**Neutral Citation No. [2008] NIFam 10** | *Ref:* **TRE7222**

*Judgment: approved by the Court for handing down* | *Delivered:* **2/7/08**

*(subject to editorial corrections)**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**FAMILY DIVISION**

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**IN THE MATTER OF L and M, MINORS**

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**TREACY J**

[1] Nothing in this case should be reported which would serve to identify the children who are the subject of this matter or their family.

[2] In this case a Health and Social Services Trust ("the Trust") which I do not propose to name is applying for a Care Order in respect of L a male child (now 6) and M a female child (now 4). The parents are contesting the application. The matter is before Her Honour Judge Loughran, who made a decision on 30 April 2008, following a threshold hearing, that the father of L and M, had sexually abused M. She then made an interim care order without the consent of the parents. The father ("the appellant") has appealed that decision.

[3] The appeal is under Article 166 of the Children (NI) Order 1995 ("the Order") against the interim care order and the finding of sexual abuse which underpinned the making of the order.

[4] Appeals of this nature have been heard on the basis of the principles set out in *G v. G* [1985] 2 All ER 225 applied by Gillen J in *McG v. McC* [2002] NI 283. In *Re M* (Section 94 Appeals) [1994] 1FLR 546 CA Butler-Sloss LJ at pages 548-549 applied the *G v. G* principles to Section 94 Appeals (the equivalent of Article 166) and reached the conclusion that:

> **"An appellate court is not free to substitute its own view of the case unless the court below has exceeded that generous ambit within which reasonable disagreement is possible and has come to a plainly wrong decision."**

[5] Moreover it was agreed that, whilst practice has developed into appeals being dealt with by submission, a flexibility should exist to consider re-hearing or the hearing of at least part of the evidence. In any event Gillen J did not rule this out in *McG v. McC.*

[6] The trial judge delivered a comprehensive reserved written judgment in which she concluded that M was touched indecently on her vagina by her father, the appellant, on at least one occasion.

[7] The children resided at one foster home until 13 December 2006 and since then they have resided consistently in the home of their current foster parents, Mr & Mrs B. On 23 April 2007 M made allegations of sexual abuse against the appellant to Mrs B. She did not repeat these at a clarification interview the next day. There was no police joint protocol interviewing and the child was instead referred to the Child Care Centre. She made further sexual abuse allegations to a Senior Social Worker, Ms Diane McCormick, at the Child Care Centre which formed the core of the Trust case.

[8] The trial judge recorded at the end of paragraph 77 of her judgment that if the statements by the child to the foster parents were the only evidence against the appellant the court could not reach any conclusion as to whether or not the child had been indecently assaulted. The core of the case against the appellant concerned what the child said and more particularly what was observed during work with the child at the Child Care Centre by Diane McCormick. The role of this Centre and the purpose of the work with the child is summarised at paragraph 20 of the judgment. Ms McCormick is a Senior Practitioner in the Centre which is a specialist unit dedicated to working with children aged 3 to 13 in the investigation of allegations of sexual abuse and in the provision of therapeutic services for children who have been the victims of sexual abuse. It is also noted that Ms McCormick is not only a qualified Social Worker who has been working at the Centre since 1995 but that she also completed video-evidence training in 1998 to 1999. She was asked by the Manager of the Centre to undertake *investigative* work with M. The purpose of her work with the child, which was an extremely serious undertaking with implications for the parents and for the child, was to consider whether the child had been sexually abused by the appellant or whether there was an innocent explanation for the remarks made by the child. The methodology is then described at paragraph 21.

[9] In all Ms McCormick had five sessions with M. The third, fourth and fifth sessions which took place respectively on 6 July, 17 July and 1 August 2007 were of particular evidential significance. The account of what transpired at these sessions is conveniently summarised at paragraphs 23-25 of the judgment which it is unnecessary to recite.

