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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

IN THE MATTER OF APPEALS FROM THE FAMILY CARE CENTRE SITTING AT BELFAST

Between:

D McA

Appellant;

-and-

A HEALTH AND SOCIAL CARE TRUST

Respondent.

Between:

BT

Appellant;

-and-

A HEALTH AND SOCIAL CARE TRUST

Respondent.

(Refusal of expert: appeal)

KEEGAN J

Introduction

[1] The identities of the parties have been anonymised in order to protect the interests of the children to whom this judgment relates. Nothing must be published or reported which allows these children or any related adults to be identified in any way.

[2] These cases are two appeals from decisions made by the Recorder His Honour Judge McFarland in the Family Care Centre in Belfast. I heard the two cases together by agreement of all parties given that they raise a common point of law in relation to

appeals. In the first case the appeal is brought by D McA in relation to a decision made on 31 May 2016. That was a decision in the context of care proceedings whereby the judge refused the mother's application for an expert namely Mr Ken Wilson, an independent social worker. In the second case BT also brings an appeal from a decision of 19 May 2016 whereby the judge refused the mother's application for a second expert assessment by Dr Jennifer Galbraith, a consultant clinical psychologist with an expertise in learning disability. The BT case is somewhat different in complexion given that BT has been found to be incompetent and is represented by the Official Solicitor. In both cases the children are living with relatives and the plans are for kinship care.

Background to D McA's case

[3] The subject child in this case is JL who was born on 13 June 2014 and his parents are D McA and ML. On 1 June 2015 this child was placed initially with his paternal grandfather by reason of Trust concerns about the parents. This placement was with the mother's consent. On 3 June 2015 the child was placed with his grandmother whereupon a viability assessment was undertaken in relation to her. This was not successful and so on 7 July 2015 the child was moved back to his paternal grandfather's care on a voluntary basis. The mother withdrew her consent to the placement on 1 September 2015 and this resulted in the Trust bringing proceedings for a care order. Agreement was reached to continue the placement on a voluntary basis pending the proceedings being adjudicated upon. The child therefore remains with his paternal grandfather and his partner.

[4] The mother D McA has subsequently given birth to another child JX who was born on 14 March 2016. That child is also subject to proceedings brought by the Trust however the court decided that the proceedings should be separate and so they were not consolidated. There are some issues in relation to that child's case including issues of paternity. However, it appears that the mother entered a residential placement with the child and that the child remains in her care, having recently moved from the placement into the community under a contract plan. The case in relation to JL is therefore different from that of the other child JX.

[5] In relation to JL's case, the mother was assessed by the Family Centre at Belfast. This was prior to JX being born. Admission took place on 24 September 2015 and a report was provided on 2 February 2016. That report highlighted concerns about the mother. Further work was also identified for the mother which included Sure Start and Women's Aid and it was contended that the mother did not engage with those services. However, she did engage with services following the birth of JX. There were a number of issues and concerns regarding the father noted in the report. It appears that he suffered a serious and significant brain injury in December 2015 and that required hospitalisation and rehabilitative care. The father was only discharged from hospital in June 2016 and so the father did not take part in this appeal.

[6] The Family Centre report was not a successful report for the mother and the case was therefore timetabled before the Family Care Centre. On 5 April 2016 a provisional date for final hearing of 30 June 2016 was provided. On 5 April it was indicated on behalf of the mother that she may seek to instruct her own expert and the judge on that occasion indicated that any such request could be brought by way of C2 application. When the case next returned to court on 20 May 2016 no formal C2 application was filed on behalf of the mother to instruct an expert. However, oral submissions were made that the mother required the assistance of Mr Ken Wilson. The judge was advised that a formal application would be made and that was made and heard on 31 May 2016. On that date the judge had the benefit of a C2 application and heard oral submissions in relation to the instruction of Mr Ken Wilson. Having heard the oral submissions, the judge refused the application and the case was listed for a full hearing.

[7] I have read the transcript of the judge's decision which was given on 31 May 2016. That is not a long decision however I have read the remarks made on the previous occasion of 20 May 2016 which set a context for the reasons given on 31 May 2016. The judge refused the application effectively on three grounds. He referred to the delay which he said was not purposeful in this case. He also referred to the cost of the second expert. Finally, he referred to the fact that he considered there was sufficient evidence before the court to make a decision and that a second expert was not necessary. The hearing on 20 May is more expansive in terms of the submissions made by counsel and the interchange with the judge. It is instructive to look at this because Ms Rice BL who appeared on that date set out the reasons for the application. Firstly, an argument was raised about the independence of the Family Centre. Ms Rice also submitted that there was a deficit in the Family Centre's report because there had been a material change in circumstances, namely the birth of JX. Ms Rice stated that the assessment was time limited and out of date and that the independent assessment would be available by the end of August or September. At the lower court this application was opposed by the Trust and by the Guardian ad Litem.

