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Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered:	**09/10/06**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

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IN THE MATTER OF K AND S (THE NEED FOR EXPERT EVIDENCE; APPEAL FROM A MASTER)

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GILLEN J

[1] In any report of this case I direct that there should be no identification of the name of the children, the names of either parent or any other matter that may lead to the identification of the family who are the subject of this appeal.

[2] This is an appeal against the decision of Master Wells given on 22 September 2006. T he Master made an Order refusing the application of the father of two children to grant leave for the disclosure of documents to and examination of the children by an expert pursuant to Rules 4.19 and 4.24 to the Family Proceedings Rules (NI) 1996 as amended ("the Rules") for the hearing of an application to confine contact pursuant to Article 53(3) of the Children (NI) Order 1995 lodged by a Health and Social Service Trust which I do not propose to name ("the Trust").

Background

[3] The relevant background to this case is as follows:

(i) Two children namely K (now 4½ years of age) and S (now 3¼ years of age) are the subject of an application before this court by the Trust under Article 18 of the Adoption (Northern Ireland) Order 1987.

(ii) Both children were taken into care in December 2003 in the aftermath of allegations of non-accidental injuries allegedly caused to them by their parents M (mother) and P (father).

(iii) The children were made the subject of a care order on 13 December 2005. That order was appealed, which appeal was rejected by the Court of Appeal in Northern Ireland on 24 April 2006.

(iv) The children remained with foster carers Mr and Mrs X until the summer of this year. The care plan approved by the court in December 2005 had envisaged permanence by way of adoption for these children. In the summer of 2006 the children were moved to their current placement which, if the court accedes to the application under Article 18 of the 1987 Order, is likely to be the permanent home for these children.

(v) On 3 July 2006 the Trust filed applications for the reduction of contact between the children and each of their parents pursuant to Article 53(2) of the Children Order (NI) 1995 ("the 1995 Order") . Contact between parents and children had been reduced in the aftermath of the care order in December 2005 to fortnightly contacts. The current application was to further reduce that contact to monthly occasions consequent upon the children moving to their planned permanent placement and in any event prior to September 2006 when it was anticipated K would commence school.

(vi) On 7 August 2006 the Master had given directions in this matter and, inter alia, had directed that any application with reference to expert evidence pursuant to Rules 4.19 and 4.24 of the Family Proceedings Rules (Northern Ireland) 1996 as amended should occur on or before 1 September 2006. No such application having occurred on or before 1 September 2006, on 8 September 2006 the Master extended the time limit for such an application to 14 September 2006. On 12 September 2006, an application was brought by the respondent father under the Rules in relation to Professor Tresiliotis. Shortly before that matter was due to be determined on 15 September 2006, an application was made to alter the name of the expert to Sally Wassall. The Master granted leave for that amendment to be made and thereafter made her determination refusing the application on 22 September 2006. P's application seeking the disclosure of documents under the Rules to Ms Wassall was grounded on his belief that an expert was necessary to assess whether it was in the best interests of the children to reduce their contact with him as proposed by the Trust. The Trust did not intend to rely on any similar expert in support of its application. It was common case that if the application by P had been acceded to, Ms Wassall could not have produced a report on the issue until December 2006 at the earliest and in the interim she would look at videos of contact between the children and her birth parents. It was also agreed that the Master had refused the application on the basis that in her opinion a delay in the determination of the application by the Trust with reference to current contact would be adverse to the interests of the children.

The appellant's case

[4] In the course of the documents setting out the grounds of appeal, a clear and skilfully presented skeleton argument by Ms Anyadike-Danes well augmented by cogent submissions from Ms McGrenera QC and the statement of P dated September 2006, the case is made that the Master has erred in law in failing to accord full and appropriate weight to the appellant's case in the following respects:-

(i) That a material reduction in current contact flies in the face of evidence that the children enjoy current contact, particularly that between P and K. My attention was drawn for example to the recent report of the guardian ad litem at page 9 paragraph 7.4 which refers to the enjoyment of K upon the arrival of the father. Similarly a key social worker in this matter who reported on 6 July 2006 Cheryl Clarke referred to the very positive nature of contact in this context. It was submitted that at this moment of change in the life of these children, when they are now moving to fresh foster carers, it was a change too many to reduce ongoing contact.

(ii) It was submitted that the Trust had produced insufficient or any expert evidence to justify the reduction. In particular my attention was drawn to a letter of 2 June 2006 from Ms Clarke to Dr McLaughlin seeking guidance on this very matter. This had not been followed through and the information therein referred to had not been sought by the Trust.