[10] Based on those sessions Ms McCormick was of the view that the combination of the child recounting the information, demonstrating what had happened and putting feeling into it would not have been possible unless M had actually experienced what she described. Her conclusion was that the appellant had put his finger into the genital area of the child. (I note that at paragraph 99 of her judgment the trial judge said that she could not be satisfied to the requisite standard that M had been digitally penetrated).

[11] Notwithstanding that these interviews form the core of the case against the applicant and that they might and in this case were to be used in public law proceedings (see para 83 of judgment) none of them were recorded.

[12] This failure formed a central but not the sole part of the appellant's challenge. He maintained that the trial judge was wrong in concluding that the evidence met the standard necessary to satisfy making a finding of sexual abuse particularly because of the flaws in the process undertaken by the Senior Social Worker at the Child Care Centre.

[13] In respect of the admitted failure to video the interviews Ms McCormick told the court below that there was no policy at the Centre in relation to the videoing of interviews and in practice not all sessions are videoed because not every room has video facilities. She also said that there are problems in the Centre about the facilities for the secure storage of sensitive videos. She conceded that there was no discussion about the use of videoing with M and she acknowledged that videoed interviews would have been helpful to the evaluation by Mr Glasgow, Consultant Clinical Forensic Psychologist, particularly in seeing the affective behaviour of, and the demonstrations by, the child which were only witnessed by her. Mr Glasgow had told the court that the failure to video the interviews at the Centre is not in accordance with his experience of forensic interviewing of vulnerable witnesses elsewhere which is that if, for good reason a decision is made to depart from the normal practice to video record, that decision will be achieved by consensus including an acceptance that the expertise and conduct of the interviewer will not be subsequently challenged. (Para 33).

[14] The law governing the determination of the threshold criteria including the standard and burden of proof was not in dispute (see the speech of Lord Nicholls in *Re H and R* (Child Sexual Abuse: Standard of Proof) [1996] 1 FLR 80 recently reaffirmed by the House of Lords in *Re B* (Children) (Care Orders: Standard of Proof). See also the review of the authorities in the trial judge's judgment at paras 56-59. Following her review of the law the trial judge stated at paragraph 60:

> **"I have therefore borne in mind the very important and potentially far reaching consequences of my decision for the family life of M and L and each of**

> **their parents recognising that a finding that [the appellant] indecently assaulted M would be likely to compromise the possibility of an early – and perhaps any – re-establishment of the family unit which prevailed before the Trust intervened in respect of the children."**

[15] The trial judge found Ms McCormick to be a "candid and impressive witness" a conclusion which is not challenged by any of the parties in these proceedings.

[16] In paragraph 83 of her judgment she stated:

> **"While Mr Glasgow made no criticism of the approach of Ms McCormick as described in her records of the sessions with M, the absence of video recordings deprived him of the opportunity to evaluate further the work and to assess the presentation of the child. The submission on behalf of the parents is that this shortcoming compromises their right to a fair hearing; not only should the parents and the court have had the benefit of the evaluation by Mr Glasgow of the child's behaviour and presentation but the parents should have had vindicated their right for the court itself to assess the child by seeing her on video. If the child had proceeded to joint protocol it is likely that any interview with her would have been video recorded and Ms McCormick accepted that video records of the sessions with M would have been helpful not only to Mr Glasgow but also to the court. The work of the Centre is, as I understand it, unique in this jurisdiction and is often relied on by Trusts in their child protection work *which is in many cases likely to culminate in public law proceedings*. It is therefore very surprising that there are not facilities at the Child Care Centre for the video recording of all interviews and for the storage of those sensitive video recordings. The absence of such facilities is all the more concerning in that it has the potential to compromise the fundamental right of parents to a fair hearing in proceedings which may have a dramatic effect on their family life.**
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> **84. The absence of any video recording of the sessions at the Child Care Centre is the second most concerning aspect of the Trust's investigation and it is a matter to which I will return."(emphasis added)**