[8] This appeal is brought on the basis that the judge was wrong in refusing the expert assessment and that before this case is determined there should be a further assessment of the mother. On appeal, Ms McGrenera QC appeared with Ms Rice BL. Ms Davidson BL appeared on behalf of Trust and Mr Bready BL appeared on behalf of the Guardian ad Litem. I am grateful to all counsel for their oral and written submissions. In relation to this appeal there are two issues for determination:

(i) whether or not an interlocutory appeal is viable from a decision such as this refusing an expert in a case; and

(ii) if an interlocutory appeal can proceed whether or not this case succeeds in substance in relation to the instruction of an expert.

Background to BT's case

[9] The second case is that of Ms BT who is aged 35 years of years. The subject children are R who was born on 3 November 2006 who is aged 9 years and 7 months and M who was born on 4 February 2008 and who is aged 8 years and 5 months. The children have four other half siblings. C is aged 14 years, D is aged 12 year and these two children reside with D's paternal grandparents in Co Cork under a care order. L is aged 4 years and T is aged 1½ years and they reside with their father under a residence order.

[10] The father of the subject children S McL resides in Scotland and did not take an active part in this appeal. The parents were not married. There is a long history of social service involvement since 2001 when BT's first child C was born. Since that time there have been interventions resulting in the four half siblings being removed from the care of BT. The proceedings in relation to the subject children R and M also have a long history. There was an Initial Child Protection Case Conference held in respect of R prior to his birth on 27 July 2016. However, proceedings appear to have commenced sometime later and it is only in December 2012 that the two children's names were placed on the Child Protection Register due to concerns regarding physical abuse, neglect and emotional abuse. There were further child protection conferences in 2014 and 2015 and on 23 January 2015 there was a Review Case Conference and one of the decisions taken was to initiate pre-proceedings. There were a series of pre-proceedings meetings which culminated in a C1 being issued by the Trust on 30 June 2015 at Lisburn Family Proceedings Court. The application at that stage was for a supervision order. On 5 August 2015 an interim supervision order was made. The mother did not attend court on that occasion. On 10 August 2015 the Trust sought an interim care order hearing.

[11] On 19 August 2015 the interim supervision order was discharged and the two children were placed in the care of paternal grandparents with the voluntary consent of the mother. After this an assessment was agreed and on 3 November 2015 Dr McCartan, consultant psychologist, filed a report in relation to the mother's capabilities. This was a report directed by the Family Proceedings Court on joint instruction between the Trust, Guardian and the mother. On 16 December 2015 the case was reviewed and timetabled for full hearing which was to take place on 10 February 2016. However, on 8 January 2016 the mother filed a C2 seeking to appoint a Mencap advocate and a further assessment by Dr McCartan; and to transfer of proceedings to the Family Care Centre.

[12] On 20 January 2016 the proceedings were transferred to Craigavon Family Care Centre upon the ground of complexity. Directions were made in relation to engaging a suitable consultant psychiatrist. On 8 March 2016 the case was listed for first directions at Belfast Family Care Centre before His Honour Judge McFarland. The case was timetabled for full hearing on 27 May 2016.

[13] On 10 May 2016 Dr Richard Bunn, consultant psychiatrist, filed a report after an appointment with the mother. In his report he refers to the mother having a mild mental retardation which meets the criteria under the Mental Health (Northern Ireland) Order 1986. On 10 May 2016 the mother filed a C2 seeking an urgent review of the case in order that consideration may be given re-timetabling of the case to allow for the Official Solicitor's involvement and that consideration may be given to a new psychological report to be prepared given the conclusions of Dr Bunn.

[14] On 19 May 2016 the mother's C2 was listed. I have seen the C2 which refers to a further assessment being requested. There is not much detail in it which is very unfortunate but having read the transcript of proceedings it appears that Dr Galbraith was put forward in oral submissions as an appropriate expert having an expertise in learning difficulties. The C2 was opposed by the Trust and Guardian. There were issues raised about delay and the fact that the children needed permanency. The Trust indicated that the application was for a care order with a plan of kinship placement with the paternal grandparents. The Official Solicitor also asked for some further time to prepare the case and that application was granted and the case was adjourned from the fixed hearing date of 27 May 2016 until 5 July 2016.

[15] The application for a second expert assessment was refused. The transcript of the proceedings has been made available to me and I have read it carefully. Extensive submissions were made by all counsel in the proceedings and the judge considered all matters in detail. In particular, Ms Walkingshaw BL, who represented the mother referred to the fact that she was represented by the Official Solicitor who was in effect making this application to the court for another assessment. Ms Walkingshaw referred to an authority of Re M (Assessment: Official Solicitor) [2009] EWCA Civ 315 which stated that where an application was made of this nature by the Official Solicitor a court should be slow to refuse it given the Official Solicitor's particular duties to represent a person under disability. However, the suggested basis for a second assessment was limited to a discrete issue. There was a criticism of Dr McCartan's methodology in conducting her assessment. There was a suggestion that she did not give the mother breaks and spent too much time in each session. There was also a suggestion that the report was flawed due to the lack of an advocate.

