The question of Mary's best interest is one of the key and one of the difficult issues in the case and it calls for thorough exposition.

That Mary's welfare is paramount is a trite observation for family lawyers. Welfare dictates the outcome of the question relating to her upbringing which is before the court. It means no more and no less than that the court must decide what is best for her, taking all her interests and needs into account, weighing and then bringing into balance the advantages against disadvantages, the risks of harm against the hopes of benefit which flow from the course of action under consideration.

The first step must be to characterise that course of action. Here it is proposed to operate to separate Mary from Jodie. So the first question is what are the gains and losses from that intervention? I would judge the answer by application of the test expressed by Lord Brandon of Oakbrook in *In Re F*....:—

“The operation or other treatment will be in their best interests if, but only if, it is carried out in order either to save their lives, or to ensure improvement or prevent deterioration in their physical or mental health.”

The only gain I can see is that the operation would, if successful, give Mary the bodily integrity and dignity which is the natural order for all of us. But this is a wholly illusory goal because she will be dead before she can enjoy her independence and she will die because, when she is independent, she has no capacity for life. The operation is not capable of ensuring any other improvement to her condition or prevent any deterioration in her present state of health. In terms of her best health interests, there are none. To be fair to the hospital, they do not pretend that there are.

If one looks to the operation as a means of meeting any other needs, social, emotional, psychological or whatever, one again searches in vain. One cannot blind oneself to the fact that death for Mary is the certain consequence of the carrying out of this operation.

### ***Conclusion as to Mary's best interests***

The question is whether this proposed operation is in Mary's best interests. It cannot be. It will bring her life to an end before it has run its natural span. It denies her inherent right to life. There is no countervailing advantage for her at all. It is contrary to her best interests. Looking at her position in isolation and ignoring, therefore, the benefit to Jodie, the court should not sanction the operation on her....

### **On the sharpest horns of dilemma: what does the court do now?**



I have found this a very difficult question to answer. Subject to having regard to the parents' wish ... the operation will be in Jodie's interests but not in Mary's. Can that conflict be resolved and if so how?

If the duty of the court is to make a decision which puts Jodie's interests paramount and that decision would be contrary to the paramount interests of Mary, then, for my part, I do not see how the court can reconcile the impossibility of properly fulfilling each duty by simply declining to decide the very matter before it. That would be a total abdication of the duty which is imposed upon us. Given the conflict of duty, I can see no other way of dealing with it than by choosing the lesser of the two evils and so finding the least detrimental alternative. A balance has to be struck somehow and I cannot flinch from undertaking that evaluation, horrendously difficult though it is. ...

*How is the balance to be struck?*

The analytical problem is to determine what may, and what may not, be placed in each scale and what weight is then to be given to each of the factors in the scales.

(i) The universality of the right to life demands that the right to life be treated as equal. The intrinsic value of their human life is equal. So the right of each goes into the scales and the scales remain in balance.

(ii) The question which the court has to answer is whether or not the proposed treatment, the operation to separate, is in the best interests of the twins. That enables me to consider and place in the scales of each twin the worthwhileness of the treatment. That is a quite different exercise from the proscribed (because it offends the sanctity of life principle) consideration of the worth of one life compared with the other. When considering the worthwhileness of the treatment, it is legitimate to have regard to the actual condition of each twin and hence the actual balance sheet of advantage and disadvantage which flows from the performance or the non-performance of the proposed treatment. Here it is legitimate ... to bear in mind the actual quality of life each child enjoys and may be able to enjoy. In summary, the operation will give Jodie the prospects of a normal expectation of relatively normal life. The operation will shorten Mary's life but she remains doomed for death. Mary has a full claim to the dignity of independence which is her human entitlement. ...

(iii) I repeat that the balancing exercise I have just conducted is not a balancing of the Quality of life in the sense that I value the potential of one human life above another. I have already indicated that the value of each life in the eyes of God and in the eyes of law is equal. ...

(iv) In this unique case it is, in my judgment, impossible not to put in the scales of each child the manner in which they are individually able to exercise their right to life. Mary may have a right to life, but she has little right to be alive. She is alive because and only because, to put it bluntly, but nonetheless accurately, she sucks the lifeblood of Jodie and she sucks the lifeblood out of Jodie. She will survive only so long as Jodie survives. Jodie will not survive long because constitutionally she will not be able to cope. Mary's parasitic living will be the cause of Jodie's ceasing to live. If Jodie could speak, she would surely protest, "Stop it, Mary,



you're killing me". Mary would have no answer to that. Into my scales of fairness and justice between the children goes the fact that nobody but the doctors can help Jodie. Mary is beyond help.

Hence I am in no doubt at all that the scales come down heavily in Jodie's favour. The best interests of the twins is to give the chance of life to the child whose actual bodily condition is capable of accepting the chance to her advantage even if that has to be at the cost of the sacrifice of the life which is so unnaturally supported. I am wholly satisfied that the least detrimental choice, balancing the interests of Mary against Jodie and Jodie against Mary, is to permit the operation to be performed...