[17] At paragraph 95 the trial judge said that she had "anxiously considered", inter alia, whether the "undoubted failures" in the approach of the Trust and those to whom they referred the child should lead the court to reject the evidence adduced by the Trust and to make no finding on the allegation of sexual abuse. She then continued:

> **"96. I have also reflected on the clear and cogent evidence from Ms McCormick, who is a very experienced practitioner, not just about what M said but also about what the child did and how her actions and emotions were consistent with what she said and could not have been achieved by coaching or by repeated questioning, whether leading or otherwise or by hearing others discuss what she had said about her father . . .**
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> **97. The conclusion of Ms McCormick that M could not have demonstrated on 17 July what she described vocally unless she had actually experienced it is, in my view, well founded. I am fortified in that view by what happened in the session on 1 August when the child demonstrated – by pointing to her genital area – with affect – by making a sad face – when she responded to the question about what made her sad by saying, "Daddy was just putting his finger in there". Notwithstanding the significant frailties, indeed failings, in the procedures of the Trust and those to whom the child was referred the evidence from the Trust therefore satisfies me to the requisite standard that M experienced her father touching her in the vaginal area and causing her to feel sore and sad."(emphasis added).**

[18] As appears from the foregoing passages the sessions at the Care Centre were absolutely critical to the determination of sexual abuse. In this respect the court was entirely dependent on Ms McCormick's evidence about:

(1) what the child said;
(2) what the child did;
(3) the affect and emotions of the child; and
(4) the precise circumstances and context in which the above arose.

[19] What the child described vocally, actually demonstrated and her perceived emotion and affect as recounted by Ms McCormick underlie the trial

judge's determination in this case. The problem however remains that because of the failure to video these sessions the core of the case against the appellant is beyond scrutiny of a meaningful kind and the evidence is not of the quality that a court is entitled to expect before it could be satisfied that a person had indecently assaulted his own children – with all of the consequences for parents and children alike that flow from such a finding.

[20] In *Re M* (a minor) (Child Abuse: Evidence) 1987 1 FLR 293 Latey J drew a distinction between purely therapeutic cases where the clinician can concentrate on the therapy without at the same time considering the forensic aspect and those cases which may well come to the court for decision. In respect of the latter category he said:

> **"… there should always be a video recording. The reason is this: where there is a dispute whether there has or has not been abuse the court is anxious whether it should accept the *ipse dixit* of the interviewer or interviewers, however skilled and experienced. This is because cases have shown (two of them have been referred to during the hearing, and there have been others in my experience) that the precise questions, the oral answers (if there are any), the gestures and body movements, the vocal inflexion and intonation, may all play an important part in interpretation. Where there is a dispute, there should be an opportunity for another expert in the field to form a view. Often, no doubt, he would reach the same interpretation and conclusion. In other cases he might not, and in the interests not only of justice between the parties but of doing its best to arrive at the truth of the matter in the interests of the child, the court should have the benefit of such evidence, so informed."**

[21] In *Re D* (Child Abuse: Interviews) [1998] 2 FLR 10 in the section of her judgment entitled "The Interviews" Butler-Sloss LJ said as follows:-

> **"There are, however, some general observations which I feel I ought to make. First, in respect of the social worker's approach to interviewing C, I am well aware of the difficulty in obtaining spontaneous evidence from a small child. But over the years, in the detailed recommendations in chapter 12 of the Cleveland Report and subsequent decisions of the Court of Appeal and the Family Division, together with the principles laid down in the Memorandum, social workers and the medical**