[16] The Trust submitted, without dispute, that the argument about time was incorrect and that Dr McCartan had not spent the length of time suggested by the mother with her. The Trust and the Guardian submitted that Dr McCartan was aware of the mother's difficulties, that she was an experienced practitioner and that any issues in relation to her assessment could be dealt with in cross-examination. I also note that while a re-assessment by Dr McCartan was originally applied for by the mother, it was not pursued and there has been no application to require further information from Dr McCartan about her working methods or to involve an

advocate at another meeting. These avenues remain open and may be considered depending on how the case is approached.

[17] In his ruling, the judge makes a number of observations. Firstly, he referred to the cost of a second report and secondly he referred to the delay in the case if a second expert were to be instructed. He distinguished the Re M case by stating that it was a case in relation to an 18 year old mother and that this is a different type of mother given the fact that she has a number of previous children and she has been subject to previous proceedings. The judge stated that he did not consider that he needed the assistance of a second expert to deal with matters in this case given the report from Dr McCartan. The judge also referred to the fact that Dr Bunn, the Consultant Psychiatrist, in conducting a competency assessment was not himself saying that there should be a further re-assessment by a psychologist.

[18] In this case there are also two issues on appeal which mirror the issues in DMcA's case. Ms McGrenera QC led Ms Walkingshaw BL on this appeal. Mr Magee BL appeared on behalf of the Trust and Ms Steele BL on behalf of the Guardian ad Litem. I am grateful to counsel for their oral and written submissions in this case. Ms McGrenera did initially question whether I should consider this case as raising a compatibility issue however as the case progressed there was broad agreement that this was not necessary. Also, whilst there was a human rights application before the court in the BT case, Ms McGrenera did not pursue the substance of it. Mr Magee raised an issue that the appeal notice in the BT case was out of time by one week however he did not actively oppose an extension of time and so I grant the extension.

[19] In determining this case, I am particularly alive to the position of BT. I understand that the Official Solicitor became involved at a late stage however she was afforded time to prepare the case. I have read the affidavit filed by the Official Solicitor dated 2 June 2016 in this regard. This was not before the trial judge. In that affidavit, there is the averment that "it is unfortunate that the Official Solicitor was not involved in the case earlier." I agree with that sentiment. In her affidavit the Official Solicitor also requests more time to take the mother through the final care plan.

Consideration

[20] The first issue in both cases is common to them, namely whether procedurally an appeal is viable in relation to a decision of this nature at an interlocutory stage. It was accepted that a substantive appeal at the conclusion of a case can deal with the issue. In broad terms, Ms McGrenera, who led the argument on behalf of both appellants, stated that an appeal could be brought from this type of decision at an earlier stage. The representatives of the Trusts did not accept that proposition. The representatives of the Guardians did not comment on the procedural issue but rather made some submissions in relation to the substance of the appeals which they opposed.

[21] The exclusion of an appeal from this type of decision is explained in a decision of Gillen J in the matter of an appeal from the Family Care Centre Re E, E1 and A reported at [2003] NI Fam 11. That was an appeal from a Family Care Centre whereby a Family Care Centre judge made a decision that an expert report should be allowed in relation to some allegations that had arisen in the case but that certain issues of sexual abuse would not be re-opened with the expert. The mother appealed the second limb of that determination. The nature of the appeal was that the judge in that instance had erred in failing to pay any attention to fresh sexual abuse allegations against a grandfather. A preliminary issue was raised in that case by counsel namely that the appellate court did not have jurisdiction to hear such an appeal, as it related to the exercise by the judge of his powers under Rule 4.15 of the Family Proceedings Rules (Northern Ireland) 1996 to make directions and not an order made under The Children (Northern Ireland) Order 1995.

[22] In his ruling, Gillen J sets out the statutory background and he determines at paragraph 9 that the rules, namely the Family Proceedings Rules are not made under The Children (Northern Ireland) Order 1995. Accordingly, he says:

> "Any direction given by a court under Rule 4.15 in the Care Centre does not come within the ambit of Article 166 of the 1995 Order and accordingly cannot be appealed under that Article."

