Neutral Citation no [2008] NIFam 5

*Ref:* **GIL7086**

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

*Delivered:* 20/02/08

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

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**FAMILY DIVISION**

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**IN THE MATTER OF THE CHILDREN (NI) ORDER 1995**
**AND IN THE MATTER OF LM1, LM2 AND SM**

**BETWEEN:**

**FOYLE HEALTH AND SOCIAL SERVICES TRUST**

**Applicant;**

**-and-**

**LOUISE MASON**
**AND**
**X**

**Respondents.**

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**GILLEN J**

[1] This judgment is being distributed on the strict understanding that no person may publish to the public at large or any section of the public any material which is intended or likely to identify any child involved in these proceedings or any address or school as being that of a child involved in any of these proceedings save that the full name, including the surname of the mother and father of the three children who are the subject of these proceedings, and the entirety of this judgment may be published notwithstanding that this may serve indirectly to identify the children. This prohibition on the publication of the identity of these children pursuant to Article 170(2) of the Children (NI) Order 1995 ("the 1995 Order") shall remain in force until all have reached the age of 18 and shall be without prejudice to the restrictions imposed by the Administration of Justice Act 1960 ("the 1960 Act").

[2] There is before me an application by the Foyle Health and Social Services Trust ("the Trust") seeking an order under Article 50 of the 1995 Order in relation to three children whom I shall identify as LM1, LM2 and SM. Louise Mason (hereinafter described by the letters "LM3" or "the first respondent") is the mother of these children and X is the father of L1 and L2. X has played no part in these proceedings and was thus not heard on the issue of anonymity. Accordingly, I have determined not to reveal his identity.

Background

[3] The background to this case is complex and concerning. I invited the parties to agree a chronology of the salient events to date. I am indebted to counsel/solicitors on behalf of the applicant, respondents and guardian ad litem for their industry in assisting the court to arrive at mutually agreed background history as follows :

[4] On 19th October 2002, a child, (hereinafter referred to as 'LM 1'), then aged 4 weeks, was admitted to Altnagelvin Hospital, Derry in a collapsed state. The presumptive diagnosis at the Altnagelvin Hospital and, initially, at the Royal Belfast Hospital for Sick Children, where the child was transferred on the evening of 20th October 2002, was of an intra-abdominal tumour (a neuroblastoma) which was bleeding.

[5] Further investigations where carried out the following day on 21st October 2002 and showed *inter alia* what appeared to be an abnormality of the left kidney which was surrounded by a large pen-renal haematoma which appeared to be causing some displacement of the bowel. The left kidney was noted to be larger than the right. There was also free intra peritoneal fluid and the mesentery, the tissue which contains blood vessels supplying the bowel, appeared to be swollen.

[6] The physicians treating LM1 formed the view that the injuries the child had sustained were non-accidental. On that basis both LM1 and a sibling (the child hereinafter referred to as 'LM2') were admitted to the care of foster parents with the consent of their mother (hereinafter referred to as 'LM3'). On 4th April 2003, following the withdrawal of the mother's consent on legal advice, the applicant Trust duly applied for and obtained from Derry Family Proceedings Court, an Interim Care Order in respect of both LM1 and LM2.

[7] At a Looked after Child Review on 18th September 2003 the applicant Trust formed the view, in the event of a full Care Order being granted by a Court, that the children should not be returned to the care of their mother and decided to seek permanent placement for both LM1 and LM2 with a view to adoption.

[8] The applicant Trust duly made its application for Care Orders and approval of its Care Plans in respect of LM1 and LM2 before the High Court, Family Division, which was heard by McLaughlin J over a 10 day hearing that started on 12th January 2004 (the "first hearing").

[9] Throughout the hearing LM3 maintained her innocence of having caused any harm to LM1. The mother's position was that she did not know how the injuries were caused to LM1. She reluctantly accepted that the child was injured. She advised the Court that she could not comment as to whether or not the said injuries were either accidental or non-accidental. Throughout the course of the hearing of the Care Order application, the mother advised the Court that her reluctant concession that LM1 had been injured was due to, what appeared to her as, the overwhelming general consensus of expert medical opinion including the views of a doctor instructed on her behalf all of which suggested that the injuries were non-accidental.

[10] The Trust application for a care order was granted by McLaughlin J. Further to the finding that a Care Order should be made, the Court ruled on the balance of probabilities that the LM1 had suffered a non-accidental injury and that the injury was probably caused by LM3. The standard of proof considered by the Court was on the balance of probabilities. The medical evidence was adduced by the applicant Trust at the trial of the matter together with the oral evidence of *inter alia* Doctor No. 1 (hereinafter referred to as 'Dr. G'), Doctor No. 2 (hereinafter referred to as 'Dr. B1'), Doctor No. 3 (hereinafter referred to as 'Dr. C'), Doctor No. 4 (hereinafter referred to as 'Dr.B2') and Doctor No. 5 (hereinafter referred to as 'Dr. S").

