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

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Delivered:	02/05/02

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

IN THE MATTER OF SM (INTERIM CARE ORDERS: EXERCISE OF JUDGE'S DISCRETION)

GILLEN J

This is an appeal from an order made at the Family Care Centre in the County Court for the Division of Belfast by His Honour Judge Markey on 11 February 2002. The order appealed against was as follows:

> "(1) That the Interim Care Order be renewed and extended for a further 28 days to 11 March 2002 on which date it will be reviewed administratively by court office until date of review hearing.
>
> (2) Should either party require further directions these should be produced in writing (under rule 4.4 and 4.5(b) using form C2), circulated to the other parties and served on the court at least two days prior to the next hearing when the judge will rule thereon.
>
> (3) Matter adjourned to a date to be fixed in mid May (full day required) for review hearing. Court office to notify parties.
>
> (4) The parties are legal aided."

The grounds of appeal as set out in the notice of appeal by the guardian ad litem acting on behalf of SM are as follows;

"(1) The learned judge erred in law in that he failed to pay any or adequate regard to the principle that there should be no delay in the proceedings.

(2) The learned judge erred in law in that the care plan was clear and defined as to the future of the appellant.

(3) The learned judge erred in law in that he failed to apply the welfare checklist and to give effect to the paramountcy of the interests of the child and gave undue weight to how the first respondent would fare in the processes anticipated in the care plan.

(4) The learned judge erred in law in that he failed to appreciate that a Care Order can properly made where a care plan reflects concurrent planning because more than one possible outcome is contemplated.

(5) The learned judge erred in law in that he failed to appreciate the length of time which is likely elapse before the assessment and review elements of the care plan are completed.

(6) The learned judge erred in law in that he embarked upon a course which will result in the child being retained in care on a succession of Interim Care Orders over a protracted period, when that is unnecessary for proper disposal of the application.

(7) The learned judge erred in law in that he failed to consider whether the care plan was appropriate in all the circumstances and applying the welfare checklist.

(8) If the learned judge did consider whether the care plan was appropriate, then he erred in law

> (a) in that if he considered it appropriate, he failed to make the Care Order or

> (b) further or in the alternative, if he considered it inappropriate he failed to indicate in what respects he considered it appropriate?"

The Homefirst Community Trust who are the applicant in the original application, supported the appeal on behalf of the child. The first and second-named respondents namely NM (the mother of the child) and JC (the father of the child) resisted the appeal.

The subject of this case is SM born on 23 July 2000. His mother has been known to Social Services since 1986 and has a history of mental health and alcohol difficulties. The father also has a history of alcohol and drug dependence as well as mental health difficulties. The evidence before the court was that on 4 July 2001 the mother voluntarily handed the child over to the paternal grandmother as she recognised she was incapable of caring for her. However on 16 July 2001, following a Core Group meeting the father and mother stated that they were not willing to cooperate with the Trust's plan to permit the child to remain with a family member until a place became available in Thorndale where a comprehensive residential assessment would be completed of parenting abilities. Consequently the Trust felt it was necessary to apply for an Emergency Protection Order in respect of the child to secure her in her paternal grandmother's care. That order was granted on 16 July 2001. The Trust expressed the view that they felt the behaviour of the parental behaviour was too unpredictable with too many unknown risks for the child to be safely returned to their care without a full assessment being made of their parenting capacity. Thereafter the parents did indicate that