At paragraph 10 of this judgment the judge goes on to say that:

> "This does not apply to all directions. There are directions which clearly can be made under the 1995 Order and these are subject to appeal. An illustration of this is Article 57(6) of the 1995 Order which states:
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> 'Where the court makes an interim care order or interim supervision order it may give such directions (if any) as it considers appropriate with regard to the medical or psychiatric examination or other assessment of the child. '

At paragraph 13 of the judgment the judge states:

> "Rule 4.15 of the 1996 Rules deals with the manner in which a judge in the Care Centre conducts the proceedings. If an appeal was to be opened for a matter such as his timetabling, his transfer of proceedings to another court, his variation on the time within which rules are to be complied with and other similar matters of conducting the case then there could well be inordinate

> delay in these very important cases being processed. Parliament can never have intended that that would be the case and hence I believe that is the reason why there is no statutory provision for appeals against such directions to the High Court. Of course when the substantive order is made under the Children Order eg a contact order, a residence order, a supervision order/care order etc, then an appellant may invoke various aspects of the conduct of the hearing as grounds of appeal on the substantive issue. If, for example, the Care Centre judge has been plainly wrong in refusing to admit medical evidence or in refusing the attendance of a child at the hearing, these can form a basis for material grounds of appeal on the order made pursuant to the 1995 Order. In this way an appellant is not deprived of his right of appeal in a matter of substance including his rights under Article 6 of the European Convention on Human Rights and the right to a fair trial."

[23] The judge went on to dismiss the appeal as he found that the order under challenge was effectively a directions order and as such should not be appealed under the 1995 Order. The judge also found that the order was made under Rule 4.15 of the Family Proceedings Rules. I pause to observe that Re E although a similar case, was not a case dealing with whether the leave of the court should be granted for a second expert. Dr Swann was instructed without objection in that case. Re E deals with the judge's direction in relation to what the expert can deal with.

[24] I was referred to another recent decision of His Honour Judge Fowler. This is an unreported decision of a Health and Social Care Trust v AD, DD and GD1 from the Family Care Centre at Londonderry. Interestingly, in this case the Trust appealed a decision of a Deputy District Judge who had issued a direction that GD, the children's maternal uncle be made a party to care proceedings. In that case a preliminary point was taken by counsel appearing for the mother. She argued that the appeal failed because there was no right of appeal to the Family Care Centre from a decision of the Family Proceedings Court exercising a power under Rule 8 of the Magistrates' Court (Children) (Northern Ireland) Order 1995 Rules (Northern Ireland) 1996.

[25] It was argued that the appeal was outside the ambit of any appeal envisaged by Article 166 of the Children (Northern Ireland) Order 1995. The Guardian ad Litem and the respondents adopted this approach. The judge sets out the applicable statutory background which is rooted in the Magistrates' Court Rules but also Article 166 of the 1995 Order. Reference is made to the decision of Gillen J in Re E, E1 and A. At paragraph 11 onwards the judge sets out his reasoning. Firstly, he rejected the submission on behalf of the Trust that there should be an appeal. Secondly, he said by extension this would mean that all decisions under the

Magistrates' Courts Rules would be amenable to appeal. In accordance with the views expressed by Gillen J in Re E if appeals were to be opened for such matters and timetabling, transfer proceedings and day to day case management this could lead to inordinate delay in 1995 Order cases. The judge said that this would be contrary to pro-active robust case management of these extremely important cases and contrary to the ethos of the 1995 Order and in his view contrary to the intention of Parliament.

[26] The judge referred to the significance of Rule 8 in the Magistrates' Court Rules. He found that there was a clear distinction made between directions and orders. Thirdly, and most pertinently in my view, the judge indicated that the Trust was not without a remedy in that case absent an appeal. He said that this was clear from the wording of Rule 8 in paragraph 5 of the Magistrates' Rules that an application may be made to the court to direct that "a party to the proceedings cease to be a party". The judge indicated that the Trust could apply to the Family Proceedings Court to seek to have GD removed as a party to the care proceedings. Accordingly, the judge found that there was no statutory provision for an appeal against the joining of a party to the proceedings in the circumstances of that case. The appeal was therefore dismissed. This is a different factual circumstance given the alternative remedy highlighted by the judge.

[27] I was also referred to decisions from England and Wales which deal with appeals from what are described as case management decisions. I asked counsel to provide the statutory background for appeals in England and Wales and upon them looking at that I was referred to the Access to Justice Act 1999 which is supplemented by a substantial Practice Direction 52A in relation to family appeals. It is clear from the statutory scheme in England and Wales, that appeals from these types of decisions are not precluded. It is also clear that there are strict requirements for appeals of this nature including that they are dealt with urgently. They may be dealt with on paper without the need for an oral hearing. There is also a leave requirement. Thirdly, there is a clear theme within the jurisprudence that appeals will only very rarely succeed given the very wide discretion given to trial judges determining cases to case manage as they see fit.