[11] In November 2004 LM3 was tried at Londonderry Crown Court on two counts. One count was of causing grievous bodily harm to LM1 with intent to do so and, as an alternative, one count of causing grievous bodily harm of LM1 simpliciter. LM3 was acquitted by a jury by unanimous decision on both charges after a 9 day hearing.

[12] On the 7th December 2004, pursuant to the Care Order previously granted by the Court, the applicant Trust filed an application to free both LM1 and LM2 for adoption. The mother resisted the Trust's application and filed an affidavit *inter alia* to the effect that she did not accept the finding of the Court in respect of the granting of the Care Order in that she maintained her innocence with regard to the finding that she had harmed LMI.

[13] On the 19th October 2004, a medical doctor, Doctor No. 6, (hereinafter referred to as 'Dr. D') made an approach to LM3s' solicitor. Dr. D identified himself as a Consultant Radiologist at Altnagelvin Hospital and provided details of his qualification and experience. Dr. D advised that on the l9 October 2002 he read an anonymous court report of the criminal proceedings in the Belfast Telegraph Newspaper. Dr. D advised that details included in

the said report struck a cord with him and reminded him of a case that he had been involved in some years earlier. Upon making various enquiries, he established that the child upon whom the alleged injury was inflicted was indeed the subject child in the case that he had recalled. Dr. D recalled that there had been a range of opinion regarding the analysis of the imaging findings in the case. Dr. D had been unaware either that there had been a Family Law case or that the mother of the child was to have been prosecuted. Dr. D voiced concern that no-one had ever contacted him or spoken to him about his medical opinion notwithstanding the fact that he had been a treating physician of the child on the night the child was admitted to hospital.

[14] Dr. D made and swore an affidavit on the 15th February 2005. As a result of his concerns, and on foot of a request by LM3's lawyers, the application to free LM1 and LM2 for adoption was adjourned. The purpose of the adjournment was to facilitate enquiries by LM3's lawyers into the concerns raised by Dr. D.

[15] Dr. D advised that a report be obtained from an independent consultant paediatric radiologist. He further advised that any report obtained should be commented upon by an independent consultant paediatrician with a particular interest in the subject and occurrence of non accidental injury. Dr. D advised that the independent consultant paediatric radiologist and the independent consultant paediatrician should be requested to comment with specific regard to how the findings of *inter alia* Dr. G, Dr. B1, Dr. C, Dr. B2, and Dr. S, correlated with the clinical record of the history of LM1 at presentation, the examination findings and laboratory results.

[16] Doctor No. 7 (hereinafter referred to as 'Dr. McH') a consultant paediatric radiologist, was duly instructed. He provided a report dated 19th May 2005 and thereafter two further notes dated 29th May 2005 and 20th June 2005 respectively. In essence, Dr. McH did not rule out the possibility of the child having suffered from a naturally occurring condition as raised by Dr. D. Dr. McH advised the instruction of a paediatrician.

[17] Further, to the recommendations of Dr. D and Dr. McH, Doctor No. 8 (hereinafter referred to as 'Dr. L'), consultant paediatrician, instructed and duly provided a report dated August 2005.

[18] Pursuant to the receipt of the report of Dr. L, it was the recommendation of Dr. D, Dr. McH, and Dr. L that either a paediatric nephrologist or a paediatric endocrinologist, be duly instructed to comment further and in more precise detail about whether, on the evidence, the child was more likely to have suffered from non accidental injury than a naturally occurring condition.

[19] Doctor No. 9 (hereinafter referred to as 'Dr. T'), consultant paediatric nephrologist, was duly instructed and provided a report dated 31 November 2005. Dr. T advised that in his opinion it seemed that spontaneous haemorrhage, *i.e.* a naturally occurring disease, provided the more comprehensive explanation of the findings. Dr. T raised concern that the appropriate investigations for neuroblastoma were not undertaken at the time of LM1's admission to hospital, either at Altnagelvin Hospital or at the Royal Victoria Hospital. Dr. T recommended that a paediatric oncologist, be duly instructed to comment further and in more precise detail.

[20] Doctor No. 10 (hereinafter referred to as Dr. E) consultant paediatric oncologist was duly instructed and, in his report of the 31st January 2006 advised, inter alia, that he considered that a neuroblastoma was the likely explanation of the subject child's illness.

