

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

**IN THE MATTER OF L (DELAY: LETTER OF INSTRUCTION
TO EXPERT)**

GILLEN J

[1] This judgment is being handed down on Friday 27 October 2006. It consists of 4 pages and has been signed and dated by the Judge. The Judge hereby gives leave for it to be reported. The judgment is being distributed on the strict understanding that no person may reveal by name or location the identity of the child and the adult members of the family in any report. No person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the child and the adult members of her family must be strictly preserved.

[2] The case concerns an application by a Health and Social Services Trust which I do not propose to name ("the Trust") for an order under Article 18 of the Adoption (Northern Ireland) Order 1987 ("the 1987 Order") to free for adoption a child whom I shall identify as L.

[3] In the course of this case at a directions hearing on 5 May 2006 it was directed, inter alia, that "leave is granted to Sally Wassell to assess the children for the purpose of providing a report and the said report shall be filed on or before 15 September 2006". Ms Wassell was to be retained by the Trust and the guardian ad litem as an expert in order to report on issues of attachment relevant to the determination of this case. The case was fixed for hearing commencing 5 November 2006. It is noteworthy to observe that the case had originally been listed for a final hearing on 22 June 2006 but that that hearing had been adjourned to facilitate the obtaining of expert evidence. On Thursday 19 October 2006, I sat to hear an application made on behalf of the guardian ad litem and the Trust to the effect that Ms Wassell had indicated that she was unable to file her report until after the time fixed in November

for the hearing and that accordingly it was requested that the case be adjourned.

[4] The facts outlined before me on the hearing of this application revealed a sequence of events punctuated by unacceptable and palpably avoidable delay resulting in the applications now before me. The sequence was as follows:

(i) Between 5 May 2006, when leave was granted for documents to be disclosed to Ms Wassell, and 3 July 2006 the guardian ad litem had failed to secure legal aid authority from the Legal Services Commission for the retention of Ms Wassell. In the meantime no step was taken by any of the parties to draw up a letter of instruction to Ms Wassell and accordingly no attempt was made to contact her. There can be no justification for a delay of two months in the securing of legal aid and in any event, that would not justify steps not being taken by public bodies and the other parties in this case to take the elementary preliminary step of attempting to draw up a letter of instruction to the expert in anticipation of legal aid being granted.

(ii) On 30 June 2006, the representatives of the parents in this case indicated they wished to consider joining the guardian and Trust in instructing Ms Wassell. That in itself is unacceptable delay because that is a matter that ought to have been considered much sooner ie within days of the directions of 5 May 2006.

(iii) On 4 August 2006, the representatives of the parents then indicated that they did not wish to become involved in jointly instructing Ms Wassell. Once again this is a totally unacceptable delay - in excess of one month - for a simple decision of this nature to be taken particularly in light of the fact that counsel had raised the matter with the court on 30 June 2006.

(iv) Thereafter, armed with legal aid which had been granted on 3 July, the Trust and the Guardian Ad Litem Agency failed to agree a letter of instruction to Ms Wassell until 30 August 2006. It was submitted to me that there were staffing problems with a solicitor on maternity leave all of which contributed to the delay. I do not accept that as a justifiable excuse for public bodies charged with the duty of making the interests of a child a paramount concern taking almost eight weeks to complete such a simple task.

[5] It is a matter of profound concern to me that virtually four months elapsed between this court granting leave to disclose documents to Ms Wassell in order to afford an opportunity for her to carry out an expert's examination and the step of a letter of instruction being completed. Ms Wassell carries absolutely no blame in this matter and the delay in my view lies entirely at the feet of those involved in processing this case.

[6] A number of courts both in Northern Ireland and in England and Wales have referred to the instruction of experts as a major cause of delay (see e.g. In the Matter of K and S (The Need for Expert Evidence: Appeal from a Master) (unreported) GILF5656). Courts are exhorted to be wary lest they be too prodigal in the use of expert evidence. This is not such a case. I have concluded that the involvement of Ms Wassell continues to be merited in order to ensure a proper and fair assessment of the key issues before the court. However this expert was only brought into the case in effect when a letter of instruction was sent on 30 August 2006 and only now can she commence to engage in the process. I am assured that the subject of this case, namely the child, is living in happy and harmonious surroundings and delay will not occasion her any emotional or physical prejudice. That is purely fortuitous. The fact of the matter is however that delay is risk laden and rarely serves the well-being of children unless it is purposeful. It is difficult to conceive of a case where the delay has been less purposeful than the instant case.

[7] In order to ensure that this sequence of events is not repeated, I draw attention to the Children Order Advisory Committee Best Practice Guidance ("the Best Practice Guidance") to which reference is regularly made in these courts. At Section 7 – which deals with experts – the following cautionary guidance is given at para.7.6:

"The Role of the Court

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7.6.2 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 expert (Re G (a minor) (expert witnesses) 1994 2 FLR 291).

7.6.3 The court should give permission to instruct expert evidence only if that evidence is relevant to a particular issue in the case and necessary for the proper disposal of the case.

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7.6.5 The court should not make a generalised order for leave to disclose papers to an expert. The order should specify:

(a) The area of expertise.

- (b) The issues to be addressed.
- (c) The identity of the expert.
- (d) The date by which the letter of instruction is to be sent.
- (e) The documents to be released to the expert.
- (f) The date for filing the expert's report with the court and for sharing it with the other parties in the case where appropriate.
- (g) A provision for experts of like discipline to communicate (as discussed below) to agree facts and define issues together with responsibility for fixing the agenda and chairing the meeting.
- (h) The requirement of the expert to give oral evidence if necessary.
- (i) Whether or not leave has been granted by the court to interview parties or the child or children and confirmation that consent has been given by the parties to be interviewed by the expert."

[8] I believe it is a matter of good practice for all courts in dealing with experts to address these matters of guidance and in particular to note the suggestion that whenever an order is made for leave to disclose papers to an expert, *inter alia*, the date by which the letter of instruction is to be sent should be specified in the order. This case is clearly instructive as to the danger of leaving that aspect unaddressed. The letter of instruction (dealt with in detail at Section 7.7.1 of the Best Practice Guidance) is a crucial factor which triggers the involvement of the expert in a meaningful fashion. It has been my sad experience that the delay occasioned in this instance in the parties drawing up a joint letter of instruction is not unique to this case. Courts may therefore find it of assistance to specify a date by which the letter of instruction is to be sent and to insist that failure to comply with the direction should trigger a return to court for a reassessment with a consideration of the cost implications where that can be done in appropriate instances.

[9] The doleful consequence of the delay in this case is that the hearing has been set back by several weeks. As a result of a failure to comply promptly with the logistics of a simple task which could have been completed within days if not hours rather than the months that were allowed to elapse before completion the determination of a child's future has been unjustifiably postponed.