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Judgment: approved by the Court for handing down

Delivered: **16/10/2003**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

IN THE MATTER OF L1 AND L2 [CARE PROCEEDINGS: CRIMINAL TRIAL]

Gillen J

[1] The judgment on this matter is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and any other persons identified by name in the judgment itself) may be identified by name or location and in particular the anonymity of the children and the adult members of their family must be strictly preserved as such.

[2] The background to this case is that the Health and Social Services Trust which I do not propose to name (hereinafter called "the Trust") seeks a care order under Article 50 of the Children (Northern Ireland) Order 1955 (hereinafter called "the 1995 Order") in relation to each of two children namely L1 born the 17 January 2001 and L2 born the 16 September 2002.

[3] Inter alia, the Trust alleged that L1 suffered a serious non-accidental injury whilst in her mother's care on either the 18 October 2002 or the 19 October 2002 when the child was just over five weeks old. The mother denies causing any injury to this child whether non-accidental or otherwise. On the 26 September 2003 the mother was charged with criminal offences in relation to the injury of L1. A considerable amount of medical expertise has been retained in this case on that issue including on behalf of the Trust a consultant paediatric surgeon at the Royal Victoria Hospital for Sick Children and a consultant surgeon who is an expert in accident and emergency procedures. The mother has instructed a similarly qualified consultant and is proposing to instruct a consultant psychiatrist to address attachment issues.

The guardian ad litem who appears in the case has also retained a consultant forensic psychiatrist.

[4] Both children are the subject of interim care orders and are now living with foster carers. The Care Plan submitted by the Trust involves permanently removing these children from the care of their mother.

[5] In essence the Trust seek to establish that the threshold criteria necessary for the making of a Care Order have been met in respect of the mother on the basis of the evidence of the medical experts as to the nature, cause and timing of the child's injuries.

[6] The discrete issue that now arises and which requires to be determined by this court is whether the care proceedings should be progressed at this stage with the intended directions being given that the respondent mother should file a statement and participate in the proceedings or should the care proceedings be stayed pending the final disposal of the related criminal charges which are outstanding against the mother in relation to the injuries to this child.

[7] Ms Dinsmore QC, who appears on behalf of the mother, in the course of a skilful skeleton argument augmented by submissions before me has submitted:

(a) The mother would suffer prejudice in the course of the criminal trial if the care proceedings took precedence by virtue of the fact that in order to properly present her case in the Care Order proceedings, it could well be necessary for her to file a statement, give evidence and give instructions for the conduct of the proceedings. Ms Dinsmore argued that there was a risk of self-incrimination if she made a statement or gave evidence in the care proceedings as this could be used for investigation and/or cross examination if the police obtained disclosure of them.

(b) She submitted that the protection afforded by Article 171(2) of the Children Order was not absolute since statements filed in the care proceedings or a transcript of the evidence, although not admissible in evidence against the maker or his spouse as part of the prosecution case, could be used by the police for the purposes of investigation. She drew my attention to Oxfordshire County Council v P (1995) 1 FLR 552. In that case, Ward J said at Page 562, Paragraph (c)

> "I would hope, therefore, that the practice can be quickly developed permitting the free exchange of information between the Social Services and the police but upon a basis that:

> 1. The information is treated by the police as confidential information.
>
> 2. Accordingly, it may be used by the police to shape the nature and range of the enquiries they undertake in the investigation of the alleged criminal offences. They may be permitted to use the information of that investigation but they are not permitted to use it as evidence in any criminal proceedings that might follow.
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> 3. If they wish to use as evidence information arising from and in the care proceedings, they must seek the leave of the court as in wardship cases."

(c) In these circumstances Ms Dinsmore argues that the respondent cannot be afforded a fair trial pursuant to Article 6 of the European Convention of Human Rights in relation to care proceedings as she would feel obliged to decline to answer questions or give evidence in the care proceedings. She drew my attention to Re O and another (Children: Care Proceedings Evidence) The Times 14th August 2003 where Johnson J said:

> "In cases concerning children there was no room for the "no comment" interview found in criminal cases. Although care proceedings could understandably be perceived as adversarial by parents who were at the risk of losing their children, the objective was not to punish the parents but to seek to achieve what was best for the children. In the instant case, the district judge did not need to consider the truth of the allegations in such depth. Unless there was some sensible reason to the contrary, the parents failure to give evidence should have been determinative of the allegations."