[28] There are a number of cases in England and Wales where case management decisions have been appealed. For instance the case of W v Oldham Metropolitan Borough Council [2005] EWCA Civ 1247and Re B (A child) (Residence Order: Case Management) [2012] EWCA Civ 1742 were referred to me as examples of appeals from case management decisions. In my view the application of the second cited case should be treated with some caution as this was a particularly egregious example of a failing at the lower court. Nonetheless the cases do establish that an interlocutory appeal may be mounted in England and Wales.

[29] Many of these appeals deal with issues of expert evidence particularly in non-accidental injury cases. In Re HL (A child) Care Proceedings – Expert Evidence [2013] EWCA Civ 655 Sir James Munby deals with the test to be applied when

expert evidence is at issue. He refers to the Rules in England and Wales and in particular Rule 25(1) of the Family Proceedings Rules which set out the necessity test for expert evidence. He says that:

> "The meaning of necessary in Family Proceedings Rules Rule 25(1) lay somewhere between indispensable on the one hand and useful, reasonable or desirable on the other hand having the connotation of the imperative, what was demanded rather than what was merely optional, reasonable or desirable. That appeal was allowed in part in that an expert geneticist was necessary within the terms of the Family Proceedings Rules in the view of the appellate court."

[30] In the context of the BT case I was also referred to a decision of the Court of Appeal in England and Wales of Re M (Assessment: Official Solicitor) [2009] EWCA Civ 315. In that case the mother was herself a minor who had been in care for the majority of her life. When the local authority brought care proceedings in respect of the child, the mother was represented by the Official Solicitor. The local authority funded a residential assessment of the mother but this failed. The local authority also instructed a consultant psychologist whose report was unfavourable to the mother. The Official Solicitor applied to the court seeking: a fresh psychiatric report for the child, an adolescent psychiatrist; a viability assessment by a different centre to determine whether the case was suitable for residential assessment.

[31] The judge refused these applications on the basis that these additional reports were unnecessary, would be disproportionately costly, and might unfairly raise the mother's hopes. The Official Solicitor appealed. The Court of Appeal decided that the appeal should be allowed. In particular the appellate court said as follows:

> "1. The Official Solicitor had a duty to explore avenues to find out if the mother could parent the child, to investigate the case on the mother's behalf and to obtain whatever evidence he thought appropriate. If the Official Solicitor, with the responsibilities within the litigation, required a medical assessment, a judge should be slow to refuse it, especially if, as in this case, the immediately foreseeable consequence of such a refusal was to deprive the incapacitated litigant of any prospect of averting care and placement orders in respect of his or her child. Re P v Nottingham City Council [2008] EWCA Civ 462 concerning the role of the Official Solicitor in such cases should have been brought to the judge's attention.

> 2. A judgment on the proportionality of costs had to recognise that one possible consequence of the reports requested by the Official Solicitor would be the curtailment of future costs, because if the new reports were in agreement with the existing reports, that would seem to be the end of the forensic road for the mother. "

[32] Counsel also referred me to Article 6 of the European Convention on Human Rights ("ECHR"). Schedule 1 of the Human Rights Act 1998 Act states that in relation to Article 6(1) - Right to a fair trial:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

[33] I have considered European authorities such as Mantovanelli v France [1997] 24 EHRR 370, Elsholz v Germany [2000], Sommerfield v Germany [2003] 2 FCR 647. I accept the established principle in all of these cases that there must be a fair trial in cases of this nature and that there is a procedural element to Article 8 of the European Convention on Human Rights and that there are fair trial protections in Article 6. There was no dispute in relation to these principles.

[34] However, as Mr Magee asserted in his written arguments, the application of these principles will depend on the facts of a particular case. For instance, in the Sommerfield case it was held that 'it would be going too far to say that domestic courts are always required to involve a psychological expert on the issue of access to a parent not having custody, but this issue depends on the specific circumstances of each case'. Mr Magee also referred to the case of Tiemann v France and Germany Application Number 47457/99 in which the ECtHR found that the national court of appeal had given sufficient grounds for its refusal for another expert opinion, a decision which was not unreasonable.

[35] Ms Davidson submitted in her written argument that Article 6 of the ECHR does not provide for a guaranteed right of appeal. This right is provided for in criminal cases in Article 2 of Protocol No. 7 to the Convention. Ms Davidson also referred to In the Matter of an Application by ES for Judicial Review [2007] NIQB but

correctly pointed out that in this case the issue was in relation to the prohibition of access to the Courts during a 72 hour period in relation to emergency protection orders. This is different from rights of appeal. At paragraph 115 of ES, Gillen J states that "Article 6 (1) does not guarantee a right of appeal from a decision of a Court whether in a criminal or non-criminal case".

[36] Both cases were argued from the point of view that an expert was necessary to offer a second opinion on the mothers' capabilities. It was argued that an immediate appeal should be allowed from the judge's refusal of the applications for this expert evidence. In neither case was it suggested that the failure to allow a second expert would impede the parties' right to effective access to a court to such an extent that the essence of that right was impaired.