(iii) Counsel submitted that the Master had placed too much emphasis on the determination not to have the timetable of the Trust application derailed particularly since Ms Wassall could report by early December. My attention was drawn to C v Solihull Metropolitan Borough Council (1993) 1 FLR 290 where Ward J said at p. 304g:

> "… Delay is ordinarily inimicable to the welfare of the child, but planned and purposeful delay may well be beneficial. A delay of the final decision for the purpose of ascertaining the result of an assessment is proper delay and is to be encouraged. Therefore, it is wholly consistent with the welfare of the child to allow a matter of months to elapse for a proper programme of assessment to be undertaken."

It was submitted to me that insufficient weight had been given to the proposition that expert evidence was necessary to assist the court to come to a just conclusion in this case. Counsel suggested that that was particularly so in a case where the parents were allegedly a constant factor in the changing landscape of these children's lives and that reduction at this particular moment could be counter-productive contributing to already existing

problems with the children. It was urged on me that there had never been any question of interference with placements in the past and therefore any further delay was not likely to attract damaging behaviour by the appellant.

(iv) Ms McGrenera relied upon the parent's right to family life under Art 8 of the European Convention for the Protection of Human Rights and Fundamentals Freedoms 1950 ("the Convention") and Art 6 of the Convention which affords to every party the right to a fair hearing. In her submission failure to permit presentation of the evidence with the assistance of expert material would be a breach of both articles. In the context of Art 6 of the Convention, my attention was drawn to Elsholz v Germany (2000) 2 FLR 486. In that matter a father, who had enjoyed frequent contact with his child since the mother and he had parted three years before, sought an order from the court when contact had stopped apparently at the child's request. The European Court of Human Rights held there had been a violation of Art 8 under the Convention when the German court purported to determine his application without the benefit of a psychological expert. At p. 498 para. 52 the court said:

> "Moreover, taking into account the importance of the subject matter, namely the relations between a father and his child, the Regional Court should not have been satisfied, in the circumstances, by relying on the file and the written appeal submissions without having at its disposal psychological expert evidence in order to evaluate the child's statements. The court notes in this context that the applicant, in his appeal, challenged the findings of the District Court and requested that an expert opinion be prepared to explore the true wishes of his child and to solve the question of access accordingly …"

The Respondent Trust's case

[5] In the course of a comprehensive and concise argument, Mr Toner QC, on behalf of the Trust, resisted the appeal on the following grounds:

(i) The Master was perfectly entitled to come to the conclusion that it would be detrimental to the interests of this child not to have the Trust's application determined until December 2006 at the earliest.

(ii) If the Master had granted the adjournment sought by the appellant in order to afford time for Ms Wassall to report, five months would have passed since the Trust application on 3 July 2006 before the matter could be properly determined. With the application to free the children to be heard merely four

weeks later, the Trust could well be faced with a claim it was a waste of time to determine the matter so close to the hearing of the substantive issue.

(iii) Whilst Mr Toner acknowledged that on an appeal from a Master the matter was a rehearing, with appropriate weight being given to the decision of the Master, nonetheless in this instance he urged particular weight should be given to the views of the Master because she had determined this issue as part of the trial process.

(iv) Dealing with the letter of 2 June 2006 from Ms Clarke to Dr McLaughlin, Mr Toner drew my attention to the fact that the decision to make application for reduced contact had already been made at a Looked After Children review on 31 May and that the essential purpose of the letter to Dr McLaughlin was to advise us to how best the settling in process should be managed.

(v) In addition to his argument that delay in this matter would in substance deny the Trust an effective hearing, he relied on the substantive points made by Ms Clarke in her report of 6 July 2006:

> "K and S are two children who have spent a considerable amount of time in temporary care. During this time they have had substantial parental contact and have experienced a number of respite placements. Previous foster carers were not able to offer permanency and it is not feasible for the children to return to their parents' care. On this basis, the Trust has identified and moved the children to permanent dual approved carers. The children's experience of trauma, loss and disruption mean that they will require clear and consistent messages about the move. Alongside these factors, the children's young age and stage of development mean the potential for confusion and mixed messages is very real when their parents do not accept the reality of their world in their new placement. They need every opportunity to be allowed to settle in their new placement and the current level of contact is disruptive to this process.
>
> The Trust has tried to maintain a balance and has taken into consideration the view and the rights of the birth parents on balance with the needs of the children. It is the Trust's opinion that these children need to have clear messages about who their permanent carers are and given a real opportunity to

> start building relationships and positive attachments. I believe if the current contact level is remained, this could potentially undermine the placement, confuse the children and this is not in their best interests."

