A framework for thinking about severely disabled children in care proceedings

The Context

“Protecting Disabled Children: A Thematic Inspection” OFSTED, August 2012:

- Most disabled children were living with parents or carers who were well motivated to provide good care for them. In almost all cases they recognised or accepted that they and their children needed additional support and were keen to take up available services. When early concerns for children’s welfare or emerging risks arose, in most cases these were tackled well ensuring that their well-being did not suffer and that their safety was not compromised: page 5.

- A particular feature of child protection enquiries involving disabled children was that in the large majority of cases the children were already known to children’s social care and receiving services as children in need, or were already subject to a child protection plan...where children had been known to children in need teams for some time, child protection concerns often went unnoticed: para. 37.

- When child protection concerns were clear they investigated promptly and steps were taken to ensure that children at immediate risk were safe. However, when concerns were less clear-cut, and particularly when the concerns related to neglect, there were delays in identifying when thresholds for child protection were reached: page 8.

- In some cases where children-in-need work had failed, professionals had been over-optimistic when improvements were made, failing to take into account the parents’ history of inability to sustain progress: para. 38

- Sometimes poor parenting was masked by large support packages. In two cases almost all the day-to-day care for young people with very complex needs was provided by carers and not by the young people’s parents. When the parents were responsible the quality of care dropped to unacceptable levels: para. 40.

Within that context, the purpose of this talk is to consider the place of disabled children in the care system:

(a) the application of the threshold test in disabled children cases;

(b) the overlap between child protection and court of protection;

(c) the provision of services and support for the parents of disabled children. What level of support is it reasonable for a parent to be given to enable the child to stay at home? What remedies does a parent have when that support is unavailable?
The threshold test

In H (Local Authority) v KJ [2007] EWHC 2798 the court was concerned with a 9 year old girl (‘C’). C was severely disabled, having suffered neonatal injuries in the form of intercranial haemorrhaging. She had microcephally and four limb bilateral spastic cerebral palsy with visual impairment and severe learning difficulties. She had no intelligible speech and was unable to move or sit up unaided.

In considering whether or not the threshold criteria were satisfied in this case, Hedley J made the important point that in view of her disability and physical condition, C had clearly suffered ‘significant harm’ and was likely to suffer significant harm in the future. At issue, however, was something he referred to as the ‘attributability criterion’, that is, the question of whether the significant harm suffered by C in the past or likely to be suffered by her in the future could be said to be attributable to the care she had been given ‘not being what it would be reasonable to expect a parent to give to him.’ In other words, the question he raised was one of causation under section 31(2) of the Children Act.

In order to explore whether or not the care that the Mother had given C had met the standard of the reasonable parent, it was important to have in mind the key components of the concept of the reasonable parenting of a disabled child:

- The parent must demonstrate unconditional love and commitment to the child.

- The parent must have basic parenting skills (supplemented by respite care and professional support where necessary) to meet the child’s physical and emotional needs, to include an ability to provide the child with appropriate stimulation and protection.

- The parent’s obligations to the needs of the disabled child’s siblings must also be taken into consideration in assessing the reasonableness of care being given by the parent to the disabled child – being brought up in the company of siblings is a factor likely to produce a more positive outcome for the disabled child but impacts to some extent on the availability of the parent to meet the disabled child’s needs.

- The parent must seek and take into consideration expert medical and social care advice and support in the exercise of his or her parental responsibility.

In this case: the Mother had failed to act upon medical, professional and social care advice she had been given; had not been as cooperative as she should have been with the medical and other professionals; did not acknowledge the need to stimulate the child; and (whilst the court acknowledged the physical limitations of the home environment) did not provide good enough levels of hygiene bearing in mind the child’s medical needs.
However, Hedley J also stated that the Local Authority cannot fail to provide an appropriate level of support to enable the child to live at home (except where the seriousness of the child’s condition is that it would be impossible to do so) then use that failure to say that the parent’s standard of care has not been reasonable. In the circumstances of this case, the court recorded that the Local Authority had fallen short and had not provided enough support to enable the child to be cared for at home (she needed to be turned every two hours at night as a result of which the Mother, without night staff, was exhausted). On the other hand, there were sufficient findings as to the Mother’s difficult personality and her failure to co-operate which meant that declaring the threshold to have been met was inevitable.

Re K (Children with Disabilities: Wardship) [2012] 2 FLR 745

Hedley J revisited the application of the threshold criteria to the parenting of severely disabled children in Re K (Children with Disabilities: Wardship) [2012] 2 FLR 745. In this case, Hedley J was concerned with five children, three of whom had severe and complex neuro disabilities and were totally dependent on others for meeting their needs. At the outset of the case, there were issues concerning the residence and contact arrangements for some of the children. By the time of the final hearing, however, the only issue for the court was whether one of the children should move to a different residential home for the purposes of his educational needs.

