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Ref: McF12302

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

ICOS ref: 20/052623

Delivered: 19/10/2023

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

Between:

A MOTHER

Appellant

v

A HEALTH AND SOCIAL CARE TRUST

Respondent

and

A FATHER

Respondent

Re: AM's application to extend time to appeal

Mr A Magee KC with Mr S Devine (instructed by Finucane & Toner solicitors) for the
mother

Ms J Hannigan KC with Mr T Ritchie (instructed by the Directorate of Legal Services) for
the Health and Social Care Trust

Ms V Ross (instructed by Harte Coyle Collins solicitors) for the father

Ms M Smyth KC with Ms C Collins (instructed by Campbell & Caher solicitors) for the
child by his court children's guardian

McFARLAND J

Introduction

[1] The mother is seeking to extend time to appeal against a decision of His Honour Judge McGarrity ("Judge McGarrity") at Craigavon Family Care Centre. Judge McGarrity made several decisions in this matter and there is some confusion as to which order is actually being appealed. Judge McGarrity granted a care order on 31 January 2023 with the judgment delivered on 6 February 2023 and then by a later

judgment delivered on 3 April 2023 he freed the child for adoption. I have given the mother a randomly selected cypher to protect the privacy of the child.

[2] The notice of appeal and the application to extend time were both dated 18 August 2023 and lodged with the court office on 21 August 2023. The notice of appeal refers to the appeal against the whole of the decree “made by the County Court on the 6 February 2023 whereby it was ordered that the subject child shall be freed for adoption ...” The application to extend time refers to the “appeal against the ruling of HHJ McGarrity on INSERT DATE April 2023 whereby it was ordered that the subject child shall be freed for adoption.” (No date was ever inserted but it is assumed that it should read 3 April 2023.)

[3] The notice of appeal is defective and will need to be amended as it is clear that the mother does not wish to appeal the making of the care order of 6 February 2023. Mr Magee, on her behalf, clarified the situation at the hearing by indicating that it was the April freeing decision that the mother wishes to appeal. Rather than delay this matter further to await a formal amendment, I am proceeding to deal with the application on the basis that this is an appeal against the freeing order made on 3 April 2023.

Time limits

[4] Rule 4.23(3)(a) of the Family Proceedings Rules 1996 provides that an appeal in Children (NI) Order 1995 cases to the high court shall be lodged within 14 days although (3)(c) allows the court to extend this to such other time as the court directs. Had this been an appeal against the care order the 14 day time limit would have applied. However, the freeing order is made under the Adoption (NI) Order 1987 and therefore Rule 2(1) of Order 55 of the Rules of the Court of Judicature 1980 applies. It provides that any notice of appeal from the county court to the high court must be lodged within 21 days. As I am now dealing with this matter as an appeal against the freeing order, the 21 day notice period applies, but this can be extended under Order 3 Rule 5(1)

The law relating to extending time to appeal

[5] The judgment of Lowry LCJ in *Davis v Northern Ireland Carriers* [1979] NI 19 is the well established authority in relation to applications to extend time under Order 3 Rule 5(1).

[6] Specifically in relation to extending time for an appeal, the English Court of Appeal has provided guidance in *Stillevoeldt v EL Carriers* [1983] 1 WLR 207, which was followed in *Norwich & Peterborough Building Society v Steed* [1991] 1 WLR 449. The key issues to be considered are:

- (a) The length of the delay;
- (b) The reasons for the delay;

- (c) The chances of the appeal succeeding if an extension of time is granted; and
- (d) The degree of prejudice to the respondent if the application is granted.

[7] Maguire J in *JG's application* [2014] NIFam 2 at [12]–[23] set out a list of factors that should be taken into account when considering an extension of time to appeal, which is essentially a distillation of the principles from *Davis* and *Stillevoeldt*:

“[12] ... [D]ecisions of this type will be made on a tailor made basis and will tend to be highly fact specific ...

[13] ...

[14] First of all, the court has taken into account the importance of the decisions which are under appeal ...

[15] Secondly, in considering whether to extend the time the court must have regard to the fact that the mother has failed to act within the time laid down in the relevant rules ...

[16] Thirdly, the court has regard to the extent of the mother's delay ...

[17] Fourthly, the court must have regard to the extent of the impact which any delay has on the child ...

[18] Fifthly, the reasons for the delay will often be influential in the context of the court's exercise of discretion. The better the reason for the delay, the more likely the court will be prepared to view this reason as a positive factor in favour of extending the time.

