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

Ref:	GILC3688
Delivered:	23/4/02

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

BETWEEN:

McG

Applicant/Appellant;

and

McC

Respondent.

GILLEN J

JUDGMENT

This matter arises out of an appeal to the High Court from a decision made by the Family Care Centre sitting at Belfast County Court on 18 December 2001 when it was ordered that the applicant/appellant the father of a child CMcC should not have any contact with the child CMcC and that the subject child should not be informed of the identity of her natural parent namely the applicant/appellant. The respondent is the mother of the child.

The preliminary issue for determination currently before me, which was brought by way of a preliminary issue, was to determine the nature of course of the hearing at the appeal.

THE STATUTORY BACKGROUND

Article 166(1) of the Children (Northern Ireland) Order 1995 ("the 1995 Order") provides where relevant;

> "(1) Subject to any express provisions to the contrary made by or under this order, an appeal shall lie to the High Court against –
>
> (a) the making by a County Court of any order under this order; or
>
> (b) the refusal by a County Court to make such an order,
>
> as if the decision had been made in the exercise of the jurisdiction conferred by Part III of the County Courts (Northern Ireland) Order 1980 and the appeal were brought under Article 60 of that Order.
>
> (2) An appeal shall not lie to the High Court under paragraph (1) –
>
> (a) on an appeal from a court of summary jurisdiction; or
>
> (b) where the County Court is a divorce County Court exercising jurisdiction under the Matrimonial Causes (Northern Ireland) Order 1978 in the same proceedings.
>
> (3) Subject to any express provisions to the contrary made by or under this Order, an appeal shall lie to the County Court against -
>
> (a) the making by a court of summary jurisdiction of any order under this order; or
>
> (b) any refusal by a court of summary jurisdiction to make such an order.
>
> …
>
> (8) On an appeal under this Article, the appellate court may make such orders as may be

necessary to give effect to its determination of the appeal.

(9) Where an order is made under paragraph (8) the appellate court may also make such incidental or consequential orders as appears to it to be just."

Article 60 of the County Courts (Northern Ireland) Order 1980 provides where relevant;

"(1) Any party dissatisfied with any decree of a County Court made in the exercise of the jurisdiction conferred by Part III may appeal from that decree to the High Court.

(2) The decision of the High Court on an appeal under this Article, shall, except as provided by Article 62 be final.

The Family Proceedings Rules (Northern Ireland) 1996 at Rule 4.23 sets out the rules which govern the procedure for mounting such an appeal. It provides where relevant;

"(1) Where an appeal lies –

(a) to the High Court …

it shall be made in accordance with the following provisions and references to `the court below' are references to the court from which the appeal lies.

(2) The appellant shall file and serve on the parties to the proceedings in the court below, and on any guardian ad litem –

(a) notice of the appeal in writing, setting out the grounds upon which he relies;

(b) a certified copy of the summons or application and of the order appealed

> against and of any order staying its execution;
>
> (c) a copy of any reasons given for the decision. …"

Although this appeal is mounted pursuant to Article 166 of the 1995 Order, it is perhaps instructive at this stage to consider the equivalent legislation in England and Wales which is found in Section 94 of the Children Act 1989 ("the 1989 Act") which provides where relevant;

> "Subject to any express provision to the contrary made by or under this Act, an appeal shall lie to the High Court against –
>
> (a) the making by a Magistrates' Court of any order under this Act; or
>
> (b) any refusal by a Magistrates' Court to make such an order."

It is immediately clear therefore that whilst the wording of the 1995 Order and the 1989 Act are similar, a crucial difference is that the 1989 Act makes no provision for appeals from a County Court judge to the High Court (such appeals lie to the Court of Appeal in accordance with Civil Proceedings Rules 1998 Part 52 which applies to all appeals to the Court of Appeal). Conversely, the 1995 Order makes provision for appeals from the Magistrates' Court to the County Court and not, as in England and Wales, to the High Court.

