Neutral Citation no. [2006] NIFam 18 | *Ref:* **GILC5706**

Judgment: approved by the Court for handing down (subject to editorial corrections) | *Delivered:* **13/12/06**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

RE: K AND S

GILLEN J

[1] This judgment is being handed down on Wednesday 13th December 2006. It consists of 6 pages and has been signed and dated by the Judge. The Judge hereby gives leave for it to be reported. The judgment is being distributed on the strict understanding that no person may reveal by name or location the identity of the children and the adult members of their family in any report. No person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of his family must be strictly preserved**.**

[2] This is a preliminary issue arising out of appeal by a Health and Social Services Trust which I do not propose to identify ("the Trust") against the decision of Master Wells given on 16 November 2006. The Master made an order refusing the application of the Trust pursuant to Article 53 (2) of the Children Order (Northern Ireland) 1995 ("the 1995 Order") authorising the Trust to reduce contact between the mother and father (A and B) of two children (K and S) from once per fortnight to once per month pending the hearing of an application, now fixed for February 2007 to free these children for adoption. These children, aged 4 and 3 respectively, are the subject of a care order made under the 1995 Order by McLaughlin J in December 2005.

Preliminary Matter

[3] The Trust sought to adduce at the appeal hearing before me additional evidence which had not been presented before the Master. The Trust sought to adduce evidence contained in a subsequent LAC review of the conduct of the parents at contact with the children over the weeks which had ensued since the hearing of the matter before the Master-albeit before the Master gave

her judgment- and which the Trust, submitted was relevant to the determination by me. The guardian ad litem adopted that approach. The application was resisted by the respondents A and B.

Submissions

(i)Mr Toner QC, who appeared on behalf of the Trust with Ms Smyth ,outlined Rule 1.4 of the Family Proceedings Rules (Northern Ireland) 1996 ("the 1996 Rules") which provides:

> "Subject to the provisions of these Rules and of any statutory provision, the Rules of the Supreme Court (Northern Ireland) 1980 … shall apply with the necessary modifications to the commencement of family proceedings in, and to the practice and procedure in, family proceedings pending in, the High Court… ."

The relevant provision of the Rules of the Supreme Court is to be found in Order 58. Mr Toner QC helpfully drew my attention to the citation from the commentary in the Supreme Court Practice 1999 ("Whitebook") at 58/1/3 dealing with the nature of an appeal from the Master to a Judge in chambers which states:

> "An appeal from the Master … to the Judge in chambers is dealt with by way of an actual re-hearing of the application which led to the Order under appeal, and the judge treats the matter as though it came before him for the first time …. The Judge 'will of course give the weight it deserves to the previous decision of the Master; but he is no way bound by it' … the judge in chambers is in no way fettered by the previous exercise of the Master's discretion, and on appeal from the judge in chambers, the Court of Appeal will treat the substantial discretion as that of the judge and that of the master."

This citation continues:

> "It is common practice for the Judge in chambers, subject of course to the question of costs, to admit further or additional evidence by affidavit to that which was before the Master or District Judge; but if a party has taken his stand on the evidence as it stood before the Master … the Judge in chambers may in his discretion, by analogy with a practice in the Court of

Appeal, refuse to allow him to adduce further evidence."

(ii) It was Mr Toner's assertion that given the inquisitorial nature of the family division, the court must be even more liberal in its application of rules which primarily deal with the practice in the Queen's Bench Division.

(iii)Mr Devlin, who appeared on behalf of the guardian ad litem, submitted in addition that the court must be provided with all relevant and current information regarding the nature and quality of contact that has regularly taken place between the respondents and children. The nature and quality of such contact he submitted can change over time whether for the better or the worse. Since it has now been ten weeks from the determination by Master Wells, in order to discharge the obligations properly and bearing in mind the need to regard the interests of the children as paramount, the court must know, by the admittance of up to date and relevant evidence, how the last ten weeks of contact has proceeded and whether it has met the needs of the children and the object of the care plan. It was his argument that these children were subject to a care order which contained a care plan for adoption or long term foster care. In those circumstances Mr Devlin submitted that contact ought not only to support the overall aim of the care plan but it must also meet the needs of the children rather than the needs of the parents.

(iv)Ms O'Callaghan who appeared on behalf of the first named respondent and Ms McGrenera QC who appeared on behalf of the second named respondent with Ms Anyadike-Danes drew my attention to Bailie v Cruickshanks [1995] 6 BN NIL 79 where McCollum J, as he then was, stated:

"1.Judges on appeal from decisions of the Master have an absolute discretion as to whether or not to admit fresh evidence and are not bound by any requirement to find special reasons or special circumstances before admitting an affidavit which was not before the Master…..