[19] ...

[20] Sixthly, the merits of the case may enter into the court's calculations. Where an appeal is obviously strong this may cause the court to feel that an extension of time should be granted; and the opposite may apply where the appeal is obviously weak ...

[21] Seventhly, it is right that the court should take into account the fact that the putative appellant has already had a hearing, namely the hearing she had at first instance ...

[22] Eighthly, the court will not neglect the convention

rights of the parties ...

[23] In considering all of the above factors, the court must make it clear that extension of time to appeal will usually not be granted for the asking even though serious issues may be involved and may be at stake.”

[8] Whatever list of factors is adopted, it is important that these should not be approached as hurdles for any applicant. The court should take a holistic approach, essentially weighing up the competing factors (see Gillen J at [19] in *Benson v Morrow Retail* [2010] NIQB 140).

Chronology

[9] This is a brief chronology of events commencing at the final hearings:

- (a) Hearing of Trust’s care order application – 30 January 2023.
- (b) Judgment delivered making care order – 6 February 2023.
- (c) Hearing of Trust’s freeing order application – 21 March 2023.
- (d) Judgment delivered freeing child for adoption – 3 April 2023.
- (e) Mother contacts her solicitor about the conduct of her personal advisor – 12 April 2023.
- (f) Mother attends at solicitor’s office – 21 April 2023.
- (g) Mother reports conduct of her personal advisor to police – 2 May 2023.
- (h) Mother issues pre-action protocol letter (re judicial review) to the police – 7 June 2023.
- (i) Mother’s solicitors write to Trust’s solicitors indicating an intention to appeal – 15 June 2023.
- (j) Personal advisor arrested, interviewed and released on bail – 17 June 2023.
- (k) Mother applies for legal aid to appeal – 22 June 2023.
- (l) Mother is granted legal aid to appeal – 23 June 2023.
- (m) Notice to appeal and application to extend time are signed – 18 August 2023.
- (n) Notice to appeal and application to extend time lodged with court office – 21 August 2023.

Consideration

[10] I propose to deal with the factors suggested by Maguire J in *JG's application*. The decision to free the child for adoption is a significant decision. The established jurisprudence indicates that it was a decision which was made as a last resort after all other less interventionist options were ruled out (see *Re B* [2013] UKSC 33). As such it weighs heavily in the balance of factors. The immediate impact was that the parents lost parental responsibility for the child. It has also set in train a series of significant events such as reducing contact between the child and his parents and introduction of a narrative for the child in light of the care plan of adoption. Ultimately, as the name suggests, it will free the way to allow a prospective adopter to apply to the court for an adoption order which will terminate the legal relationship between the birth parents and the child.

[11] The mother has not brought the appeal within the permitted time-frame. It should have been brought by 24 April 2023 and having been lodged on 21 August 2023 it was nearly four months late.

[12] The impact of the delay is that although the notice to appeal does not impose a stay on the operation of the order, it clearly has the effect of putting a pause on the implementation of the care plan for adoption. The social workers will not be able to progress the care plan. It will create an emotional burden on the proposed adopter, and most of all, the pause will impact on the child. The child is approaching his fourth birthday. The impact is significant. The Children (NI) Order 1995 was not amended in 2014 to include a requirement on a court to have regard to "the impact which any ensuing timetable revision would have on the welfare of the child" (section 32(6)(a) Children Act 1989). However, delay is clearly a factor that must be taken into account. Article 3(2) of the Children (NI) Order 1995 states:

"In any proceedings in which any question with respect 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."

[13] McFarlane LJ in *Re H* [2015] EWCA Civ 583 dealt with the issue of appeal time limits in some detail. He said that the timetable for any appeal in a public law child case must plainly be established in a manner which is compatible with Article 3(2) (at [30]) and then went on at [33] and [34] to state:

"[33] As a matter of law, if no notice of appeal is lodged during the 21 days permitted for the filing of a notice, a local authority should be entitled to regard any final care order and order authorising placement for adoption as valid authority to proceed with the task of placing the child for adoption. If that process has subsequently to be put on hold in order to allow a late application for permission to

appeal to be determined, the impact upon the welfare of the child (particularly where prospective adopters who have been chosen may be deterred from proceeding) is also too plain to contemplate.