THE PRACTICE IN ENGLAND AND WALES

a. It is quite clear that in England and Wales on an appeal from a Magistrates Court to the High Court, the appeal is governed by the principles set out in G v G [1985] FLR 894. This case is authority for the proposition that the High Court will not interfere unless the decision was plainly wrong or the magistrates erred in law or in principle. In Re CB (A Minor) (Parental Responsibility Order) [1993] 1 FLR 920 at 924c Waite J said;

> "The magistrates are also the primary court of discretion; no appeal can be entertained against any decision they make within the scope of the numerous statutory discretions committed to them by the Children Act 1989, unless such decision can be demonstrated to have been made under a mistake of law, or in disregard of principle, or under a misapprehension of fact, or to have involved taking into account irrelevant matters, or omitting from account matters which ought to have been considered, or to have been plainly wrong – ie outside the generous ambit within which a reasonable disagreement is possible."

I will hereafter refer to these principles as "the principles set out in G v G.

The court is reluctant to take oral evidence and will only do so in exceptional circumstances. (See Ladd Marshall 1954 3 AER 745). However it is to be noted that in Re S (Minors) (Abduction) [1993] 1 FCR 789 at 793g the Court of Appeal indicated that a relaxation of those principles was appropriate where the welfare of children required the court to see the additional evidence.

In Re W, Re A, Re B (Change of Name) [1999] 2 FLR 930, the Court of Appeal discussed the basis upon which an appeal in a child case from a

District judge should be heard by the Circuit judge. Butler-Sloss LJ (as she then was) said at page 938e;

> "In my judgment in the Children Act jurisdiction where the Magistrates, District judges, Circuit judges and High Court judges all have the same statutory jurisdiction on these issues, the approach of the appellate courts, whether to High Court judges from Magistrates, to Circuit judge from District judge or to Court of Appeal from judges should be the same and on G v G principles in cases where no further evidence is adduced."

THE PRACTICE IN NORTHERN IRELAND

There is no doubt that in Northern Ireland appeals from the Magistrates Court to the County Court are dealt with by way of a full rehearing. Mr Long QC, who appeared on behalf of the appellant in this case, informed me that the practice in the High Court in Northern Ireland in family cases where there has been an appeal from a Family Care Centre, has been not to have a full rehearing of the evidence. In Homefirst Community Health & Social Services Trust v SA [2001] NIJB 218 Higgins J was dealing with an appeal from a decision of His Honour Judge Burgess Recorder of Londonderry against the making of an Interim Care Order in respect of four children. Dealing with the practice of the hearing in the High Court of an appeal from the County Court the judge said at page 220h;

> "Thus the hearing in the High Court of an appeal from the County Court to the High Court is to be treated in the same way as a civil appeal under Article 60 and Part III of the County Court (Northern Ireland) Order 1980. County Court appeals are in practice a rehearing with the onus on the plaintiff or applicant who proceeds first. …

> Appeals in family law proceedings will not always require a full hearing with oral evidence. Whilst these appeals from the County Court are treated as having been brought under the County Court order, the procedure to be adopted may vary from case to case. Thus in some cases a full hearing with oral evidence will be required, in others the matter can proceed on the papers or a written judgment of the court below or both or a mixture of them. It will be for the court, after hearing any submissions made, to determine how the appeal should proceed. In this case the parties were agreed that the appeal could proceed on the papers and the written judgment."

It is right to say however that I have had the benefit of a much fuller argument presented to me by counsel on both sides in this case and it seems that the issue and the relevant authorities may not have been as fully aired in the past in Northern Ireland as it has now.

CONCLUSIONS

Whilst I recognise that the approach in England and Wales is governed by a different Act and different statutory rules and procedures, nonetheless I have come to the conclusion that in family law proceedings appeals to the High Court from the Family Care Centres in Northern Ireland should be approached broadly in the same manner as in England and Wales. Accordingly I intend to conduct this present appeal and future appeals from Family Care Centres on the principles set out in G v G (Supra). I have come to this conclusion for the following reasons;

(1) I find nothing in Article 166 of the 1995 Order or Part III of the County Courts (Northern Ireland) Order 1980 which defines the basis upon which

appeals should be heard from Family Care Centres. Similarly I find nothing in the Family Proceedings Rules (Northern Ireland) 1996 or the Rules of the Supreme Court (Northern Ireland) 1980 which persuades me that there should be any asymmetry between the approach in England and Wales and the approach in Northern Ireland. Indeed I think there is much to be said for the view adopted by Butler-Sloss LJ in Re W (Supra) that there should be a common approach of appellate courts where at all possible.