Submissions of the Guardian Ad Litem

[6] Mr Devlin who appeared on behalf of the guardian ad litem in the course of concise arguments made the following points:

(i) The guardian ad litem relied on the arguments of the Trust and shared the conclusions and submissions of the Trust in this matter.

(ii) Counsel reminded me that the care order had been made on the basis that non-accidental injuries had been caused to S and that in the absence of any application to discharge the care order, which had not been forthcoming, these children were going to remain with their present carers either by way of adoption or long term foster care. Accordingly he submitted that this was a vital stage in the lives of these children and that nothing must be permitted to damage or undermine the attachment now being tentatively established with the current carers. He drew my attention to the recent guardian ad litem's report at paragraphs 9.6 , 9.7,9.25 and9.26 where the guardian ad litem produced evidence of the parents engaging in damaging messages to the children about the current carers. It was a fear on the part of the guardian ad litem that behaviour of the kind indicated in those paragraphs could present a danger to the placement particularly where the parents still envisaged rehabilitation. It was the guardian's submission therefore that it was vital that a hearing on this matter be not postponed to December because it would prevent the determination of the issue of whether or not these parents would act in a manner potentially damaging to the placement. The relevant extracts from the report of the guardian ad litem were as follows:

> "9.6 From the outset (M) voiced her strong objections regarding the current foster carer/placement, associating the children's placement move with the reduction in contact and increase in supervision/assessment of contact. In particular she stated that she strongly objects to the foster father remaining at the contact venue (albeit in a different room) for the duration of the contact, and that she had been asked to meet directly with the new carers but was refusing 'point black' (her words) to do so.
>
> 9.7 In an attempt to (sic) (M's) level of acceptance of the children's current situation and their needs at

> this time, I asked her how she felt about the placement move. She replied 'I don't like where they are. I don't think they are happy'.
>
> …..
>
> 9.25 In my discussion with the carers they informed me that recently during an episode when (K) was very upset and on edge, he reported that during a particular contact visit when his extended family were also present, his father had taken him aside and told him that 'Everyone was trying to stop their contact with their parents. Apparently P told K to keep this a secret'.
>
> 9.26 The above in my view raise serious concerns regarding (P's) ability to accept the children's care plans, his capacity to give positive messages to them regarding their current placement and his capacity to engage in work with a view towards achieving these goals."

The Principles to be Applied

[7](i) This matter comes before me by way of appeal from the Master. As such I must treat it as though it comes before me ab initio as a rehearing and not as an appeal from the exercise of the Master's discretion. Nonetheless I am entitled to take into account any judgment given by this experienced Master in family matters.

(ii) Given the infinite variety of the facts which drive the discretionary conduct and disposal of these difficult cases, it is rarely appropriate to go beyond issuing some generalisations about the approach to be adopted by other courts in relation to the appointments of experts. Nonetheless in the context of this case it may be helpful if I make some such observations about the appointment of experts.

(a) The court has a positive duty to enquire into the information provided by the party or parties seeking leave to instruct an expert and to take a proactive role in granting leave for documents to be released to such experts (see Re G (minors) (expert witnesses) 1994 2 FLR 291 and paragraph 7.6 of the Children Order Advisory Committee Best Practice Guidance).

(b) Courts give permission to instruct expert evidence only if that evidence is relevant to a particular issue on the case and necessary for the proper disposal of the case.

(c) Experts are expensive and their use must be judicious.

(d) The sole purpose of experts is to assist the court in matters where only they have the expertise to advise.

