Neutral Citation Number: [2018] EWFC 3

Case No: ZC17C00071

**IN THE FAMILY COURT**
**Sitting at the ROYAL COURTS OF JUSTICE**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 January 2018

**Before** :

**SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION**

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**In the matter of AB (A Child)**

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**Mr Alex Verdan QC and Ms Stephanie Hine** (instructed by local authority solicitor) for the local authority
**Mr Nicholas Stonor QC and Ms Amanda Meusz** (instructed by Jung and Co) for AB's parents
**Mr Cyrus Larizadeh QC and Mr Tim Hussein** (instructed by Miles and Partners) for AB's children's guardian

Dealt with on paper

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

**This judgment was handed down in open court**

## Sir James Munby, President of the Family Division :

1. Life and fate have dealt cruelly with Mr and Mrs N and their children, a girl who is now six years old and a little boy, AB, who is just 4 years old. I am concerned primarily with AB. He has a complex neuro-metabolic, neuro-developmental, neuro-degenerative disorder which is probably mitochondrial in origin. It is a life-limiting condition. The symptoms and clinical presentation do not have a named diagnosis. AB is profoundly neurologically disabled. His care routine is complex and intensive. His difficulties include: (i) global intellectual delay; (ii) profound motor difficulties; (iii) cortical visual impairment; (iv) no speech or vocalisation (he does not cry or make any sound); (v) unsafe swallow, requiring feeding by PEG (percutaneous endoscopic gastrostomy – through the stomach wall) and PEJ (percutaneous endoscopic jejunostomy – through the intestinal wall); (vi) difficulty regulating secretions (requiring constant monitoring and suctioning when necessary); and (vii) frequent abnormal neurological movements, including spasms, twitches and dystonia. AB's older sister has a less serious form of the condition.

2. Mr and Mrs N are devoted to both their children and are determined to do the very best for them.

3. Because – and I emphasise only because – of their children's difficulties, Mr and Mrs N have unhappily become embroiled in litigation.

4. On 18 May 2016, following a five day hearing, Parker J, on the application of the relevant NHS Trust, made a raft of declarations in the exercise of the inherent jurisdiction of the High Court to the effect that the Trust would be acting lawfully and in AB's best interests by withholding certain identified medical treatment, including all forms of resuscitation, in the event that his condition deteriorated to the extent that such treatments would otherwise be necessitated. It is important to record some of what Parker J said in that judgment: *An NHS Trust v AB and others* [2016] EWHC 1441 (Fam).

    i) She noted the parents' "self-evident and obvious love for [AB], feelings of parental protectiveness; they have behaved as devoted parents. Their religious beliefs also require respect for life if not at almost all costs, certainly that it should be continued if at all possible."

    ii) She noted that the hospital wanted AB to go home so that he would be spared "the dis-benefits of hospitalisation" and "would be able to have the permanent care of one or other of his parents, accepted by all to be exceptional caring, attentive and in lay terms, skilled." She observed that "These are distressing circumstances where the best option for him is that he has loving, supportive, end-of-life care from those who love him, supported to the highest level by medical and social work staff in that environment."

    iii) She noted that there was "some evidence, particularly from the nursing staff, that when with [his parents] AB can be more settled, particularly in his mother's arms or on his mother's lap, that he may find some sounds more soothing than a noisy hospital environment." She further observed: "I accept the evidence of the doctors that this little boy has minimal awareness of his surroundings and minimal awareness of those who are with him although I do accept that he may

find the presence of his parents soothing. They know him better than anyone else. They may be more tuned in to what he wants and he may find certain tones of voice and certain musical vibrations a more calming environment than a less soothing one."

iv) She noted that she was not being asked to control or restrain the parents in their care of AB outside the hospital setting and observed "I shall assume that unless or until some episode arises in which a Local Authority might intervene on safeguarding grounds (and we are very far from that at this stage) these parents are at liberty to treat their child as they wish."

5. On 21 June 2016, the Court of Appeal (McCombe and King LJJ) refused the parents' application for permission to appeal against Parker J's decision: [2016] EWCA Civ 899. In refusing permission to appeal, the court paid tribute to the parents' love and devotion for AB (King LJ at para 48) and noted that "they have also demonstrated that care and love in their daily attention to the needs of AB so far as they are able to provide them." (McCombe LJ at para 53).