(2) Unlike other proceedings in the County Court, in family proceedings the Family Proceedings Rules (Northern Ireland) 1996 at Rule 4.21(4) and (5) provide:

> "(4) When making an order or when refusing an application, the court shall either –
>
> (a) issue a written judgment;
>
> (b) cause a judgment to be recorded by mechanical or electronic means; or
>
> (c) record in form C19 any finding of fact which it made and the reasons for its decisions.
>
> (5) An order made in proceedings to which this part applies shall be recorded either in the appropriate form in Appendix 1 to these rules or where there is no such form in writing."

Rule 7.11, where relevant provides;

> "(1) A record of the proceedings at the trial of every cause shall where practicable be made by mechanical or electronic means.
>
> (2) A record may be made by mechanical or electronic means of any other proceedings before

> the judge if directions for making such a record are given by him."

It is right to say that counsel in this case informed me that in fact provision is rarely made for the recording of such proceedings at Family Care Centre level and that accordingly neither proceedings nor judgments are recorded by mechanical or electronic means. Given the clear wording of the rules it seems to me highly regrettable that steps have not been taken to make it practicable to make a record of these extremely important proceedings in family law cases. It is to be hoped that this will be taken up at the appropriate level in the future.

Nonetheless the fact remains that in the Family Care Centres highly experienced specifically designated judges are hearing these cases. Pursuant to the rules written judgments or mechanical records of the judgment or forms C19 are issued at the conclusions of the cases. As I have indicated, provision is made in the rules for a full mechanical recording of all the proceedings albeit that in practice this may not yet be happening in all cases. It seems to me highly incongruous that Magistrates including lay Magistrates, in England and Wales should have their decisions scrutinised under the principles in G v G, but that highly experienced County Court judges in Northern Ireland should have their decisions subjected to a rehearing in circumstances where they have been obliged to set out in detail a reasoned judgment and where, if practicable, the whole proceedings may have been recorded. It is difficult to accept that Parliament ever intended that with such safeguards, a full rehearing should be afforded and that an approach other

than that set out in G v G should be adopted. This clearly places a heavy burden on Care Centre judges to ensure that they comply strictly with Rule 4.21(4) of the Family Proceedings Rules (Northern Ireland) 1996. In B v B [1997] 2 FLR at page 606g Holman J said;

> "But clearly an appellate court is only able to assess whether or not the court below has failed to take into account relevant matters or has inappropriately taken into account irrelevant matters if that court does set out its reasons with sufficient detail and clarity to make clear the facts upon which it has relied and that matters which it has taken into account in exercising its discretion and reaching its decision."

Where that does not occur then there may be grounds for allowing an appeal as was the case in B v B. It is to be observed however that Holman J added:

> "I cannot emphasise strongly enough that a judgment is not to be approached like a summing up. It is not an assault course. Judges work under enormous time and other pressures and it would be quite wrong for this court to interfere simply because an ex tempore judgment given at the end of a long day is not as polished or thorough as it might otherwise be."

3. A third reason for adopting the approach in G v G is that the nature of family law proceedings is somewhat different from other proceedings heard in the County Court. This in itself does not justify them being subject to special rules of their own, but it confirms the appropriateness of the approach that I consider ought to be adopted to appeals from a Family Care Centre. In G v G Lord Frazer of Tullybelton said at page 651d;

> "The jurisdiction (of cases concerning the welfare of children) in such cases is one of great difficulty as every judge who has had to exercise it must be aware. The main reason is that in most of these cases there is no right answer. All practicable answers are to some extent unsatisfactory and therefore to some extent wrong, and the best that can be done is to find an answer that is reasonably satisfactory. It is comparatively seldom that the Court of Appeal, even if it would itself have preferred another answer, can say that the judge's decision was wrong, and unless it can say so, it will leave his decision undisturbed. The limited role of the Court of Appeal in such cases was explained by Cumming-Bruce LJ in Clarke-Hunt v Newcombe [1983] 4 FLR 482 where he said at p.486;
>
> > `There was not really a right solution; there were two alternative wrong solutions. The problem of the judge was to appreciate the factors pointing in each direction and to decide which of the two bad solutions was the least dangerous, having regard to the long-term interests of the children, and so he decided the latter. Whether I would have decided it the same way if I had been in the position of the trial judge I do not know. I might have taken the same course as the judge and I might not, but I was never in that situation.' "