(d) Ms Dinsmore argued that the first named respondent is a compellable witness with no right to refuse to give evidence or refuse to answer questions which might incriminate her. In Re Y and K (2003) 2 FLR 273 at paragraph 34 Hale LJ said:

> "We are glad, therefore, to have the opportunity today of clarifying the situation. Parents can be compelled to give evidence in care proceedings; they have no right to refuse to do so; they cannot even refuse to answer questions which might incriminate them. The position is no different in a split hearing from that in any other hearing in care proceedings. If the parents themselves do not wish to give evidence on their own behalf there is, of course, no property in a witness. They can nevertheless be called by another party if it is thought fit to do so, and the most appropriate person normally to do so would be the guardian acting on behalf of the child."

[8] It was Ms Dinmore's argument therefore that the mother's Article 6 rights to a fair trial in the care proceedings to be heard before me would be compromised by a split or any trial of the care proceedings prior to the completion of the parallel criminal proceedings.

[9] I have come to the conclusion that there is no reason why the care proceedings should be adjourned pending completion of the criminal proceedings for the following reasons:

(i) There is no bar on the hearing of care proceedings in advance of the hearing of criminal proceedings involving the same family. Where care proceedings in respect of children and criminal proceedings in respect of their parents are both pending, the welfare of the child should take precedence over the family who face criminal proceedings. In Re TB (Care proceedings: criminal trial) 1995 2 FLR 801 at page 804E Butler-Sloss LJ (as she then was) said:

> "Each case has to be seen on its own facts and considered on its own merits and the welfare of the child has to take priority over the detriment to the family who are coming up for trial. The detriment to the family of having to face criminal proceedings and care proceedings and to have a trial run, as they might see it, in the care case, is not of itself a reason for delaying the care proceedings. There will be cases where it is right, in the interests of the children, that the care proceedings are delayed for the outcome of the criminal proceedings. It is a relevant but not a determining factor in considering the welfare of children that they should have parents whose case is probably tried and who have not been put at risk in their criminal trial for some particular reason that

> may come out in the care proceedings. But the issue of delay is all important."

It has been suggested before me by Ms Dinsmore that the criminal proceedings could be determined within about 4 months. A date for a preliminary enquiry has been set in October 2003, arraignment is due on 18 November 2003 and it is anticipated that thereafter a trial will be within 14 weeks. Experience reveals that such timetables are by there very nature uncertain. The trial itself may be a lengthy one and, in the event of a conviction, 6 weeks could elapse before an appeal was lodged with even further delay pending resolution of the appeal. These children have been in care since October 2002. L1 is aged 2 years and 10 months, L2 1 year and 1 month. Already a year has passed and it is common case that these are sensitive and delicate years for these children. It has not been possible to put them in concurrent placements in the Londonderry area according to the guardian ad litem. Mr Toner QC, who appears on behalf of the Trust has indicated that the reality is that it is simply not possible to find concurrent placements for these children pending an order freeing them for adoption. Inbuilt delay is already therefore a factor in this case and I believe that further delay occasioned by the uncertain prospect of a trial some months ahead would be detrimental to the interests of these children. Ms McGrenara QC, who appeared on behalf of the guardian ad litem, submitted that further delay in this case would be intolerable and a real prejudice to the best interests of these children particularly in the context of a statute which enjoins the court under Article 3(2) of the 1995 Order to avoid delay. I have been persuaded that that is a reasonable argument to put forward and reflects the realities of this case.

(ii) Article 171 of the 1995 Order protects persons who give evidence in care proceedings from self-incrimination in criminal matters with the exception of perjury. Where relevant, it states as follows:

> "171-(1) In any proceedings in which a court is hearing an application for an order under Part V or Part VI, no persons shall be excused from –
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> (a) Giving evidence in any matter; or
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> (b) Answering any question put to him in the course of his giving evidence,
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> on the ground that doing so might incriminate him or his spouse of an offence.
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> (2) A statement or admission made on such proceedings shall not be admissible in evidence

> against the person making it or his spouse in proceedings for an offence other than perjury."

I share entirely the views of Higgins J who said in South and East Belfast Health and Social Services Trust and DW (unreported Ref HIGF3433 delivered 5 June 2001) at page 21:

> "Thus a statement or admission made in care proceedings is not admissible in evidence against the person making it in proceedings for an offence other than perjury. A 'statement' includes a written statement filed under Rules 4.18 of the Family Proceedings Rules. If criminal proceedings follow care proceedings, any written or verbal statement made by a parent is not admissible in the criminal proceedings. If it is not admissible in the criminal proceedings it cannot be used by the prosecution in those proceedings for any purpose. Any attempt to water down this protection against incrimination only defeats the objective of the Children Order to encourage frankness and candour on the part of the witness in the best interests of the child."