6. On 24 June 2016, the local authority made a without notice application to Parker J for an order preventing AB's parents removing him from the hospital. Parker J made the order the same day. Three days later, on 27 June 2016, she discharged that order, the order she made on 27 June 2016 reciting that the local authority, the NHS Trust, AB's solicitor and his mother all agreed that

> "it is in AB's interests to be able to return home immediately for periods of up to 48 hours, and in the long term; provided that an appropriate package of care can be provided to him."

In accordance with the various provisions of that order, on 2 September 2016 AB was discharged home to the care of his parents.

7. On 3 February 2017, the local authority issued care proceedings in relation to AB in the Central Family Court, having previously issued care proceedings there in relation to his sister. The local authority's statement of facts in support of threshold was dated 16 March 2017. The core allegations, further elaborated over 25 paragraphs in relation to AB, were that:

> "AB's parents "have been reported [to] be[1] uncooperative, rude and aggressive and intimidating of medical and nursing staff."
>
> "Due to the lack of co-operation from the parents, and repeated allegations about the carers, it has been impossible to implement a care package of support for [AB]. [He] will suffer significant harm over time if the care package cannot be provided to him."
>
> "The parents' behaviour has led to [AB] not receiving the assessed level of care provision to meet his needs even when care

[1] I draw attention, yet again, to the impermissibility of this form of pleading: see *Re A (Application for Care and Placement Orders: Local Authority Failings)* [2015] EWFC 11, [2016] 1 FLR 1, para 10 (approved by the Court of Appeal in *Re J (A Child)* [2015] EWCA Civ 222), and *Re W (A Child) (Adoption: Delay)* [2017] EWHC 829 (Fam), [2017] 2 FLR 1628, para 32.

> staff were exchanged for nursing staff at the parents' request. The appropriate level of care cannot be given whilst [he] is in the home environment."

8. On 18 April 2017, following a six day hearing in March 2017, His Honour Judge Tolson QC handed down a long, careful and detailed judgment explaining his reasons for making a care order in relation AB while making no order in relation to his sister. The central core of his reasoning in relation to AB is to be found in the following passages (judgment, paras 57-60):

> "57 … The parents have effectively taken over the giving of rescue medication even from qualified nursing staff. It may be that on odd occasions professional staff do give rescue medication, but that is the exception. In a situation where the parents have sought and obtained the substitution of professionally trained nurses for carers I find this striking. I find that the parents adopt this course in order not to give appropriate rescue medication at the doses recommended. This is because the parents know perfectly well that these medications may over time compromise AB's respiratory system and shorten his life. I find that the parents removed the symptom management plan from AB's room for an unknown period of time before returning it. They did so in order to hinder professionals in the care of AB, specifically so as to make it harder for them to administer rescue medication. They compounded this failing by not telling the truth as to the amounts of rescue medication administered by the parents themselves. I find that the parents are prepared to countenance AB's ongoing dystonia, and therefore probable significant pain, knowing that they could do something about it but consciously deciding not to do so. They have known for a long time that this was against the advice of doctors …
>
> 58 Against those findings of fact it is but a short step to finding the threshold crossed. Dr X, on her monthly visits, sees a helpless child in significant amounts of unnecessary pain. I have no doubt but that the parents do not see things this way, but Dr X's vision is, in my judgment, the truth.
>
> 59 It is, in my view, a further short step to holding that the local authority's conclusion as to the steps necessary to be taken is also correct. If the parents were able to respond to this judgment, to change their viewpoint, to come to regard the quality of AB's remaining life to be more important than its length, then this would not be so. The history of this case, and the earlier proceedings, demonstrate to my mind, however, that the parents will not change their position. They have had the advice of Parker J, but have effectively been unable to take it on board. They will not listen to me. The history of the parents' approach towards carers and professionals also demonstrates that they will dig their heels in in a manner which is, in the