[37] The European cases do not take me much further in relation to dealing with the point at issue, given the fact that Article 6(1) does not guarantee appeal rights. I have listened carefully to the submissions of counsel and I have read their excellent written papers. Counsel submitted that my determination really comes down to whether or not the decision in Re E applies to the cases before me. If I follow that case there is no appeal at an interlocutory stage. That is the position of the Trust in these appeals however the mothers in both cases argue that the decision in Re E is incorrect as it introduces a blanket ban which is fundamentally unfair. Counsel for the appellants also argued that applying Re E it would be anomalous to have a situation where a parent could not challenge such an important decision as an assessment decision whereas a parent could challenge a decision under Article 57(6) if a residential assessment is refused.

[38] Ms McGrenera, on behalf of both appellants, submitted that to raise an appeal at the end of the case rather than after a decision is made at an interlocutory stage simply adds further delay. Mr Magee on behalf of the Trust correctly raised a floodgates argument. He also raised an argument that as an appeal could be taken at the end of a case parents are not without remedy. He reiterated the fact that case management decisions are within the discretion of a lower court and that it was a bridge too far to open up appeals of this nature. Mr Magee however did make some concessions in relation to the points of statutory interpretation which I will now come to.

[39] The starting point in looking at the statutory provisions is Article 166 of The Children (Northern Ireland) Order 1995 which states as follows:

> "166.—(1) Subject to any express provisions to the contrary made by or under this Order, an appeal shall lie to the High Court against—
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> (a) the making by a county court of any order under this Order; or

(b) any 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; or

(c) where the county court is a civil partnership proceedings county court exercising jurisdiction under the Civil Partnership Act 2004 in the same proceedings."

[40] Article 60 of the County Courts (Northern Ireland) Order 1980 states as follows:

> "60.—(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."

[41] In the interpretation section of the County Courts (Northern Ireland) Order 1980 decree includes a dismiss, a decree on a counterclaim and any order, decision or determination made a County Court in any civil proceedings instituted by virtue of any statutory provision, and any judgment registered under the Inferior Courts Judgments Extension Act 1882, and any decree or dismiss which is affirmed, reversed or varied on appeal. In the Interpretation Section order includes any decree or other order whatsoever of a County Court.

[42] The Family Proceedings Rules (Northern Ireland) 1996 are the rules which give effect to the Children (Northern Ireland) Order 1995. There are a number of rules which are pertinent to this case. Rule 4.15 is entitled Directions and states as follows:

"4.15.—(1) In this rule, "party" includes the guardian ad litem and, where a request or a direction concerns a report under Article 4, the welfare officer.

(2) In proceedings to which this Part applies the court may, subject to paragraph (3), give, vary or revoke directions for the conduct of the proceedings, including—

(a) the timetable for the proceedings;

(b) varying the time within which or by which an act is required, by these rules or by other rules of court, to be done;

(c) the attendance of the child;

(d) the appointment of a guardian ad litem, whether under Article 60 or otherwise, or of a solicitor under Article 60(3);

(e) the service of documents;

(f) the submission of evidence including experts' reports;

(g) the preparation of welfare reports under Article 4;

(h) the transfer of the proceedings to another court;

(i) consolidation with other proceedings.

(3) Directions under paragraph (2) may be given, varied or revoked either—

(a) of the court's own motion having given the parties notice of its intention to do so and an opportunity to attend and be heard or to make written representations,

(b) on the written request in Form C2 of a party specifying the direction which is sought, filed and served on the other parties, or

(c) on the written request in Form C2 of a party specifying the direction which is sought, to which the other parties consent and which they or their representatives have signed."

[43] The other rules which are important in this case are Rule 4.19 – Expert Evidence – Examination of the Child:

> "4.19.—(1) No person may, without the leave of the court, cause the child to be medically or psychiatrically examined, or otherwise assessed, for the purpose of the preparation of expert evidence for use in the proceedings.
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> (2) An application for leave under paragraph (1) shall be made in Form C2 and shall, unless the court otherwise directs be served on all parties to the proceedings and on the guardian ad litem.
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> (3) Where the leave of the court has not been given under paragraph (1), no evidence arising out of an examination or assessment to which that paragraph applies may be adduced without the leave of the court."

[44] Further Rule 4.24 – Confidentiality of Documents:

> "4.24.—(1) Notwithstanding any rule of court to the contrary, no document, other than a record of an order, held by the court and relating to proceedings to which this Part applies shall be disclosed, other than to—
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> (a) a party,
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> (b) the legal representative of a party,
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> (c) the guardian ad litem,
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> (d) the Legal Aid Department, or
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> (e) a welfare officer
>
> without leave of the judge.
>
> (2) An application for leave shall be made in Form C2 setting out the reasons for the request.
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> (3) Nothing in this rule shall prevent the notification by the court or the proper officer or chief clerk of a direction under Article 56(1) to the authority concerned."