At page 30 the judge went on to say:

> "In proceedings under the Children Order no documents held by the court and relating to the proceedings can be disclosed to anyone (including the police and the DPP) other than a party to the proceedings, their legal representative, the GAL, the Legal Aid Department or a welfare officer without leave of the court. Any request for leave to disclose a document filed in or a transcript of care proceedings requires to be carefully considered with Article 171(2) in mind."

It is right to say that this would not prevent the police making such an application for the release of documents or considering a further line of investigation arising out of the matters revealed in the care proceedings if it came to their attention. However in this case, as Mr Toner pointed out, the police investigation has now reached an extremely advanced stage with witness statements having been obtained from doctors, a number of statements (eight in all) having been obtained from the mother and a date for a preliminary enquiry already fixed. The dye is essentially cast in this case and I consider that the possibility of any prejudice accruing to the mother in this case is more hypothetical than real. I remain therefore singularly

unconvinced that on the facts of this case there is any realistic prospect of the mother being inhibited in her conduct of the care proceedings. She has already outlined her case on a number of occasions to the police in the course of eight statements to them and to a number of medical experts including an expert retained by her in this case.

(iii) It is important to appreciate that in the care proceedings, Article 6 rights are there to be invoked both by the mother and the child. As I have indicated Ms Dinsmore fairly accepted that her concern was not a derogation of her Article 6 rights in the criminal trial at this stage, but rather a derogation of her right to a fair trial in the care proceedings. The right to a fair hearing is guaranteed by Article 6 of the ECHR and applies to both civil and criminal proceedings. However it is worthy of note that Dombo Beheer v Netherlands (1993) 18 EHRR 213 is authority for the proposition that "the contracting states have a greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases." Article 6 rights in any event are not absolute rights (which cannot be restricted or derogated from) but rather are limited rights which have limited scope but are not otherwise qualified. Any given factual circumstance, such as the facts of this case, may engage more than one person with a similar right. Convention rights may conflict with each other and the court may have to balance competing rights. In this case, in the context of these care proceedings, I have to balance the competing rights of the mother to a fair trial with the right of the children to have a fair trial. In looking at the right of the children to a fair trial, I must bear in mind that Article 3(1) of the 1995 Order makes it mandatory that the child's welfare shall be the courts paramount consideration. Moreover, as I have already indicated, Article 3(2) obliges the court to have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child. Against that I must balance the right of the mother to have a fair trial. I am not persuaded that the factual matters outlined on her behalf indicate that she is in any way precluded from participation in the care proceedings or that her ability to participate is inhibited. Ms Dinsmore relied on, inter alia, X v Sweden (1959) 2 TB 354 as authority for the proposition that fairness requires that a mother can freely and without inhibition participate in the trial. Whilst I accept that principle, I do not see why, given the protection of Article 171 of the 1995 Order and the advanced stage of the police enquiries, she should be in any way inhibited in participating in this trial. Although afforded she is a compellable witness, she is still afforded the statutory protection of Article 171. I am not of the view that the decision in Re O and Another (Children: care proceedings evidence) The Times 14 August 2003 would prevent the trial judge determining that her failure to give evidence was reasonable in the context of a forthcoming criminal trial and should not be determinative of the allegations made against her. The option would be open to a trial judge to conclude that such a conclusion would be unreasonable in the particular circumstances of the case. Similarly if the police did apply to seek the leave of

the court to obtain any statement or transcript in the care proceedings, it would be open to the mother to resist such an application and reformulate any suggestion of prejudice or interference with her rights under the ECHR. Accordingly, carrying out the balancing exercise of the Article 6 rights of the children on the one hand and the Article 6 rights of the mother on the other, I have come to the conclusion that the hearing of the case proceeding in advance of the criminal proceedings would not infringe the mother's rights, and in any event, even if there was a risk that it might, the balance would come down firmly in favour of protecting the Article 6 rights of the children in the context of this case.

[10] I have come to the conclusion therefore that on the facts of this case, the future of these children needs to be settled as quickly as possible. That need would be jeopardised by a delay in the outcome of the care proceedings during which time the children would be held in yet further and unjustified limbo. The interests of these children's welfare will not be best served by the care proceedings taking place after the criminal proceedings have been concluded at some indeterminate date in the future. Each case has to be considered on its own merits and determined on its own facts, and in this instance I have therefore decided that I must reject the application of the mother to postpone the hearing of the care proceedings until the completion of the criminal proceedings.