> experience of those professionals, unprecedented. They will press their point of view aggressively even if it means they are barred from hospital wards. I wish it were otherwise, but the evidence in this case does not permit me to conclude that the parents will now take my advice, give, and permit staff to give, appropriate doses of medication, record all such doses, suction only as needed, and, in short, place AB's freedom from pain (I hesitate to call it comfort) above all other things. In future, in my judgment, only professional staff will be capable of such an approach. During this hearing, once it became more apparent that the threshold would be crossed, I gave very active consideration to adjourning AB's case in order to give the parents a further opportunity, but to do so would be to prolong the present very difficult position for no gain and to leave a young boy who deserves better in pain. Moreover, any change of heart by the parents (which as indicated I regard as highly unlikely) is much better assessed and tested over time and in real time by the local authority under a care order than by a court at a distance and only at particular points in time.
>
> 60 Only a care order, with its present care plan for residential, and perhaps in future foster, care for AB will do if his welfare interests are to be paramount. In making such an order it is of some consolation to me that I will bring to an end a difficult situation for professionals within the family home, and perhaps thereby make things a little easier for [AB's sister] (who will be remaining at home subject to any appeal against my order). I emphasise, however, that it is AB's interests alone which drive me to my conclusion. By reference to the welfare checklist, he cannot express any wish, but if a care order is made he will avoid harm, and his need to be free of pain will better be met. The effects of a change will be beneficial. No other use of any power of the court could achieve this result."

9. Earlier on in his judgment (paras 35, 37) the judge had rejected the parents' contention that he should no longer be exercising the care jurisdiction in relation to AB, that the case had become "an end-of-life treatment" case, and that it should be dealt with under the inherent jurisdiction. He seems to have taken the effect of section 100(2)(d) of the Children Act 1989 as being that (judgment, para 37) "No judge could use the inherent jurisdiction of the High Court to confer power on the local authority in present circumstances."

10. Unusually, the judge himself granted the parents permission to appeal, staying the care order in the meantime. He explained why:

> "The evidence before me established that whilst the care to which the local authority took objection caused the child pain, it also prolonged his life. The evidence on this point was striking: the child would probably have died before now but for the care.

> He probably would die if removed into care and subject to a different care regime.
>
> This seemed to me to amount to a compelling reason for there to be an appellate process … Counsel elected to keep her powder dry on 'real prospects of success'."

11. Because of the course that events have since taken, first in the Court of Appeal and then subsequently, there is no need for me to examine either the parents' grounds of appeal and the very detailed and interesting skeleton arguments lodged in the Court of Appeal by Mr Nicholas Stonor QC and Ms Amanda Meusz on behalf of the parents, by Mr Alex Verdan QC and Ms Stephanie Hine on behalf of the local authority, and by Mr Cyrus Larizadeh QC and Mr Tim Hussein on behalf of AB's children's guardian, or the fresh medical, nurses' and carers' evidence which the parents sought to rely upon in the Court of Appeal.

12. It suffices to record the local authority's stance as being that, but for the new evidence, the appeal should be dismissed; that the new nursing / caring evidence was "important", going to the issue of whether AB was suffering pain; and that it "may change the position", the local authority being content to be "guided" by the Court of Appeal's view of the importance of that evidence. The guardian's stance was that the appeal should be allowed in any event, essentially on the grounds (less extensive than those relied on by the parents) that the judge had failed properly to analyse, articulate and set out the evidence in relation to threshold; that he had failed to address in any meaningful way the second – "not being … reasonable" – limb of section 31(2)(b)(i) of the 1989 Act; that he had not undertaken an appropriately rigorous welfare evaluation; and that he had not considered proportionality in any meaningful sense.

13. The appeal came on for hearing before Patten, King and Burnett LJJ on 9 May 2017. The appeal was allowed, the care order was set aside and the case was remitted "for rehearing on all issues" before me or a High Court judge to be nominated by me.

14. There is no transcript of what took place in the Court of Appeal but an agreed Note sufficiently indicates the course matters took:

> "LJ Patten: We have had an opportunity to view papers and it is our strong view that it should go back to the family division, and we would allow the appeal. Obviously we are not going to close the door on anyone who wants seriously to argue to the contrary, but having read the skeleton arguments and considered the issue, we think there are jurisdictional and other problems in relation to threshold. We are acutely conscious of the importance of achieving a speedy resolution of the problems. I have made enquiries with the President and the matter could get back into the division fairly speedily. Anyone here take issue strongly to maintain the judge's decision and that the order should stand?
>
> LA: No. The Appellant raises an important point in relation to new evidence and the issue of pain vs prolonging of life.