(e) Whilst it is the common experience of those practising in the field of public law Children Order proceedings that many of the cases are decided on expert evidence, nonetheless it is clear that the instruction of experts is a major cause of delay and their use must be strictly scrutinised by the court before granting leave in order to ensure that non-purposeful delay is not occasioned and thus harm potentially caused to children. Courts must therefore be wary lest they be too prodigal in the use of expert evidence. The fact of the matter is that in Northern Ireland not only is there a shortage of experts but those who are available are very busy and often cannot undertake the task allotted by the court within the time frame set down by the judge . The court is then faced with three choices, all unsatisfactory. The first is to wait for the expert, thereby infringing the principle that delay in determining the case is contrary to the interests of the children and adds to the stress on the parties and the children concerned. Secondly to try and find another expert (who is likely to be in the same position or may not be as good) and thirdly to abandon the idea of expert evidence altogether. The solution perhaps is rigorous case planning. In the very early planning stages courts must identify the type of assessments likely to be necessary on the assumption that the court finds the facts in a particular way. If more than Trust social work assessments are then thought likely to be required, the expert whose assessment is likely to be commissioned can be approached at that early stage and invited to be prepared to carry out work. That would provide sufficient notice for the expert and since the date for the final hearing will have been fixed at an early stage the expert should have time to make his assessment in good time for the final hearing. A difficulty which often arises is where an assessment or a report is ordered from an expert – perhaps jointly instructed – and the receipt of that assessment or report prompts one of the parties – usually the parents – to seek a second opinion. If the application is justified, there is the obvious risk that the timetable for the case will be thrown out, the final hearing vacated and substantial additional delay incurred. There is no easy answer to this problem except to plan for it at the earliest possible stage by giving a direction that the report has to be received sufficiently in advance of the date fixed for final hearing so as to enable a second opinion to be obtained (usually on paper). If, in the event, the report is not received in time, any application to adjourn has to be heard with the "delay" principle very much in mind and can be refused if a fair hearing within Art 6 of the Convention is possible. (See comments by Wall LJ in "Delight and Dole; The Children Act Ten Years On" at page 84). A cautionary case in this regard is London Borough of Croydon v R (1997) 2 FLR 675 where a local authority had obtained a psychiatric report making it clear that in the

psychiatrist's opinion there were too many risk factors attached to the mother being able to care for her baby. The mother was given permission to obtain a psychiatric report, but the psychiatrist did not answer letters or file his report on time. Shortly before the hearing, the mother applied for permission to instruct another psychiatrist. That instruction would almost certainly have required an adjournment. The justices refused, and the mother's appeal against the refusal was dismissed. It was held that the mother would have a fair trial on the available material and that parental capacity was essentially a matter for the justices to resolve.

(f) Courts must become increasingly aware of the multi-disciplinary nature of family justice. Cases benefit from input from professionals with expertise in many areas and often can be from professionals, including social workers, whose permanent employment is within the public service. It is worth citing the concerns expressed by Dame Margaret Booth in her 1996 report "Avoiding Delay in Children Act Cases" where she recorded:

> "3.3.9 Evidence of social workers in court. A matter of major concern raised by every local authority consulted was the lack of credibility given by the court to the evidence of social workers. It was said that social workers find court appearances stressful and that many were terrified by the prospect. This has serious repercussions. Stress related illness connected with court appearances was said to be common place and this could necessitate an adjournment of a hearing with consequential delay. Aggressive and hostile cross-examination could undermine the standing of the social worker and go so far as to taint the whole department in the eyes of the family so that future work was put in jeopardy. One local authority reported that social workers had resigned as a result of their court experiences. Because the evidence of social workers carries little weight, local authorities reported that they often felt compelled to instruct experts, despite the cost, to deal with matters which would otherwise be dealt with by their social workers who would speak with much greater knowledge of the child or family concerned."

Clearly training in all aspects of court work for social workers is essential and the social work qualification which most social workers have must be pitched at an appropriate level with adequate content. There is no doubt that social workers need to be professional and to know what the court requires and expects by way of evidence. They also need to have a thorough understanding of court procedures. However, the courts themselves do need

to have a good understanding of the role of the social worker and the extent of his or her authority. Courts should be open to according to social workers the appropriate status in the cases notwithstanding their absence of medical/psychiatric/psychological qualifications. They give evidence as professionals and as part of what is – or ought to be – a multi-disciplinary process. They bring their particular form of expertise into play in each case. No doubt the multi-disciplinary assessment may from time to time uncover the need for a particular therapeutic service or for outside expert evidence which is not available to the multi-disciplinary team within the public authority. This is where the assistance of the guardian ad litem can be vital in assisting the court to assess the need for outside expertise. The judicial function is to filter when and to what extent experts can provide further assistance of the court. There is no fetter on the judge's discretion to curb proliferation in investigations and reports when they seem to him to be unnecessary or unhelpful to the future resolution of issues. Thus the court should adopt a pro-active role in the appointment of experts in this way. I share entirely the views of Wall J (as he then was) who said in Re G (supra) at 293C:

> "The court has a proactive role in the grant of leave. Thus in my judgment the court in each case:
>
> (1) Has a duty to analyse the evidence and decide the areas in which the expert evidence is necessary, and
>
> (2) Both the power and the duty:
>
> (a) To limit expert evidence to given categories of expertise; and
>
> (b) To specify the numbers of experts to be called."

The court later stated:

> "A further assumption … was that the court should also be proactive:
>
> (a) In laying down a timetable for the filing of expert evidence.
>
> (b) In making arrangements for the dissemination of reports, and
>
> (c) In giving directions for experts to confer."