[45] Article 165 of the Children (Northern Ireland) Order 1995 states:

> "165.—(1) An authority having power to make rules of court may make such provision for giving effect to—
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> (a) this Order;
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> (b) the provisions of any regulations or order made under this Order; or
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> (c) any amendment made by this Order in any other statutory provision,
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> as appears to that authority to be necessary or expedient.

[46] The Family Law (Northern Ireland) Order 1993 by Article 12 states as follows:

> "12.—(1) There shall be a committee known as the Northern Ireland Family Proceedings Rules Committee ('the Committee') which may make rules of court in accordance with Article 12A for the purposes of family proceedings.
>
> (2) Schedule 2 shall have effect with respect to the Committee."

Conclusions

[47] The first issue to determine is whether or not these decisions of the judge are orders or directions under The Children (Northern Ireland) Order 1995. I have been referred in detail to the decision of Gillen J in Re E, E1 and A [2003] NI Fam 11. In that case reference was only made to Rule 4.15 of the Family Proceedings Rules. This is clearly a rule dealing with directions. The relevant part of the Rule is 4.15(2)(f) which refers to the submission of evidence including experts reports. The rest of this rule refers to matters which are in the nature of timetabling evidence and timetabling witnesses. Interestingly, there is also reference in these rules to transfer of proceedings to another court.

[48] It is quite clear to me that a first instance judge should have a wide discretion to arrange a case and a timetable in accordance with these rules. I consider that Rule 4.15(2)(f) is really about when evidence should be submitted including expert reports. I do not consider that that rule actually deals with the issue of whether or not an expert should be instructed. This point does not seem to have been argued in the Re E case. Having looked carefully at the facts of Re E I can understand why because Re E is truly a case about a judge's direction in relation to what an expert

should cover. There was no issue as to the actual instruction of the expert. It seems to me that a different factual circumstance arises in Re E. However, I still have to consider whether I follow the principles established by that case. I can understand the rationale that precluded appeals from timetabling directions. In any event Rule 4.15(3) also allows for directions to varied or revoked by the court of its own motion or by a party and that must impact upon the necessity of an appeal. This was also a factor in the decision by His Honour Judge Fowler to which I have been referred.

[49] The issue in this case is in relation to the refusal of leave to release papers to an expert. It is important to actually look at where the judge's power lies to either grant or refuse an application for an expert. It is under the Family Proceedings Rules however as I have said I do not consider that it is in Rule 4.15. Rather the relevant rule is Rule 4.24 which concerns confidentiality of documents. This clearly states that no document shall be disclosed without leave of the judge. An application has to be made in Form C2 setting out the reasons for the requests. This is the rule which governs expert assessment of adult parties because documents will need to be released for an expert assessment and a judge can effectively refuse the assessment if that application is refused.

[50] The other provision which is specifically in relation to expert evidence in the rules is Rule 4.19 which deals with examination of the child. That rule is framed in more robust terms. Rule 4.19(1) refers to the fact that leave of the court is required to cause the child to be medically or psychiatrically examined for the purpose of the preparation of expert evidence. That rule goes on to refer to an application for leave having to be made in the format of a C2 to be served on all parties.

[51] These are the substantial rules dealing with applications for expert evidence. Any application requires the leave of the court. I consider that such a process results in an order. It may be described as a directions order or a direction comprised in an order but it is still an order. This analysis is referred to in paragraph 11 of Re E. In the case of an adult assessment the court does issue an order stating whether or not it grants leave for an expert to receive certain papers. Similarly, if a child is to be examined as part of an expert assessment leave must be granted. It seems to me that this procedure also extends beyond the boundaries of Rule 4.15 which refers to the submission of expert evidence. That is a stage after leave has either been granted or refused where a judge can direct when an expert report is to be lodged in court.

[52] I should say that Mr Magee on behalf of the Trust in the BT case frankly conceded this point in argument. Mr Magee submitted that the appeal remained barred on an interpretation of Article 166(1) of The Children (Northern Ireland) Order 1995. He submitted that the problem is not so much in the difference between the designation of a decision as a direction or an order but that the phrase under this Order is the operative part of the provision. I agree with Mr Magee's astute analysis that this is the core issue.