> LJ Patten: Case raises hugely important jurisdictional issues that are almost unique. Case is of enormous importance to the parents, and of considerable important in relation to jurisdiction issues.
>
> LA: Experience at the Bar chimes that it is unique.
>
> CG: There is nothing I wish to add.
>
> LJ Patten: I am going to invite Lady Justice King to set out the terms of what we do.
>
> LJ King: There are three key issues 1. Jurisdiction, 2. Threshold and 3. Welfare. All three issues are live and need to be considered by a High Court judge. The trial judge did not refer to *Re C* [*Re C (Children: Power to Choose Forenames)* [2016] EWCA Civ 374, [2017] 1 FLR 487], or how s100 might work. This case is a type where LA might be limited, in the way that I dealt with in *Re C*. That was not before the judge and for understandable reasons, and that was not argued in skeleton arguments. If it is being re-heard and going back, then that must be before the judge.
>
> Second, if matter goes back, it goes back in its entirety. Welfare and threshold are intimately connected. We have discussed if you can salvage threshold and there are cases, which say CoA should not go behind a finding of the trial judge. This is not such a case. All issues are open, relating to pain but also suction and the environment of care within the house. I do not want in a delicate case like this for there to be any confusion. Welfare is at large. Is that the appropriate course?
>
> All QCs: Yes
>
> LJ King: This case has been discussed with President, but given joint view of seriousness of case the President should look at it in first instance."

15. In accordance with the Court of Appeal's order, the matter was listed before me for a Case Management Hearing on 17 May 2017. Both on that occasion, and at a further Case Management Hearing before me on 27 July 2017, I gave comprehensive directions with a view to the final hearing of the matter by Holman J on 14 September 2017. The order I made on 27 July 2017 provided for an Issues Resolution Hearing before me on 8 September 2017, to be dealt with by email.

16. The local authority's final case on threshold was set out in a document dated 26 May 2017 which there is no need for me to rehearse. Although helpfully recast, it traversed much the same ground as the earlier document dated 16 March 2017. The parents' response was in an appropriately detailed document dated 26 June 2017.

17. On 8 September 2017 Mr Verdan, on behalf of the local authority, sent me an email, copied to all the parties, attaching copies of the most recent expert evidence and of the local authority's final evidence, in the form of a statement dated 1 September 2017 by the allocated social worker. This was a careful, thoughtful and appropriately analytical document by a senior practitioner with many years' experience. His conclusion and recommendation was as follows:

> "However, despite the reservations expressed, I need to gauge the benefit and impact on [AB]. In my judgement, the evidence is that he is more settled, there is less suctioning, less dystonic episodes, with consequently reduced need for rescue medication. The current support Package is working satisfactorily and there has been a plethora of appointments for [AB] from a number of therapists which, again, will ultimately benefit him. The litmus test will be the parents' sustained cooperation with advice and professional judgement, beyond the Court Framework.
>
> I have reviewed the evidence of their past behaviour both when [AB] was in hospital, and since October last year when he returned home, which highlights that we need to be circumspect about this. I am mindful that even with the Court framework, the parents have made their views clear about what they perceive education will achieve for [AB and his sister].
>
> Their behaviour has really only improved in the last 4 months, since the cessation of the original hearing, and I need to be reassured that the parents accept and understand that less zealous suctioning will not only allow [AB] to rest, as we heard so clearly in [the expert medical] evidence in March, but ultimately benefits him medically for the reasons outlined in the later reports from [the medical experts].
>
> In light of this evidence and the situation over the last 4 months, the Local Authority will not be seeking removal of [AB] from his parents. I have further considered whether any order would be in [his] best interests, and have considered the merits of a Supervision Order or Family Assistance Order.
>
> My view is that neither are beneficial at present. As I have stated, professionals are gaining access to the family home, and [AB] needs neither befriending, assisting nor advising, which are the thrust of these Orders. His paramount need is safeguarding, and that is afforded to him under the Child Protection process, which will remain in place."