It is for the advocate to come to court prepared to demonstrate the area of expertise for which leave is sought and to justify the grant of leave by reference to the specific facts of the case and the relevance of expert evidence to those facts. I refer to my own comments on this issue in Re R1 (care order: freeing without parental consent: expert evidence) (unreported November 2002 Ref: GILH3238).

[8] The court must never lose sight of the fact that planned and purposeful delay to obtain a further opinion may from time to time be in the interests of the child particularly where the refusal to allow a parent to obtain a second opinion would deny the child the effective chance to remain within his natural family or, as in this instance, to avail of appropriate contact. It is a principle of natural justice that a person is entitled to have the opportunity to call witnesses to support his case and that a person is entitled to adequate notice and opportunity to be heard before any judicial order is made against him. Re G (Children) (Adoption Proceedings: Representation of Parents) 2001 1 FCR 353 is ample authority for the proposition that a court's determination not to have the timetable of the matter derailed must not be allowed to veil the importance of justice being seen to be done , the need to ensure that parents have a quality of representation and the sense that they have had a full and sympathetic hearing even if they are unsuccessful. Contact is an area where Art 8 rights under the Convention are clearly invoked and a decision should only be taken after a parent has had a reasonable opportunity to dispute the case against him since not to allow such an opportunity is unlikely to be justified or proportionate. Moreover the right to a fair hearing under Art 6 of the Convention requires compliance with the principle of "equality of arms" in the sense of a fair balance between the parties. This means that each party must have the opportunity to present his case under conditions which do not place him at a substantial disadvantage to his opponents. The right to a fair hearing is unqualified.

Conclusion

[9] Against the background of these principles, I have come to the conclusion that in this instance the Master has neither misdirected herself nor failed in the exercise of the discretionary balance which is fundamental to such decisions. On the re-hearing before me, I have determined that her decision was correct. I have so concluded for the following reasons:

(i) Adopting the positive duty to enquire into the need for the expert in this matter and taking a proactive role, I have concluded that there is a rich field of multi-disciplinary evidence before the court in terms of a comprehensive social worker's report from an experienced source , a report from the guardian ad litem, contact sheets over a substantial period and the circumstances of the case from which this careful Master can make a

determination without the need for a report from Ms Wassall on this discrete issue.

(ii) I do not consider that a report from Ms Wassall on this specific issue would be either helpful or necessary for a just disposal of this aspect of the case.

(iii) In my opinion the public expenditure incurred in the cost of this report would not be justified. This matter is publicly funded and in my judgment the court owes a duty to the public to ensure that public funds are not wasted on unnecessary investigation. I am conscious that the Rules of the Supreme Court (Northern Ireland) 1980 recite at Rule 1A(2) the following:

> "(2) Dealing with the case justly includes, so far as is practicable –
>
> (b) Saving expenses ….
>
> (d) Ensuring that it is dealt with expeditiously and fairly; and
>
> (e) Allotting to it an appropriate share of the court's resources while taking into account the need to allot resources to other cases."

(iv) Given the other material available, I do not believe that this is a field where only Ms Wassall has appropriate expertise.

(v) I have concluded that the delay which Ms Wassall's report would require is unjustifiable. In effect it would prevent any consideration being given to the argument raised by the Trust that contact needs to be reduced at this time in order to allow the children to settle into the new circumstances that will confront them. Experience and commonsense persuade me that the question of whether or not at the young age and stage of development of these two children the potential for confusion and mixed messages exists if this contact was not reduced is an issue well within the competence of this Master to determine without the need for further expertise given the evidence at her disposal.Such issues are regularly determined by Masters and she will have a wealth of experience in this area .

(vi) I do not consider that the decision to refuse the expertise of Ms Wassall constitutes any breach of the parent's right to family life under Art 8 of the Convention by virtue of giving the appellant insufficient involvement in the decision-making process. I am satisfied that appropriate marshalling of the available evidence by his counsel and the opportunity for him to give evidence in the case are more than sufficient to involve him appropriately in

the process. The right to a fair hearing does not require compliance with the application to adduce further expert evidence in this instance. He will have the opportunity to present his case under conditions which do not place him at a disadvantage given the quality of the evidence already in this case. The tension between ensuring a final determination of a dispute and allowing the parties to the dispute the opportunity to bring evidence to support their case as is necessary to ensure a fair trial is always acute in cases under the Children Order. I am convinced that this decision preserves the parents' position adequately and will ensure that a fair trial ensues within an appropriate timescale.

(vii) I therefore dismiss the appeal.