As with H (Local Authority) v KJ (above), the Judge was careful to point out that the very fact of the children’s disabilities meant that they could be said to be suffering significant harm or likely to suffer significant harm on a daily basis, but that in order for the Local Authority to be able to compulsorily intervene in the family, that significant harm or risk of significant harm must be attributable to the care being given by the parent, not being what it would be reasonable to expect a parent to give to him. At para. 25 Hedley J again set out the model of reasonable parenting of a disabled child, pointing out that the care of seriously disabled children often involves endless compromises being made between the needs of the child to fulfil his or her individual potential and the benefits to that child of maintaining a place in the family unit.

In the circumstances of this case, the court found that the care proceedings were not necessarily the best way forward bearing in mind the risk that the proceedings would undermine the parents’ morale, and the ongoing need for co-operation between the parents and the Local Authority in relation to the care of the children who remained at home. See para. 30: “Whatever its deficits may be perceived to be, the family unit, if functional, is of central importance to the permanently disabled for it is the one fixed point in the constantly moving waters of state care provision. The welfare of such children over a lifetime is closely bound up with the ability of the family to remain a functioning and effective unit.”

In accordance with the level of agreement that had been reached in this case, Hedley J gave the Local Authority permission to withdraw the care proceedings in respect of all
five children. Although this would mean that only the parents would have parental responsibility for the two children who were residing permanently away from home, he pointed out that section 3(5) of the Children Act would cover the situation where emergencies arose or where the parents could not be contacted. However, rather than leaving the case without any legal structure at all, he made the three disabled children wards of court subject to a review in 12 months’ time: whilst an unusual outcome, the Judge considered that this recognised the family’s need for ongoing professional support and services and the need for some of the new arrangements to have a settling-in period during which recourse to the court might be required.

**Severely disabled children and the Court of Protection**

Re B [2010] EWHC 831

This case picks up the point made by Hedley J in Re K as to the negative effects that care proceedings can have on the morale of the parents and the need not to undermine the parents and birth family in cases where they are likely to play a crucial role in the child’s future. Specifically, the case deals with a narrow –and specific – category of children: those aged at least 16 who have lifelong disabilities and who lack the capacity to litigate on the question of where they should live.

The 17 year old concerned had a diagnosis of severe learning disability, autism and Tourette Syndrome, all of which impairments were said to be lifelong. Following her removal from the jurisdiction by her Mother at the start of proceedings (and a court order for her prompt return) she was placed in a residential home where she then remained in voluntary accommodation throughout. This was some distance from the family home - necessitating complicated travel arrangements - and it was accepted by all parties that a final move to somewhere nearer the family’s base would be in her best interests. Threshold having been conceded, the real issue for the court was the speed at which the move should be effected. Hedley J found that the current placement met her needs sufficiently, but that the permanent move should be managed carefully by children’s social care in conjunction with the adult learning disabilities team and with the recognition of the need for long-term family involvement as a significant factor. It was going to require some time to plan.

Whereas the Mother’s case was that there was no need for a care order and that the plans could be worked out on the basis of a section 20 agreement, the Local Authority argued that it needed to share parental responsibility with the Mother because of the risk of abduction. Whilst Hedley J considered that there was a need for a legal framework, he had serious reservations about the use of a care order where “first, there is a proved commitment over time and in devotion to contact and secondly, ...the family remain the key constant for this young person...thirdly, this is a family driven not by a sense of perversity or resistance to authority but one of moral and religious duty.” Further, it was relevant that if a care order were to be made, it had to be made before the young person’s 17th birthday (in about a month’s time) and would then last only for
a further 12 month period. In circumstances where the issues would be unlikely to be resolved by the time of the young person’s 18th birthday, and where the demands made by her needs would be ongoing throughout her life, a 12 month period was wholly arbitrary.

In transferring the matter to the Court of Protection, Hedley J referred to Article 3 of the Mental Capacity Act 2005 Transfer of Proceedings Order SI 2007/1899. This permits Children Act proceedings to be transferred to the Court of Protection where in all the circumstances it is considered ‘just and convenient’ to do so:

Under Article 3(3):

In making a determination, the Court having jurisdiction under the Children Act 1989 must have regard to:

(a) Whether the proceedings should be heard together with other proceedings that are pending in the Court of Protection;

(b) Whether any order that may be made by the Court of Protection is likely to be a more appropriate way of dealing with the proceedings;

(c) The extent to which any order made as respects a person who lacks capacity is likely to continue to have effect when that person reaches 18 and,

(d) Any other matters that the Court considers relevant.