they were willing to cooperate with the Trust's plan for the child. However the court acceded to the Trust's initial applications for an Interim Care Order to be granted to ensure ongoing cooperation and to ensure that the child was safe and not exposed to risk. Accordingly Interim Care Orders have been made on 24 July 2001, 18 September 2001, 16 October 2001, 5 November 2001, 29 November 2001, 27 December 2001 and 14 January 2002. At a hearing on 14 January 2002, the threshold criteria were established between the parties and an agreement ratified by the court. The Trust are seeking a Care Order in relation to the child. The overall aim of the care plan is that following the successful completion of a number of assessments, the child should return to the care of her mother. It is the intention of the Trust that in the interim S should remain in the care of the paternal aunt and uncle and that the parents should continue to have contact with the child three times per week supervised in the household of the foster carers. The Trust also propose that the mother and father should see Mr Paul Quinn Consultant Clinical Psychologist for assessment with regards to their potential for change and their ability to safely parent the child. Mr Quinn will also comment on the advisability or otherwise of the mother participating in a further Family Centre assessment with the aim of further determining her parenting abilities and deficits. Should the further assessment at the Family Centre proceed, the Trust proposes that the mother should complete the assessment at Thorndale Family Centre with the child in her care. Following the process, and subject to its successful completion, it is the Trust's intention that the child should

return to the sole care of the mother in the community. It was anticipated that if the findings of Paul Quinn were to the effect that the mother had the capacity to change, the assessment to be arranged by the Trust would take 20 weeks at the Family Centre, in the light of which a completion of the initial residential assessment or other recommendations would be considered. In the event of reunification not being considered appropriate the Trust would then consider more permanent arrangements in the present placement. In a report dated 8 February 2002 the guardian ad litem recommended that a Care Order be made. Mr Long QC who appeared on behalf of the appellant in this matter, indicated that it was anticipated that the report from Paul Quinn would be available some time in May 2002. The court was therefore faced with a care plan in which the Trust stated that it needed the conclusions of Paul Quinn in order to decide whether there was merit in an assessment to be carried out at a Family Centre. Only then, and after an assessment had taken place lasting 20 weeks, could the Trust decide whether further work was required or whether, on the best possible showing, it could move toward reunification.

Arising out of the hearing before the Family Centre on 11 February 2002, this court had before it a document headed;

> "Agreed summary of decision and observations made by His Honour Markey 11 February 2002 in respect of GAL request for listing of the case for the purposes of making a final order in the light of the care plan".

This document had been amended by the learned judge and he had concluded at the end;

> "With the amendments which I have made the above sets out the gist of my reasons for refusing to make a full Care Order until the outcome of the first stage of Mr Quinn's assessment of the mother was known."

Whilst this may not be the orthodox or even the most appropriate method of complying with the obligation under Rule 4.21 of the Family Proceedings Rules (Northern Ireland) 1996 to issue a written judgment, nonetheless I am satisfied in this particular instance that the spirit of the rule has been complied with.

As this court has already decided in McG v McC appeals from Care Centres to the High Court will be governed generally by the principles set out in G v G [1985] 2 AER 225. Accordingly I must be satisfied that either the judge has erred as a matter of law (ie he has applied the wrong principle) or that he relied upon evidence that he should have ignored or ignored evidence that he should have taken into account or that the decision was so plainly wrong that the only legitimate conclusion is that the judge has erred in the exercise of his discretion.

Mr Long in the course of a comprehensive skeleton argument and oral address to me, helpfully conflated the salient points in this appeal and I can deal with them as follows;

1. That the judge erred in law in that he failed to apply the welfare checklist and to give effect to the paramountcy of the interests of the child.

He further argued that the learned judge had given undue weight to how the first respondent ie the mother would fare in the process anticipated in the care plan. Counsel urged on this court that the failure of the judge to make any reference whatsoever to the welfare checklist as set out in Article 3(3) of the Children Order (Northern Ireland) 1995 ("the 1995 Order") or to the paramountcy of the child's welfare was clear indication the judge had failed to address these matters. I consider that these criticisms of the judge are unfair. The views expressed by Lord Hoffman in Pigloska v Pigloski [1999] 2 FLR 763 at p784(f) serve as a cautionary reminder of the pressures on busy judges;

> "The exigencies of daily courtroom life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes such as was given by the district judge. These reasons should be read on the assumption that, unless he has demonstrated to the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2). An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."