I consider this reasoning applies equally to cases heard in Family Care Courts which are the subject of appeal to the High Court. The fact of the matter is that Care Centre judges are vested with a discretion in family law cases where there may be two or more possible decisions any of which a judge may make without being held to be wrong. There is also a strong inquisitorial element in family law cases which reflects the balancing exercise that has to be carried

out by the judge. This inquisitorial role has been emphasised in a number of authorities commencing with Re E (a Minor) (Wardship: Courts Duty) [1984] 7 LR 457 in the House of Lords where Lord Scarman said at page 488;

> "But a court exercising jurisdiction over its ward must never lose sight of a fundamental feature of the jurisdiction that it is exercising, namely that it is exercising a wardship, not an adversarial, jurisdiction. Its duty is not limited to the dispute between the parties: on the contrary, its duty is to act in the way best suited, in its judgment, to serve the true interest and welfare of the ward. In exercising wardship jurisdiction, the court is a true family court. Its paramount concern is the welfare of its ward. It will therefore sometimes be the duty of the court to look beyond the submission of the parties in its endeavour to do what a judge is to be necessary."

These sentiments apply equally to the nature of proceedings under the Childrens Order (Northern Ireland) 1995 (see Re CH (Care or Interim Care Order) [1998] 1 FLR 409). It is the exercise of this inquisitorial role which lends itself to the High Court marking the enormous care given to these cases in the Care Centres by exercising its appellate function pursuant to the principles laid down in G v G.

4. A further aspect of Children Order proceedings which militates against a de novo hearing, is the desirability of putting to an end litigation. Whilst this applies to all classes of case, it is particularly strong in Children Order cases because the longer legal proceedings last, the more are the children, whose welfare is at stake, likely to be disturbed by the uncertainty. (See G v G (Supra) at page 652b). These cases are emotionally draining on all the parties, particularly the children who are the subject of the proceedings and

are often lengthy and complex. It cannot be in the interests of these children or indeed the parties to have a re-run of these issues absent the circumstances outlined in G v G. Indeed the 1995 Order at Article 3(2) expressly provides;

> "In any proceedings in which any question with regard to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child."

I consider therefore that it is necessary to ensure that any appeal which is heard is construed in such a way as to accord with the principle of reducing delay where possible. A de novo hearing in every instance would militate against this.

5. Miss Dinsmore QC, who appeared on behalf of the respondent in this matter, argued that a reason against an approach based on G v G was that in practice the spirit of rule 7.11 of the Family Proceedings Rules (Northern Ireland) 1996 is not observed in the Care Centres in Northern Ireland and a record of the proceedings at the trial of every cause is not made by mechanical or electronic means. I have already indicated that I consider that steps should be taken to obviate this problem and in any event, it is still open to the parties if they so wish to seek a copy of the judge's notes of the proceedings or to provide a copy of the notes taken by a solicitor or counsel at the hearing and attempt to have these agreed. This is a problem that occurs in the Court of Appeal from time to time when a transcript is lost. I do not consider therefore that this is a valid argument for avoiding an appellate hearing on the basis of the principles in G v G.

6. A final reason which I consider favours the approach centred on G v G is an acknowledgement of the overriding objective which governs the Rules of the Supreme Court (Northern Ireland) 1980 to enable the court to deal with cases justly. Rule 1A(2) recites the following were relevant;

> "(2) Dealing with a 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."

In a small jurisdiction such as Northern Ireland where there are a limited number of judges in the Care Centres and also in the Family Division of the High Court, it is important that these overriding objectives are adhered to in terms of costs, resources and time available. Lengthy rehearings should therefore be discouraged. Consequently the hearing based on the principles in G v G is more likely to accord with the principles set out in these rules.

It is my view therefore that all appeals from a Family Care Centre to the High Court under Article 166 of the 1995 Order, should be dealt with in precisely the same manner as appeals in England and Wales under Section 94 of the 1989 Act pursuant to the principles set out in G v G. Questions of fresh evidence, the calling of witnesses, and remittal in some circumstances to the Family Care Centre will all be approached on an individual case sensitive basis relying on the plethora of authorities which have grown up in England

and Wales in the wake of the 1989 Act. I therefore conclude this appeal will be heard accordingly. The precise details of the hearing will be determined at a directions hearing after the conclusion this judgment.

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