18. In his email, Mr Verdan said:

> "You will see that in light of the medical evidence in the case and after careful consideration of the complex and unusual issues in the case, the LA no longer seek to prove the 'threshold criteria' and therefore no longer to remove the child from his parents'

care. The proposal is that the child will remain at home with his sister and subject to a Child Protection Plan and an ongoing support package.

**Therefore the LA now seeks permission to withdrawn the s31 application**.

The … order also timetabled evidence to be filed from the parents and the Guardian, by 7.09.17 and 11.09.17 respectively and they will do so but ask for short extensions to 8.09.17 and 13.09.17. However they have all confirmed that they agree with the LA position.

In the above circumstances and following an advocates' meeting, all counsel would prefer you to deal with the LA's application to withdraw proceedings administratively by email without the need for a hearing in court as this would reduce costs and save time and given your previous management of the case … we would ask that … the existing 7 days hearing [be] vacated.

… All parties agree to the withdrawal of the proceedings and none seek a court hearing with physical attendance."

19. The following day, 9 September 2017, I received the parents' final evidence together with a draft order in agreed form which I was invited to make notwithstanding that the guardian's final analysis was still awaited. I made the order the same day. In material part it read as follows:

"AND UPON all parties agreeing that the Local Authority should have permission to withdraw their application and agreeing to invite the judge to make this order;

AND UPON the parties expecting to complete a draft final order by consent in respect of the conclusion of these proceedings, once the final evidence as directed below has been filed,

THE COURT ORDERS

…

3 The Guardian shall serve her final analysis report by 10am on the 13th September 2017.

…

6 The hearing listed to commence on the 14th September 2017 before Holman J with a time estimate of 7 days is hereby vacated.

7 The proceedings shall be considered and determined by The President by email.

> 8 An agreed draft final order shall be filed by the Local Authority by 4pm on the 15th September 2017 with The President for his approval …"

20. There was a pressing need in the circumstances to make this order, so that the final hearing could be vacated and further trial preparation abandoned without the incurring of unnecessary further expense.

21. The guardian's final analysis was dated 12 September 2017. Her recommendations were clear and succinct:

> "I am relieved that [AB] circumstances have changed; it was very difficult to consider removing him from his parents who love him so much and who are so deeply committed to caring for him. I believe that [they] have always done what they believe is in [AB]'s best interests and struggled to accept professional opinion, advice and support or to consider that they were in fact causing [him] harm and distress. I sincerely hope that [they] continue with their present engagement with professionals and that the improvements in [AB]'s experience of being cared for is maintained in the long term. However, I also agree with [the allocated social worker] that there is a risk that, in the absence of the spotlight of these proceedings, the parent's cooperation with nursing staff and support of [AB]'s symptom management plan may deteriorate. In such circumstance the Local Authority may need to again consider taking protective action.
>
> Given the improvements in [AB]'s circumstances and the care he is presently receiving I do not support any order being made in respect of him. I do not see the need for any further assessments and there is no gap within the evidence to prevent the court in concluding this matter.
>
> I have considered if the advice, support and assistance offered under a Supervision Order would assist [AB] and his family. However, I conclude that the support and protection offered to [him] as a child subject to a Child Protection Plan in my experience supersedes that provided under a Supervision Order. I therefore support the local authority's request to withdraw its application and conclude the proceedings with no order being made."

22. On 18 September 2017, I made an order in the following agreed terms:

> "IT IS RECORDED THAT
>
> (1) The parties acknowledge that factual disputes remain between them but they do not invite the court to determine those disputes on the basis that this is no longer necessary or proportionate.

(2) For the avoidance of doubt, no adverse findings have been made in respect of the parenting given to [AB] by his parents, their care of him and their adherence to the Symptom Management Plan.

(3) The local authority and the children's guardian consider that, at this stage, it is appropriate for [AB] (and his sister) to remain subject to a Child Protection Plan; the parents consider that a Child in Need plan is appropriate. [AB] will remain a Child in Need throughout his life by virtue of his neuro-disability.

(4) Notwithstanding the factual disputes and the differences as to the appropriate auspices for continuing professional involvement with the family, the local authority and the parents are committed to working together in the future in the best interests of [AB] (and his sister).