**and other health professionals have been put on guard against prompting or leading children to provide information in these cases. For the purposes of civil proceedings in the family context, the guidelines set out in the Memorandum, required for criminal trials, may not have to be strictly adhered to, but its underlying principles are equally applicable to care or private family law cases. Spontaneous information provided by a child is obviously more valuable than information fed to the child by leading questions or prompting. The questioning of young children is a difficult and skilled art. Some children have to be helped to give evidence, but the greater the help provided by facilitating the answers the less reliable the answers will be. If it is necessary to prompt in the investigative stage, it must be done so far as possible in a non leading form so as not to indicate to the child a possible answer. It may be difficult to obtain the information which the young child has to impart within a single session which also must not go on for too long. It may be necessary to interview the child again. But the more often the child is asked questions about the same subject the less one can trust the answers given. To remind a child of earlier answers and, for instance, to show the child earlier drawings to nudge the child's recollection has its own dangers as to the reliability of the answers then given.** ***Efficient audio and/or audio recording of the question and answer sessions is most desirable and should always be put in place if it is available. There will always be cases (and some are reported) where these general guidelines are not followed and the evidence is nonetheless accepted but those cases are unusual.*** **The answers given by the two principal social workers allocated to this case to the criticism of their questioning shows a sad lack of understanding of** ***the importance of the interviews for the purpose of civil court proceedings which are, for the child, and the child protection process, as important as the criminal trial. The unsatisfactory evidence is unlikely in family proceedings to be excluded entirely but may be of such little weight that the court cannot rely upon it.*** **Social Workers, in particular, must consider the purpose of the interview and whether it is being conducted with a view to taking proceedings to protect the child or for separate therapeutic purposes where the restrictions**

> **upon prompting would not apply but the interview would not be for the purposes of court proceedings. It is essential to distinguish between interviewing the child to ascertain the facts and interviewing to provide the child with help to unburden her worries. The therapeutic interview would seem to me to be generally unsuited to use as part of the court evidence, although there may be rare cases in which it is necessary to use it."**

[22] In this case the Senior Social Worker was specifically trained in video recording and such facilities plainly existed in the Centre but were not utilised. This was contrary to what Mr Glasgow regarded as good and essential practice. The decision to conduct the sessions without recording was not agreed or discussed. There has been no explanation or justification for the failure to record. In this case it was plain from the outset that if the sessions yielded up evidential material that they might be relied upon in family law proceedings. These were not therapeutic interviews but forensic in the sense that they were intended to gather evidence which might (and in fact was) used in legal proceedings which would gravely impact on the children and their parents. This flawed approach conflicts directly with the long established learning, good practice and jurisprudence on this issue referred to in the passages quoted above.

[23] In my view this unjustified and self imposed handicap was contrary to the interests of justice, compromised the search for the truth, and deprived the court of evidence of sufficient quality which would enable it to make a reliable finding of sexual abuse. It is also unfair because it deprived the appellant, the children and the court of making its own assessment and of obtaining an independent analysis and compelled the court to rely on the ipse dixit of the person conducting the forensic or investigative sessions.

[24] If the court is being asked to rely on the word of others as to what the child actually said and did and to evaluate what weight is to be attached to this it will usually be necessary to comply with the best practice of video taping the investigative non-therapeutic sessions. The unjustified and self imposed failure to do so will almost certainly mean that when such evidence represents the core of a Trust case it is unlikely, save in exceptional circumstances, that the Trust will be able to discharge the burden of satisfying the court that sexual abuse has occurred.

[25] The evidence thus gathered in this case is of insufficient weight to allow the court to rely upon it. The Trust has thus failed to discharge the burden of satisfying the court to the requisite standard that the appellant sexually abused his daughter.

[26] There were other serious criticisms particularly in relation to the conduct of the so called clarification interviews. Mr Glasgow had expressed the view that it was "incredible" that there was no contemporaneous record of that interview and indeed the trial judge referred to the Social Worker's (Ms McCullough) "complete failure to comply with a fundamental aspect of good practice in not recording the clarification interview" (see para 79). However in light of my finding in relation to the failure to record the sessions at the Centre it is unnecessary for me to rule upon that aspect of the case.

[27] Accordingly the appeal is allowed.