In this case, this is an extremely experienced Family Care Centre judge and I have no doubt whatsoever that he had in mind the welfare checklist and the paramountcy of the welfare of this child. I do not believe that there is any need to slavishly repeat in each instance that the welfare checklist has been

applied so long as the gravamen of that exercise is clear from the judgment. The judgment states:-

"However, he considered that it was `incorrect to send out messages to parents by making Care Orders' he said `labels have significance' (ie if a Care Order were made before the mother's capacity to change was assessed the making of the Care Order could of itself adversely affect her morale and engagement)". At this point the judge clearly had in mind the text of Article 3(3)(f) of the 1995 Order which reads "how capable of meeting his needs is each of his parents and any other person in relation to whom the court considers the question be relevant." It is also highly relevant to (3)(e) "any harm which he has suffered or at risk of suffering". I also consider that when the judgment stated "he decided that the case would be heard when the court had adequate information before the court" the judge had in mind Article 3(3)(g) of the 1995 Order which states "the range of powers available to the court under this order in the proceedings in question". His subsequent reference to the present location of the child viz "he acknowledged that the child would not be moving out of her current family placement, regardless of the outcome of the first stage of the three stage assessment" underlines not only his attention to Article 3(3)(c) which deals with the likely effect on a child of any change in his circumstances, but also is but one of several indiciae of this judge's close attention to the paramount interests of the child's welfare. I am satisfied that he did not give undue weight as to how the first respondent would fare in the process outlined in the care plan. On the contrary he

viewed the mother in the context of how a successful outcome for her would contribute to the welfare of this child. I therefore reject this ground of appeal.

2. Mr Long QC submitted that in this case the trial judge was seeking to exercise a supervisory jurisdiction over the implementation of the care plan and that in essence the judge was using the Interim Care Order as a means of exercising a now defunct supervisory role of the court. There is no doubt whatsoever that the court does not have a function to oversee a care plan and that any attempt to do so by the court would be uncontestably inconsistent with an appropriate construction of the 1995 Order. A number of authorities to this effect were laid before me but the principle has been most recently and most cogently expressed by the House of Lords in Re S (FC) in Re S & Others [2002] UK HL 10. Since Interim Care Orders are regularly made by courts in this jurisdiction it is worthwhile to quote in extenso what Lord Nicholls of Birkenhead said at paragraph 90 and thereafter;

> "90. From a reading of section 38 as a whole it is abundantly clear that the purpose of an Interim Care Order, so far as presently material, is to enable the court to safeguard the welfare of a child until such time as the court is in a position to decide whether or not it is in the best interests of the child to make a Care Order. When that time arrives depends on the circumstances of the case and it is a matter for the judgment of the trial judge. That is the general guiding principle. The corollary to this principle is that an Interim Care Order is not intended to be used as a means by which the court may continue to exercise a supervisory role over the local authority in cases where it is in the best interests of a child that a care order should be made.

91. An Interim Care Order, thus, is a temporary `holding' measure. Inevitably, time is needed before an application for a Care Order is ready for a decision. Several parties are usually involved: parents, the child's guardian, the local authority, perhaps others. Evidence has to be prepared, parents and other people interviewed, investigations may be required, assessments made, and a local authority must produce its care plan for the child in accordance with the guidance … . Although the Children Act itself makes no mention of a care plan, in practice this is a document of key importance. It enables the court and everyone else to know, and consider, the local authority's plans for the future of the child if a Care Order is made.

92. When a local authority formulates a care plan in connection with an application for a Care Order, there are bound to be uncertainties. Even the basic shape of the future life of the child may be far from clear. Over the last 10 years problems have arisen about how far courts should go in attempting to resolve these uncertainties before making a Care Order and passing responsibility to the local authority. Once a final Care Order is made, the resolution of the uncertainties will be a matter for the authority, not the court.