(5) The parties agree that the current care package, which is jointly funded by the LA and the CCG, is meeting the needs of [AB] (and his sister); and that it will be reviewed systematically on a holistic basis taking into account the children's needs and the information from all clinicians involved in the children's care; the local authority has confirmed that it is committed to working with the health authority and the parents with a view to ensuring that the care package continues to meet the needs of [AB] (and his sister).

(6) Permission to withdraw the proceedings is granted on the basis that the court is satisfied, on the evidence filed, that:

a. The care being given to [AB] by his parents, with the supporting care package, is meeting his needs;

b. The Symptom Management Plan is being followed, including the administering of medication by [AB]'s nursing team;

c. It is in [AB]'s best interests for the application to be withdrawn and for no order to be made.

…

THE COURT ORDERS

1 The Local Authority shall have permission to withdraw their application for a Care Order in respect of [AB].

2 Any future applications relating to [AB or his sister], whether in the Family Court, High Court or Administrative Court, shall be reserved to Munby P if available."

23. My reasons for making these last two orders are apparent enough. In the light of all the evidence, including much that had not been before Judge Tolson, I was entirely satisfied that it was in AB's interests that I adopt the course proposed by the local authority and recommended both by the allocated social worker and by AB's guardian.

24. In the circumstances, I have not had occasion to consider the important jurisdictional and other questions identified by the Court of Appeal. Further consideration of these matters must await another day. I think I can, however, properly make four observations:

    i) Cases such as this (*Re Jake (A Child)* [2015] EWHC 2442 (Fam), [2016] 2 FCR 118, is another example) raise very complex issues, as yet little explored in the authorities, as to whether the appropriate process is by way of application for a care order or application under the inherent jurisdiction. Local authorities need to think long and hard before embarking upon care proceedings against otherwise unimpeachable parents who may justifiably resent recourse to what they are likely to see as an unnecessarily adversarial and punitive remedy.

    ii) A local authority does not need any specific *locus standi* to be able to invoke the inherent jurisdiction: see *In re D (A Minor) (Wardship: Sterilisation)* [1976] Fam 185. Section 100 does not prevent a local authority invoking the inherent jurisdiction in relation to medical treatment issues: see *Re C (Children: Power to Choose Forenames)* [2016] EWCA Civ 374, [2017] 1 FLR 487, para 97.

    iii) Whatever its strict rights may be, a local authority will usually be ill-advised to rely upon its parental responsibility under section 33(3)(a) of the 1989 Act as entitling it to authorise medical treatment opposed by parents who also have parental responsibility: see *Barnet London Borough Council v AL and others* [2017] EWHC 125 (Fam), [2017] 4 WLR 53, para 32, and the discussion in *Re C (Children: Power to Choose Forenames)* [2016] EWCA Civ 374, [2017] 1 FLR 487, paras 92-95. For a local authority to embark upon care proceedings in such a case merely to clothe it with parental responsibility is likely to be problematic and may well turn out to be ineffective.

    iv) If, on the other hand, in a case such as this, a local authority is thinking of embarking upon care proceedings with a view, as here, to removing the child from the parents, it needs to think very carefully not merely about the practicalities of finding an appropriate placement, whether institutional or in a specialised foster placement, but also about the practicalities of ensuring that the parents have proper contact with their child during what may be its last few months or weeks of life. And by proper contact I do not mean contact two or three times a week for a couple of hours a time if the parents reasonably want more, even much more. As I said in *Re Jake (A Child)* [2015] EWHC 2442 (Fam), [2016] 2 FCR 118, para 29, "In terms of simple humanity, parents must have as much time as they want, not least because it may be a distressingly short time, with their much loved baby." And it is simply unbearable to contemplate the reaction of parents unable to be with their child at the moment of death because of geography or, even worse, bureaucracy.

## Postscript

25. When I sent this judgment to the parties in draft, I asked for up-to-date news of AB. His parents' response, which obviously delighted me, was that he "remains stable and largely comfortable at home" and "Whilst he continues to have dystonic episodes they are not as frequent or as severe as in the past." They also sent me, for which I am grateful, a heart-warming photograph of the family by the Christmas tree.