[34] The problem that I have described is a necessary difficulty that arises from our system which contemplates that, notwithstanding the expiry of the 21 day period for lodging a notice of appeal, the court may, where to do so is justified, permit an appeal to proceed out of time. There will thus inevitably be a period after a late application for permission to appeal where time is taken to process the application before it is determined. Whilst accepting the inevitability of this source of, in some cases, highly adverse impact on the welfare of a child, every effort should be made to avoid its occurrence. One strategy which would seek to avoid the problem would be for the judge in every case where a final care and placement for adoption order is made to spell out to the parties the need to file any notice of appeal within 21 days and for the resulting court order to record on its face that that information was given to the parties by the judge. Secondly, this court and any appellate judge in the Family Court, must continue to strive to process any application for permission to appeal in a public law child case with the utmost efficiency. Finally, the fact that an application for permission to appeal which relates to a child in public law procedure is out of time should be regarded as a very significant matter when deciding whether to grant 'relief from sanctions' or an extension of time for appealing."

[14] Turning now to the reasons for the delay, it is clear that the mother had access to her solicitors throughout this period. She had instructed senior and junior counsel for the care order and freeing proceedings and in the run up to those hearings she had therefore a very experienced team of lawyers advising her. The issue she raises now is the fact that because of an undue influence being placed on her by her personal advisor and given her vulnerabilities she felt compelled to reignite a relationship she had with the father in the early months of 2023. The personal advisor had been allocated to her by another Trust who were responsible for her as a looked after child and transitioning into adulthood. The mother was born in October 2002, and was therefore 20 years at this stage. Her complaints against the personal advisor relate to alleged sexual grooming. Obviously, no finding of fact on this issue is feasible at this stage, but for the purposes of this application I will treat the mother's allegations as accurate.

[15] The mother did not disclose any of these details to her solicitor or to either counsel, and declined to make reference to them in her written statements and oral

evidence before Judge McGarrity. The reason for this was explained as being her vulnerability and embarrassment. In addition to her legal team, she has disclosed that throughout this period she was supported by a number of individuals and organisations (Thorndale, VOYPIC, the Hospice and the Simon Community) so there was not a sole reliance on the personal advisor. I accept that these are relevant factors to be taken into account, although whether they could be regarded as sufficiently significant to override the need to provide all relevant evidence to lawyers dealing with public law proceedings with a plan to free a child for adoption, is questionable.

[16] The mother did, however, tell her solicitors on 12 April 2023 and consulted with the solicitor on 21 April 2023. Both these dates are within the permitted window for appeal. No action was taken. I was told that the focus was on reporting the matter to the police and it was also suggested that there was a fear that an exposure of the issue within the domain of the proceedings might alert the personal advisor and could lead to the destruction of evidence. I do not accept this as a valid reason. This was a deliberate and tactical decision not to appeal within the time frame. The excuse suggests that the successful prosecution of the personal advisor was the principle motive of the mother and not the welfare of her child. Even if it was a valid reason, there would have been nothing to stop the mother lodging a 'holding' notice of appeal within the time limit, and then seeking leave to amend it to expand the grounds, once the police investigation caused the personal advisor to become aware of the complaint.

[17] There then followed a period of two months which involved liaising with the police, and at one stage the issue of a PAP (pre-action protocol) letter to the police threatening judicial review proceedings. This indicates that the mother was sufficiently motivated to engage in threatening legal proceedings to the extent that she drafted the PAP letter, but was not willing to take the necessary steps to engage in the appeal against the freeing order.

[18] By June 2023 the police had accepted the complaint and the personal advisor was arrested and interviewed on 17 June 2023. Any concern about the destruction of evidence had receded.

[19] On 15 June 2023 the mother's solicitors wrote to the Trust's solicitors indicating an intention to appeal. Legal aid was applied for on 22 June 2023 and was granted the next day. Whatever may have influenced the thinking of the mother and her solicitor for the two months since the freeing order was no longer a factor. The mother was now focussed on the appeal and legal aid was in place by 22 June 2023. There were no obstacles in place.

[20] This brings me to the next, and final, two months of inaction. Although it must be acknowledged that this was largely within the vacation period, there were two weeks from when the solicitor expressed the intention to appeal and eight days from receipt of legal aid to the end of term. No real excuse has been offered for this period of the delay. The notice of appeal was a very straightforward document. In fact it would have demanded less time and effort than the drafting of the PAP letter.

[21] An analysis of this four month period reveals that there is really no valid reason for any period of the delay. There was a tactical decision not to appeal at the beginning, and then no motivation to bring the appeal with no urgency on the part of the mother and her legal representatives.