93. In terms of legal principle one type of uncertainty is straightforward. This is the case were the uncertainty needs to be resolved before the court can decide whether it is in the best interests of the child to make a Care Order at all. In C v Solihull Metropolitan Borough Council [1993] 1 FLR 290 the court could not decide whether a Care Order was in the best interests of a child, there a `battered baby', without knowing the result of a parental assessment. Ward J made an appropriate Interim Order. In such a case the court should finally dispose of the matter only when the material facts are as clearly known as can be hoped. …"

Lord Nicholls made further reference to the issue of such orders at paragraph 100 when he said;

> "Cases vary so widely that it is impossible to be more precise about the test to be applied by a court when deciding whether to continue interim relief rather than proceed to make a Care Order. It would be foolish to attempt to be more precise. One further general point may be noted. When postponing a decision on whether to make a Care Order a court will need to have in mind the general statutory principle that any delay in determining issues relating to a child's upbringing is likely to prejudice the child's welfare: section 1(2) of the Children Act."

Accordingly there is no doubt that the court must always maintain a proper balance between the need to satisfy itself about the appropriateness of the care plan and the avoidance of over zealous investigation into matters that are properly within the administrative discretion of the Trust.

I have come to the conclusion, having read the judgment in this case, that the judge has acted consistently with these principles. Within the ambit of his discretion, he has properly come to the conclusion that the uncertainty in this case with reference to the possibility of assessment of the mother needed to be resolved before the court could decide whether it was in the best interests of the child to make a Care Order at all. The judge felt that he needed at least to know the result of the first stage of the three stage assessment of the mother before deciding whether it was in the best interests of the child to make the Care Order. The reasons for refusing to make the full Care Order included the following extract at paragraph 4 of his judgment;

> "The learned judge stated that the case would `not go on ad infinitum'. However he considered that it was `incorrect to send out messages to parents by making Care Orders'. He said `labels have significance'. (Ie if a Care Order were made before the mother's capacity to change was assessed the making of the Care Order could of itself adversely affect her morale and engagement). He decided that the case would be heard when the court had adequate information before the court. The judge felt that while he would be able to determine the case before Ms M would have completed all three proposed stages of assessment, he could not consider the matter to be ready for a full hearing until he had Paul Quinn's report on the mother's capacity."

At paragraph 5 it is recorded;

> "The judge rejected the argument that delay in making the final order was not purposeful. He said that the `reliance upon' the `no delay' principle (in the circumstances of this case) was `a load of nonsense'. He observed that this child was `going nowhere'. He acknowledged that the child would not be moving out of her current family placement, regardless of the outcome of the first stage of the three stage assessment. He was not receptive to the argument that a final order should be made as soon as possible, precisely because the care plan was clear – ie concurrent planning provided for the child to stay where she was for the foreseeable future."

It is quite clear to me that the judge was indicating that contrary to the suggestion by the guardian ad litem and the Trust, this care plan was not clear in his view and that he required this further information before he could possibly consider making a Care Order. There are a large number of documents in this case all of which I have no doubt this judge had read. There have already been several hearings. He was therefore clearly in a

position to make an assessment of the character and motivation of this woman at least on a preliminary basis in the context of what was best for this child. He has also considered and assessed the question of further delay and has proceeded in the proper exercise of his discretion to conclude that further delay is purposeful and can be used to ensure that more information is before him to enable him to come to a conclusion. It is an extremely serious matter indeed to make a Care Order and it is not a decision to be made lightly. I consider this judge was properly and carefully recognising the very heavy burden that is cast on him and has appropriately decided that the situation is currently too uncertain to allow him to come to a final decision. I therefore consider that his decision to make a further Interim Care Order was a proper exercise of his discretion.

One further matter was drawn to my attention in this context. The precise form of the order made by the judge read as follows;

> "That the Interim Care Order be renewed and extended for a further 28 days to 11 March 2002 on which date it will be renewed administratively by Court Office until date of review hearing."