[21] As a result of the opinion of Dr. D, Dr. McH, Dr. L, Dr. T, and Dr. E it was indicated to a judge sitting in the High Court, Family Division, that LM3 was to make application to the Court of Appeal to reverse the decision of McLaughlin J. The Court was advised that a legal aid application had been made. Further to an application by the legal representatives of LM3, the application to free LM1 and LM2 for adoption was adjourned generally, pending the outcome of the Court of Appeal.

[22] On the 6th February 2006, LM3 gave birth to a third child (hereinafter referred to as "SM"). Due to the fact that the judgment of McLaughlin J was extant at that time, the applicant Trust applied for and was granted an interim care order. The child was removed from the mother's care. LM3 indicated her intention to resist the Care Order as applied for by the applicant Trust.

[23] On the 1st March 2006, the Court of Appeal considered LM3's application and duly quashed the decision of McLaughlin J. The Care Order application was referred back to the High Court for a rehearing.

[24] The re-hearing of the Care Order was duly listed to commence on the 5th June 2007 before this court. The case was opened by the applicant Trust on all aspects of the proposed threshold criteria previously put before the first hearing. After the case was opened some time was allowed by the Court to facilitate discussion between the parties. In the event, after consultations and discussions with the medical witnesses, the applicant Trust advised the Court that it did not intend to call any evidence in respect of the allegation of non-accidental injury to the child LM1. The applicant Trust referred the Court to the reports from the various doctors, referred to above, and invited the Court to adjudicate the issue based on the content therein. In the absence of evidence being called this court duly determined that, on the balance of probability, the allegation of non-accidental injury could no longer form part of the case.

[25] LM3 duly conceded other aspects of the proposed threshold criteria which did not contain allegations of violence against the children and did not resist or make counter submissions regarding the proposed care plans in respect of the three children. In essence, subject to proposed work to be undertaken by LM3, it was planned that all three children would be re-unified with their mother at varying times to be determined by their needs.

[26] Since the Summer of 2006, LM3 has undertaken a course of work with, and has been advised by, the applicant Trust. This has resulted in the reunification of the youngest child SM together with much increased contact including overnight unsupervised staying contact, with LM1 and LM2. As matters presently stand it is intended that LM2 will be placed permanently with LM3 in the near future. The position with LM1 has proved more complex. Whilst work is ongoing, the position with re-unification, although still an objective, is unclear at this time. Work with this family in recent times has been to address attachment issues, some of which were brought about by the lengthy separation between the mother and the children.

The Order

[27] The Order of this Court therefore is to invoke the provisions of Article 3(5) of the 1995 Order and make no order in relation to any of the children since I do not consider that to make an order in this instance would be better for the children than making no order at all. The provisions of paragraph 1 of this judgment continue to apply to this order.

Publicity

[28] I have been made aware by the parties during the lengthy process of this case of gathering press and media interest in the unfolding events in this complicated and troubling case Accordingly I have invited the submissions of counsel throughout each stage on the issue of publicity. Happily counsel on behalf of the parties have largely been ad idem on the approach that the court should adopt towards any relaxation of reporting restrictions. It is fair to say however that the guardian as litem agency, representing the children, has consistently advocated extreme caution in any relaxation of the statutory restrictions in order to protect the interests of the children which of course must remain paramount under the terms of the 1995 Order.

[29] It may be helpful at this stage to summarise the position with reference to confidentiality and privacy in family courts. In the High Court and Family Care Centre Courts family proceedings involving children are heard in chambers unless the court directs otherwise. Under Article 170(2) of the 1995 Order no person may publish to the public at large or any section of the

public any material which is intended or likely to identify any child involved in any proceedings under the 1995 Order or any address or school as being that of a child involved in any proceedings. Any contravention is a criminal offence. This prohibition ends when the relevant proceedings are concluded unless extended by the court as I have done in this case (see Clayton v Clayton (2007 )1 FLR 11). It is worth noting however that under article 89 of the Magistrates' Courts (NI) Order 1981 representatives of newspapers or news agencies can be present during the hearings of domestic proceedings in those courts (but not the High court or Care centre courts ) save in those circumstances where the court exercises its powers under article 89(3)/(4) to exclude.

[30] The Administration of Justice Act 1960 s. 12 ("the 1960 Act") prohibits accounts being given or published of what has gone on at the hearing before the judge, contents of documents drawn up for and arising out of the hearing and transcripts or notes of the evidence or judgment. This does not apply to the publication of the text or summary of the whole or part of a court order unless expressly prohibited by the court.

[31] The inherent jurisdiction of the High Court may be used either to relax or to reinforce the statutory restriction on publication contained in the 1995 Order or 1960 Act.