2. It is desirable that Masters should have before them all the material necessary to enable them to make the appropriate decision on the hearing of the case at first instance. A judge on appeal, notwithstanding the undoubted discretion which he enjoys in this regard, should therefore not lightly admit evidence which was not available before the Master. The onus was on the person seeking to advance such fresh evidence on appeal to:
(i) establish that the interests of justice would be better served by the admission of the additional evidence rather than by a refusal to do so ;and
(ii) advance a sound reason to the Court for the failure to exhibit such evidence before the Master"

It was their submission that there was no sound reason why I should admit this new evidence because the Trust could have applied to introduce this

evidence between the date of the hearing and the date when the Master gave her judgment orally.

(v) Ms McGrenera also sought to apply by analogy the principles set out in Ladd v Marshall [1954] 3.A.C 745 where a plaintiff had appealed and sought to adduce evidence from the defendant's former wife that the evidence she had given at the trial had been a lie. Lord Denning said at 748 (approved by the House of Lords in Skone v Skone [1971] 2 AER 582 at 586);

> "It is very rare that an application is made for a new trial on the ground that a witness has told a lie. The principles to be applied are the same as those when fresh evidence is sought to be introduced. In order to justify the reception of fresh evidence for a new trial, three conditions must be fulfilled: first it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words it must be apparently credible, although it need not be incontrovertible."

CONCLUSIONS

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[4] I pause at this stage to observe that I have no doubt that the principles of Ladd v Marshall are subject to relaxation in cases where the welfare of children is an issue. In Re S (Minors) (Abduction), in a case concerning the Hague Convention where additional evidence was sought to be reduced on appeal from a foreign lawyer, Lady Justice Butler-Sloss, as she then was, said:

> "… In appropriate cases, the Ladd v Marshall rules are relaxed where the welfare of children requires the court to see the additional evidence."

[5] I respectfully adopt that view and it is an approach that I have followed in similar cases in the past. I am fortified in this opinion by the comments of Waite LJ in Re S (Discharge of Care Order) [1995] 2 FLR at 639 where he said:

> "The willingness of the family jurisdiction to relax the ordinary rules of issue estoppel and (at the appellate stage) the constraints of Ladd v Marshall … upon the admission of new evidence, does not originate from

> laxity or benevolence but from recognition that where children are concerned there is liable to be an infinite variety of circumstances where proper consideration in the best interests of the child is not to be trammelled by the arbitrary imposition of procedural rules. This is a policy whose sole purpose, however, is to preserve flexibility to deal with unusual circumstances."

Waite LJ went on to say:

> "In the general run of cases the family court (including the Court of Appeal when it is dealing with applications in the family jurisdiction) will be every bit as alert as courts in other jurisdictions to see to it that no one is allowed to litigate afresh issues that have already been determined. The maxim 'sit finis litis' is, as a general rule, rigorously enforced in children's cases, where the statutory objective of an early determination of questions considering the upbringing of a child expressed in s1(2) of the Children Act is treated as requiring that such determination shall not only be swift but final."

[6] Counsel recognised that common sense and the public interest must also play a part in consideration of this matter. It cannot be in the public interest for a court to adopt a narrow or technical approach to the introduction of fresh evidence which could contribute to the detriment of children and would not be subservient to the principle of the paramount interest of children in cases under the 1995 Order. This principle is subject to the rider that there must be finality even in children's cases but not at the expense of the child's best interests. However in such applications as this I consider there is a requirement on the moving party to establish a reasonable prospect that the evidence, on a re-hearing, may enable a court to find in favour of that applicant. I find authority for that proposition in Re K (Non-accidental Injuries: Perpetrator: New Evidence) [2005] 1 FLR where the Court of Appeal acceded to an application for the introduction of fresh evidence serving to identify the perpetrator in an instance were there had been a finding of non-accidental injuries in the course of an application for a care order and freeing order. Wall LJ said at p.298 para.60:

> "It is manifestly not for this court to become engaged with the facts: that is for the court of trial.. it is sufficient for (counsel) to establish a reasonable prospect that the evidence, on a re-hearing may enable the mother to be excluded …"

(7) I have come to the conclusion that it is appropriate that the fresh evidence in this case should be heard on the appeal. It probably would have been preferable if this information had been drawn to the Master's attention before she gave her determination, but in the circumstances in which that did not occur, I am satisfied that the interests of justice and of the children require that that evidence be admissible. By its nature the evidence was not available to be called during the actual hearing. However I am satisfied that it could have an important influence on the outcome of this appeal. I favour the view that courts in the family division should be willing to relax the usual constraints on admission of fresh evidence in appeals particularly in cases concerning contact where the concept of contact itself is not a fixed notion and can change as circumstances alter.