Frankly I am not absolutely certain what the phrase `will be renewed administratively by Court Office until date of review hearing' means. It was clear that counsel in this case were also somewhat unclear. It may be helpful if I set out at this stage some comments on the renewal of Interim Care Orders;

1. When an Interim Care Order is made it is normally necessary for the making of further Interim Care Orders to be considered on at least one

occasion before the final hearing. I am given to believe that there may be a variety of local practices for dealing with such cases and while it is not intended to encourage courts to depart unnecessarily from well-established local arrangements (particularly those which approximate closely to what I recommend below), some guidance may be helpful to ensure a degree of uniformity. Although the making of further Interim Care Orders is described as "renewal", it must be remembered that the proper form of order is that the whole application is adjourned to the next date for further consideration.

2. A court may not renew an Interim Care Order as a matter of course and without reconsideration. At the expiration of every Interim Care Order, the granting of every further Interim Care Order must be considered independently on its merits. It can never be right for a court granting an Interim Care Order at one sitting to attempt to lay down a policy which might fetter the discretion of any future sitting in regard to the grant or refusal of a further Interim Care Order – see Re P (Minors) (Interim Order) [1993] 2 FLR 742.

3. It is, therefore, necessary for the court to make a judgment regarding renewal in each occasion and the court should treat each further hearing as an opportunity to monitor the progress of the application. This does not mean however that all parties should be required to attend a hearing on each occasion. The court is perfectly entitled to deal with the matter on the basis of the attendance of the applicant only provided that written consents of the other parties are produced and no party objects. Provision can therefore be

made at the first direction hearing for further Interim Care Orders to made without the need for the personal attendance of all the parties.

4. In the Family Care Centres where the Trust, who normally would be the applicant, produces consents from all the parties, confirms that directions have been complied with and the court considers that it might be unduly onerous to require the personal attendance of his representative eg due to the distance to be travelled or for some other good reason, then I can see no reason in principle why the court should not permit the applicant Trust in those circumstances to make a written application for renewal. In such an instance, the responsibility would rest with the applicant to ensure that a written application was acceptable to the court, that all the consents were in order, and that all parties concerned were satisfied that the papers would reach the court file in time for the hearing. That application must however be considered by the appropriate judicial officer. Such a procedure would be similar to the well-established practice of hearings on the papers presently carried on for example in the Court of Protection and before masters in the High Court.

5. Where any parent, or other person who has had or who seeks care of the child, is unrepresented, the court should make a tailor-made order depending on that party's significance in the case and give notice of every hearing to that person.

In so far therefore as the judge intended the phrase "renewed administratively" to coincide with this general guidance there is no objection

to the order. However it must be emphasised that renewals of Interim Care Orders cannot be made by court staff but must be made by a judge, master or magistrate in the circumstances I have outlined. In this context Ms Walsh helpfully drew my attention to rule 28 of the Family Proceedings Courts (Children Act 1989) Rules 1991 SI 1991/1395 which provides;

> "A justice's clerk or single justice shall not make an order under section 11(3) or section 38(1) unless –
>
> (a) A written request for such an order has been made to which the other parties and children's guardian consent and which they or their representatives have signed;
>
> (b) A previous such order has been made in the same proceedings; and
>
> (c) The terms of the order sought are the same as those of the last such order made."

Although Northern Ireland does not have such a rule, the practice is clearly a sound one. In the near future a practice note will be issued in Northern Ireland which will coincide with the general guidelines that I have set out.

I have therefore concluded that the judge in this case has not made any mistake of law, he has not acted in disregard of any legal principle or under a misapprehension of fact and he has not taken into account irrelevant matters or omitted from account matters which ought to have been considered. In my opinion he has not been plainly wrong and has not acted outside the appropriate exercise of his discretion. I therefore dismiss this appeal.

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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J U D G M E N T O F

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