Hedley J suggested the following guidelines: whether the child was over 16; whether the child lacked capacity in respect of the principal decisions to be made in the Children Act proceedings; whether the disabilities were lifelong or at least long-term; whether the decisions which arise in respect of the child’s welfare can be resolved within the child’s minority; whether the Court of Protection has procedures more appropriate to the resolution of the outstanding issues than were available under the Children Act. Taking all these factors into consideration, Hedley J reconstituted the court as the Court of Protection and made appropriate declarations as to the young person’s best interests (ie that she should stay in her current placement until either agreement or further order of the court; that her family should have regular and frequent contact with her; that the Local Authority should explore and implement a move to her home town, etc.), with liberty to the parties to restore the matter to the court in the event that any further disagreements arose.

Support for the parent of the severely disabled child: What level of support is it reasonable for a parent to be given to enable the child to stay at home? What remedies does a parent have when that support is unavailable?

Section 17 (1) of the Children Act 1989

“It shall be a general duty of every local authority
(a) To safeguard and promote the welfare of children within their area who are in need; and

(b) So far as is consistent with that duty, to promote the upbringing of such children by their families,

by providing a range and level of services appropriate to those children’s needs.”

Under section 17(10) of the Children Act 1989: a child is to be taken to be “in need” if ...(c) he is disabled.

The definition of ‘disabled’ is set out in section 17(11): “a child is disabled if he...suffers from a mental disorder of any kind or is substantially and permanently handicapped by illness, injury, or congenital deformity or other such disability as may be prescribed...”

Children Act 1989, Schedule 2, Part 1 ( Provision of Services for Families)

1(1) Every local authority shall take reasonable steps to identify the extent to which there are children in need within their area

2(1) Every local authority shall open and maintain a register of disabled children within their area

3 Where it appears to a local authority that a child within their area is in need, the authority may assess his needs for the purposes of this Act at the same time as any assessment of his needs is made under –

(a) The Chronically Sick and Disabled Persons Act 1970;

(b) Part IV of the Education Act 1996

(c) The Disabled Persons (Services, Consultation and Representation) Act 1986; or

(d) Any other enactment

6 Provision for disabled children

(1) Every local authority shall provide services designed-

(a) To minimise the effect on disabled children within their area of their disabilities;

(b) To give such children the opportunity to lead lives which are as normal as possible; and

(c) To assist individuals who provide care for such children to continue to do so, or to do so more effectively, by giving them breaks from caring

(2) The duty imposed by sub-paragraph 1(c) shall be performed in accordance with regulations made by the appropriate national authority (NB The Breaks for Carers of Disabled Children (Wales) Regulations 2012)
Chronically Sick and Disabled Persons Act 1970, section 2

2(1) Where a local authority having functions under section 29 of the National Assistance Act 1948 are satisfied in the case of any person to whom that section applies who is ordinarily resident in their area that it is necessary in order to meet the needs of that person for the authority to make arrangements for all or any of the following matter, namely –

(a) the provision of practical assistance for that person in his home;

(d) the provision of assistance for that person in arranging for the carrying out of any works of adaptation in his home or the provision of additional facilities designed to secure his greater safety, comfort or convenience…

then it shall be the duty of that authority to make those arrangements in exercise of their functions under the said section 29.

Section 28A of the Act was inserted by section 108(5) of the Children Act 1989 and provides that it applies to disabled children in relation to whom a local authority has functions under Part 3 of the Children Act.

Carers (Recognition and Services) Act 1995

Section 1(2):

Subject to subsection (3) below, in any case where—

(a) a local authority assess the needs of a disabled child for the purposes of Part III of the Children Act 1989 or section 2 of the Chronically Sick and Disabled Persons Act 1970, and

(b) an individual (“the carer”) provides or intends to provide a substantial amount of care on a regular basis for the disabled child,

the carer may request the local authority, before they make their decision as to whether the needs of the disabled child call for the provision of any services, to carry out an assessment of his ability to provide and to continue to provide care for the disabled child; and if he makes such a request, the local authority shall carry out such an assessment and shall take into account the results of that assessment in making that decision.

Carers and Disabled Children Act 2000:

Section 6(1) If a person with parental responsibility for a disabled child-

(a) Provides or intends to provide a substantial amount of care on a regular basis for the child, and
(b) Asks the local authority to carry out an assessment of its ability to provide and to continue to provide care for the child

the local authority must carry out an assessment if it is satisfied that the child and his family are persons for whom it may provide or arrange for the provision of services under section 17 of the Children Act 1989.

Section 6(5): The local authority must take the assessment into account when deciding what, if any, services to provide under section 17 of the Children Act 1989.

Useful Cases:

R v London Borough of Lambeth LBC, ex parte A [2001] EWCA Civ 1624

Section 17 of the Children Act 1989 does not assist in obtaining better housing for the disabled child and his or her family

The Claimant was the Mother of two autistic children aged 7 and 5, both of whom had severe learning difficulties and required constant supervision. An assessment of the children’s needs under section 17 of the Children Act 1989 in 2000 had concluded that the family needed to be re-housed in appropriate (4 bedroomed) accommodation with a garden: their current two-bedroomed flat had no outside play area, was overcrowded, damp, unhygienic and dangerous for the children. In September 1998 the family had been considered by the Housing Department to be in priority need for a transfer, but by June 2000 they had still not been re-housed and the Local Authority was unable to say how long it would be before an offer was likely to be made.