[53] This second issue was considered by Gillen J in the Re E case at paragraph 9 where he says that the rules are not made under the 1995 Order. As such he found that a direction under the rules does not come within the ambit of Article 166. I consider that this analysis applies even with an order made in accordance with the provisions of the rules. During the course of this hearing, I was referred to Article 71 of The Children (Northern Ireland) Order 1995. This argument was incorrect as whilst Article 71 is a power within the Order in terms of the creation of rules and regulations, it is related to Part VI of the Children Order. I have also looked at Article 165 of the Children (Northern Ireland) Order 1995 which refers to rules but again that does not offer me a solution as that provision simply allows for rules to be made to give effect to the 1995 Order. Article 12 of The Family Law (Northern Ireland) Order 1993 is the legislative provision which provides for the Rules Committee and empowers that Committee to make rules in family proceedings. The Family Proceedings Rules (Northern Ireland) 1996 were made by the Rules Committee and are the relevant rules in relation to the Children (Northern Ireland) Order 1995.

[54] Following from the dicta in Re E a direction for a residential assessment or a refusal of a residential assessment under Article 57(6) can be appealed but an assessment of a parent, be that a psychiatric or a psychological assessment, cannot be appealed at an interlocutory stage. I do understand the argument that this may be viewed as incongruous. However, the first type of application is different as it involves the potential reunification of a parent with a child for the purpose of assessment. It is also associated with the making of a substantive order under Article 57. It clearly emanates from within the Children Order itself. The facility for the instruction of experts is not found within the Children (Northern Ireland) Order 1995. Therein lies the difficulty and I cannot reconcile it, notwithstanding my conclusion that the judge's decisions may be described as orders. They are not orders 'under the Order.'

[55] I consider that Parliament must have intended this course when the Children (Northern Ireland) Order 1995 was enacted. The instruction of an expert is not an automatic right and it will depend on the facts of each case. A second opinion is also not guaranteed. An expert opinion does not usurp the judge's role in determining a case. It is also a matter for a trial judge to determine within his or her discretion. I have paid particular attention to the fact that in the BT case, the application was made by the Official Solicitor. The Official Solicitor is acting on behalf of the mother given her disability in accordance with Part VI of the Family Proceedings Rules 1996 . The Official Solicitor has specific duties and careful attention must be paid to her opinion. I commend the Official Solicitor for the care she has applied to this case. However, I was not referred to any special provision which would allow me to override the statutory scheme for appeals. It follows that I cannot depart from the authority of Re E in either case and that both of these appeals must fail due to the procedural issue.

[56] In my view, this course does not deprive the parties of a fair trial. The court of first instance must conduct the hearing in accordance with Article 6(1) of the ECHR. It follows that each mother can make their respective cases at trial with the assistance of their lawyers, the Official Solicitor and an advocate. Whether or not any fair trial issue arises will be a question of fact depending on the progress of each case. In relation to BT, I am confident that the Official Solicitor will act with her customary care and expertise to ensure that BT is properly represented at the hearing. The Official Solicitor was appointed at a late stage but having now had time to consider the case with the mother I am sure that she will take all necessary steps on her behalf and that she will raise any issues with the trial judge from a fully informed position. There is an ongoing obligation to ensure that a fair trial takes place. The Official Solicitor is also at liberty to seek clarification from Dr McCartan who is an independent expert, prior to hearing and to question her at the hearing.

[57] In addition there is a right of appeal at the conclusion of the proceedings when arguments can be raised if a final order is made under the Children (Northern Ireland) Order 1995 with which a party disagrees. The refusal of expert evidence is frequently raised as a point of substance in family appeals. The appeal court can consider that point in the context of the case as a whole. Indeed, in my view, it is after the hearing of a case that an appellate judge can truly assess whether there has been a fair trial.

[58] There is effective access to an appellate court which has wide powers to determine outcomes on appeal. This includes a power to direct expert evidence if appropriate. It has also become the practice in this jurisdiction that an appellate court may hear evidence if necessary and so I do not accept the argument that the appellate remedy is deficient. I consider that a substantive appeal protects the rights of the appellants to a fair trial under Article 6 (1) of the ECHR and that an appellate court can correct any defects if they are established.

[59] There is an appeal mechanism however in my view it is not by way of an interlocutory appeal hearing. I am not convinced by the argument that this practice causes further delay. I do understand that there is a different procedure in England and Wales. However, the appeal of case management decisions in that jurisdiction is provided for in statute, supplemented by extensive practice directions. It is subject to the strictures I have set out at paragraph 27. That is also a much larger jurisdiction. It is clear to me that statutory change would have to take place in this jurisdiction to allow for interlocutory appeals from case management decisions. That would obviously follow a period of consultation.

[60] It is therefore in the interests of all of the parties to have these cases heard and to have decisions made in each case. Given my conclusions and the fact that the cases will now proceed to hearing before the Family Care Centre, I will not make a determination on the substance of the applications for expert evidence. That preserves the appellant's rights to make any arguments in a substantive appeal. The

appeals are dismissed. The human rights application in the BT case is also dismissed. I discharge both of the Guardian ad Litems.