[32] The legislation recognises the need to strike a balance between open justice and confidence in the process on the one hand and on the other the necessary confidentiality required to protect children in an area of law where their interests are paramount. It cannot in most instances be in their interests, for example in care proceedings, that intensely private matters should be laid bare to the public at large. Children – often reluctant participants in proceedings which are not of their own making – are entitled to as much privacy as possible from intrusions by the media and the public during their formative years.

[33] In Re Webster; Norfolk County Council v Webster and Others [2007] 1 FLR 1146 ("Re Webster") Munby J directed that the media were permitted in that case to have access to pending care proceedings. He concluded that the prohibition on publicity under the Children Act 1989, s. 97(2) (similar to the contents of art. 170(2) of the 1995 Order) and the requirement of privacy at the hearing can be dispensed with under the European Convention of Human Rights and Fundamental Freedoms ("ECHR") not merely if the welfare of the child requires it but whenever the court was required to give effect to the rights of others.

[34] The approach adopted by the British courts to the issue of privacy in cases involving children has been approved in Moser v Austria (2006) 3 FCR 107 in the European Court of Human Rights. In that case, involving a child

being taken into care, the Austrian law did not allow a judge to exercise a discretion to hold proceedings in public. Holding this to be a breach of article 6 of the ECHR, the court expressly approved the contrasting position in English courts in a case of B v UK [2001] 2 FCR 221 stating:

> "In that case the court attached weight to the fact that the courts had discretion under the Children Act to hold proceedings in public if merited by the special features of the case and a judge was obliged to consider whether of not to exercise his or her discretion if requested by one of the parties."

[35] Nonetheless there has been criticism of the way family courts carry out their work with accusations of secrecy, lack of transparency, and of being insufficiently open. Lord Falconer, the former Lord Chancellor and Secretary of State for Justice, has recently visited the issue of openness in the family courts in "Confidence and confidentiality: Openness in family courts – a new approach" published by the Ministry of Justice in June 2007 (hereinafter called "Confidence and confidentiality" or "this document"). This document was published after a period of lengthy consultation on Government proposals which had initially included allowing the media in to family courts as of right. The conclusion arrived at in this document was that the earlier proposals to allow media in to family courts as a matter of right was not to be taken forward. The focus was now "to improve openness of family courts not by the numbers or types of people going in to the courts, but by the amount and quality of information coming out of the courts."

[36] For some years now in Northern Ireland judgments in the High Court in family law cases have been provided to all the parties and placed on the Northern Ireland Court Service website, suitably anonymised where appropriate, in order to protect the identity of the children involved. That website is open to the public and the media.

[37] I share the view expressed by Munby J in Re Webster that once the issue of publicity has been raised, the outcome must be determined in accordance with the ECHR, "balancing" all the various interests which are engaged and not giving pre-eminence to the claim of privacy. Having weighed the competing interests of open justice and confidentiality in the instant case I consider that there are grounds for relaxing the prohibitions on publicity in the manner I have set out in paragraph one of this judgment. I am of this view for the following reasons:

[38] First, the mother of these children harbours a sense of injustice about these unfolding events and wishes the facts to be publicised. Mr McMahon QC, who has represented her before me, has made it clear however that she wishes the children's identity to be protected as much as possible.

[39] Secondly there already has been publicity about this case in the locality where the family live, often misinformed, and it is important that the full facts emerge. Accordingly although the disclosure of the mother's name will inevitably indirectly serve to identify the children, I am assured their identity is already in the public arena locally. Accordingly there will be no disproportionate interference with their rights while any greater degree of restraint would involve a disproportionate interference with the rights of the mother.

[40] Thirdly the workings of the family justice system in this case are matters of public interest and do merit public discussion. Public confidence in the process is necessary and the emergence of the changing circumstances of this case merits an open discussion. Accordingly from the outset of the hearings before me I initiated discussions in court with counsel on the issue and timing of publicity of this case. This has been an exceedingly complex case where differing and indeed conflicting medical evidence has been emerging throughout. Courts are confined to making determinations on the current expert evidence available at any given time. They do not have the luxury of hindsight. During the entirety of these proceedings over which I have presided the first respondent,through Mr McMahon, has never sought to blame or criticise the court process for the events which I have outlined .It is clear that the unfolding medical evidence, with the increasing involvement of medical experts from a disparate number of disciplines, has driven the progress and pace of this case.

[41] Finally whilst I did not consider the interests of the children and of the first respondent herself could have been sufficiently protected by permitting access to the media during the course of all the disclosures during the hearing, I have directed that the media be informed of the date of this judgment and I have made copies of the judgment available to them as well as publishing it on the website.