The Mother applied for judicial review of the Local Authority's failure to accommodate the family, arguing that the general duty to promote the welfare of children in need under section 17 of the Children Act 1989 became specific once the child’s needs had been assessed. Her application was refused and the Mother appealed.

Held, dismissing the appeal: the wide, general and discretionary language of section 17 of the Children Act 1989 does not create a specific duty enforceable at the suit of an individual child. It is an aspirational power rather than an enforceable duty. See also R v London Borough of Barnet ex p G [2003] UKHL 57.

If the identification of a particular need under section 17 was able to ‘trump’ the provisions of the housing legislation, it would be a very surprising result indeed, since the housing legislation imposes detailed and complicated legislation on local authorities to ensure the fair allocation of housing stock.

Although section 20 of the Children Act 1989 requires the Local Authority to provide accommodation for a specific group of children in need, and results in an enforceable duty at the suit of an individual, it was inapplicable to the circumstances of the case – but even if it had applied, since it refers to a duty to accommodate the child, it could
not have required the Local Authority to have provided accommodation for the whole family.

S v Hampshire County Council [2009] EWHC 2537

A local authority is entitled to set eligibility criteria for the allocation of resources from its Disabled Children’s Team: whilst this may exclude some disabled children from its remit, it is not a breach of the Disability Discrimination Act 1995 to do so

The Mother of a severely disabled child aged 10/11 sought permission to apply for judicial review of the Local Authority’s refusal to provide services from the Disabled Children’s Team for her child when he was at home during the holidays from his residential school. The Core Assessment had found that although the child’s behavioural difficulties fell into the severe/profund spectrum, he was physically well and performing to National Curriculum Levels educationally, and – since his needs fell under the severe/profund spectrum for only one category – he was not therefore eligible for services provided by the authority’s Disabled Children’s Team. The assessment had also found, further, that all of the child’s needs could be addressed by the Education and the Health Departments of the Local Authority.

Held, refusing the application for permission:

(1) the Local Authority had not fettered its discretion in the application of its policy for allocating the resources of the Disabled Children’s Team, since it had made it clear to the Mother that it was willing to consider anything further that she might wish to say, and had in fact considered whether or not the circumstances were such that exceptional provision should be made;

(2) The Core Assessment had identified the child’s needs, considered what provision should be made to meet those needs; and set out what services the Local Authority would provide.

(3) The Claimant should have followed the complaints procedure before resorting to an application for judicial review;

(4) The Local Authority’s ‘matrix’ for deciding whether a child should fall within the remit of the Disabled Children’s Team was not a breach of the Disability Discrimination Act 1995 (the Claimant had argued that the local Authority had discriminated against those with good cognitive ability but with severe learning behavioural difficulties by denying them access to the Disabled Children’s Team). The broad purpose of that Act was to ensure that those suffering from a relevant disability are not unjustifiably treated less favourably than those fortunate enough not to be suffering from that disability: the application of the matrix did not deny to the child a service that was offered more readily to those who were not disabled, but identified a fair and consistent basis for deciding when it is that children suffering from a disability should fall within the remit of the Disabled Children’s Team.
Re LH [2006] EWHC 1190

Importance of identifying needs, producing a care plan, and providing the identified services: a ‘package of support’ must be precisely identified

Application for judicial review of the Local Authority’s Core Assessment and Care Plan by the Mother of a 10 year old boy with autism, moderate learning disabilities, chronic long-term constipation, severe epilepsy and asthma. Mother was finding it very difficult to look after him, especially with regard to his challenging behaviour, and wanted him to attend a residential school, but the Local Authority’s Core Assessment recommended that steps should be taken to help the Mother cope with the child at home, and that the residential school should be a last resort.

Held, granting a declaration that the Local Authority was in breach of its assessment obligations:

The Local Authority had breached its assessment obligations under Part III of the Children Act 1989 in that it had failed to identify clearly what was needed to meet the need to manage the child’s behaviour at home, and to assist the Mother in setting boundaries and regaining control. A repeated reference throughout the document to his attendance at a Play Centre and for support to be provided by ‘Family Link’ did not amount to a fully considered ‘package of support’: (para. 66) ‘It is not for the court to decide between a residential placement and support for LH and MH at home. There are rational arguments against a residential placement. However, to conclude that a so-called ‘package of support’, much of which remained to be identified, was to be preferred to a residential placement was seriously flawed and, particularly in the light of a year of fitful attention to the central problem, irrational.’

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31st October 2012

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