[22] The next issue is the merits of the appeal. The mother relies on what she has described as the conduct of the personal advisor which had an over-bearing impact on her conduct. In particular it resulted in her returning to the company of the father, a matter about which she lied to the Trust.

[23] On any reading of the judgment of Judge McGarrity it is clear that Judge McGarrity was taking into account much more deep-seated issues in relation to the mother's capacity to care for the child. Rehabilitation into her care had been considered but was ruled out. It had been ruled out for a variety of reasons. The incident when the mother returned to the father's company was noted (para 7) but only in a reference to the Trust's reliance on this fact to reinforce the view that rehabilitation was not a safe or viable option. Judge McGarrity does not make any reference to it in his reasoning at para 13. This emphasised a number of factors:

- (a) The parenting deficits of both parents were longstanding and multi-faceted;
- (b) Concerns existed on their ability to adequately meet the child's needs;
- (c) The capacity to change assessment of the mother was unsuccessful due to misuse of drugs and alcohol and contact with the father;
- (d) The parents could not provide a standard of safe and adequate care; and
- (e) Any work with the parents sat outside the child's timescales.

[24] Any appeal from Judge McGarrity's decision will take the form of a review focussing on whether he was wrong. It will not be a re-hearing. New evidence would have to be adduced provided it passes the well-known tests referred to by Denning LJ in *Ladd v Marshall* [1954] 1 WLR 1489 namely, the evidence could not have been obtained with reasonable diligence for use at the trial; the evidence would probably have had an important (though not necessarily decisive) influence on the result; and the evidence must be credible (though it need not be incontrovertible).

[25] The mother is likely to be able to satisfy the third test, but realistically she would struggle with the first two tests. The evidence was clearly within her knowledge, but she chose not to disclose it to her lawyers or to the court. The evidence, if admitted, is not likely to have an important influence on the result given the overwhelming nature of the other evidence about the mother considered by Judge McGarrity.

[26] In summary, the mother will struggle to have this new evidence admitted on appeal, and even if it is admitted, it may not have any significant influence of the

appeal, which is a determination on whether or not Judge McGarrity was wrong, rather than a re-hearing of all the evidence and the appellate court substituting its own decision.

[27] This brings me finally to the seventh and eighth factors which can be dealt with together. Any Article 6 ECHR right to a fair trial must be seen in the context that there has already been a trial on the merits of the case. This trial proceeded with the mother having legal representation including senior counsel. She was able to give evidence, and she was afforded the opportunity to challenge the evidence presented against her. Judge McGarrity gave a reasoned judgment. She does not claim that she did not get a fair trial. Her only complaint is that there was other evidence which the judge should have taken into account. Her failure to adduce that evidence does not in itself deny her a fair trial. She was then afforded the opportunity to appeal but she neglected to do so for four months. In any event, Article 6 does not guarantee a right of appeal, notwithstanding that that right did exist in this case.

[28] The right to respect for the mother's private and family life (Article 8 ECHR) has been dealt with fully by the process right up to the trial and judgments in the family care centre.

[29] In conducting the balanced approach to all of these issues, I bear in mind the draconian nature of the order that has been made. But I also take into account the other factors counter-balancing the significance of the order – the failure to act with promptitude and the general inadequacy of the proffered excuses for the delay; the extent of the delay; the impact on the welfare of the child who remains the principle focus of the court; the lack of a strong meritorious appeal; and the fact that the mother has already had a trial on the merits.

[30] Lord Guest delivering the judgment of the Judicial Committee of the Privy Council in *Ratnam v Cumarasamy* [1965] 1 WLR 8 at 12B stated:

“The rules of court must prima facie be obeyed and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules.”

[31] The purpose of the rules in the context of public law family cases is to provide a timetable to ensure the promotion of a child's welfare. The mother has not provided any real material upon which the court can, or should, exercise its discretion. Her child requires, and perhaps demands, certainty at this stage of his life. A care plan has been created and it has now been the subject of two hearings first as part of the care order proceedings and then as part of the freeing order proceedings. Appeal rights were available to the mother, but she waited four months to avail of those rights.

[32] For the reasons given I refuse to exercise my discretion in extending the time for appeal. On the assumption that neither the Trust nor the guardian are seeking costs against the mother, I make no order as to costs between parties, but there will be the usual taxation order for any legally assisted party.