

12. Guidance on giving judgement in family cases

12.1 Introduction

Every judge has his or her own style of giving judgement, which has been honed by trial and error. This is about content not style. Its aim is to provide both a suggested outline and a checklist for you to make sure that all the necessary elements are in place. Judges in the Court of Appeal who have been elevated from the Family Division frequently make two points: make your reasons clear so that your decisions can be supported and adopt a structure so that nothing essential is omitted.

In *Re H* [1998] 1 FLR 851, Thorpe LJ complained about a 'lack of structure in the judgement'. Furthermore, for general guidance on the requirements of a judgment, see the observations of Henry LJ in *Flannery and Another v Halifax Agencies Ltd [trading as Colley's Professional Services]* [2000] 1 WLR 377.

It is not suggested that you should slavishly follow this outline since, particularly in a short case, it would result in a long and diffuse judgement. It is hoped, however, that an eye to it will avoid unnecessary delays for children resulting from avoidable appeals.

Many of the pitfalls identified later on are avoidable by good Directions' Orders. The President's Practice Direction effective from the second May 2000 (see Appendix 1 to this Bench Book) is still honoured as much in the breach as in the observance but contains, at paragraph 3.1, a list of invaluable requirements for preparation for trial.

12.2 Preparation

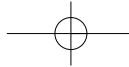
Preparation for the judgement begins as soon as you pre-read the case, if there is time. Many judges in family cases will not go into court until they have made time to pre-read. Make notes, for instance of the dramatis personae and the key issues. Highlight or underline key passages in the evidence and note page references. Keep your notebook tidy; how you take notes is again a matter of preference and convenience but margin headings of topics can shorten revision. Make sure that you and the parties are working from either the same bundle or a complete set of documents. Mistakes can happen whether the case is straight forward or complex, short or long.

12.3 Structure

What follows is a suggested outline for the judgement. It can be tailored, of course, to whatever the case is that you are trying, whether a Children Act or a Family Law Act case.

12.3.1 The Applications

- What is the case about?
- Who is making them and what is being sought? Is an application no more than a 'ratchet' response merely to try and put pressure or to raise the temperature than for 'real' relief?



- What were the opening positions? This is important: even if the President's Practice Direction has been complied with, there will have been negotiations in the corridor outside your court and written positions may have shifted. Check.
- What are the orders that are being sought?

12.3.2 The family dynamics

- Children and their 'parents'. Ages and dates of birth.
- Legitimate/illegitimate: who has parental responsibility?
- What is the current position of the 'parents' and the children?
- Where are they and with whom?
- The family home, who owns/rents it; rent or mortgage liability; those in occupation; what is available for occupation and how it is shared.

12.3.3 Chronology

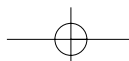
- The relevant history; how the present applications have come about.
- Factual issues: what are they? Make sure that they are dealt with appropriately. In all cases after 2 May 2000, the Practice Directions calls for a chronology at the hearing.

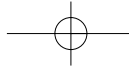
12.3.4 The issues

- What are they? Again the Practice Direction calls for a statement of issues to be filed by all parties.
- Refer briefly to what evidence has been considered, both the bundle of written evidence and oral evidence.
- Make some mention of all the oral witnesses' evidence. Some general impressions can be indicated.

In *Re O [Minors] [Care: Preliminary Hearing]* [2003] 2 WLR 1075, Lord Nicholls of Birkenhead advanced this guidance:

'To assist social workers, transcripts of judgements given at preliminary hearings should always be made available when required so that reliance does not have to be placed on summaries or bare statements of conclusions.'





12.3.5 The Applicant's case

- Cover by summary:
 - 'Lay' witnesses.
 - Any medical and any non-medical assessments.
- Findings. Specific findings on contentious issues must be made and made clearly, where they are relevant to the result and you should state their relevance to the outcome on the issues. Deal with credibility.

12.3.6 The Respondent's case:

- Cover by summary:
 - 'Lay' witnesses.
 - Any medical and any non medical assessments.
- Findings. Specific findings on contentious issues must be made and made clearly, where they are relevant to the result and you should state their relevance to the outcome on the issues. Deal with credibility.

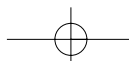
12.3.7 The determination of factual issues

Clear findings of fact are essential, both for the parties' sake and in the event of subsequent hearings and/or appeals.

- Who was believed and who was not believed: why?
- 'Winners' and 'losers' must know why and be clear in their minds where they stand in relation to each other and to their children. Likewise the Court of Appeal must be able to see what you ordered and why.
- In the end, when the lawyers and, indeed, the judge has finished with the case, the parties have to live with the orders that are made and the consequences of them. No matter how great the temptation or how considerable the provocation, let the parties leave with dignity. After all, if the case is returned to you and you find that they were right and you were not, many a judicial utterance has proved indigestible!

12.3.8 The rival proposals:

- What is the final position of each party, as identified in their concluding submissions? Make necessary interventions during final submissions to make it clear what they are and to tie a party down to their case.
- Consider whether there are any criticisms of each parties' positions, and deal with them.
- Findings.



12.3.9 The Children and Family Reporter (in a public law case the Children's Guardian)

- Give a short summary.
- If the author was called, cover the evidence given.
- What were the objections/criticisms.
- Make findings.
- If you are not following any recommendation – you must give reasons in sufficient detail for both the CFR/CG and any appellate or subsequent court to see what was the decision and why. It is usually fatal to your decision if you fail to do so.

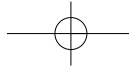
12.3.10 The relevant law

In Children Act private law cases:

- The relevant part of section 8: have careful regard to the actual wording of the various orders: residence, contact, etc. The welfare principle.
- The welfare checklist.
- The 'no order' principle: why is it necessary to make an order?
- Options: including no order.
- Case law cited.

In Children Act public law cases:

- The threshold criteria. Best practice now requires a local authority to serve on the other parties a statement setting out the grounds upon which they seek to show that the threshold criteria are established and the other parties to accept it or put in a counter statement. This saves a huge amount of time and effort. The vast majority of cases end up with total or near total agreement and with specific factual issues for determination listed.
- The welfare principle.
- The welfare checklist.
- The 'no order' principle: why is it necessary to make an order?
- The care plan
- Options
- Case law cited.



In Part IV Family Law Act cases:

- Which section is the application being brought under (see Schedule 2 below).
- Consider the grounds for making an order as set out within the relevant section.
- Non molestation orders.
- Power of arrest.
- Was it a case where undertakings were offered: why were they not acceptable?
- Consider carefully the precise wording of the order(s) made.

12.3.11 Submissions

- Consider the range of options.
- Investigate the proposals.
- Set out the factors that have led to the result.

12.3.12 Conclusions and decisions

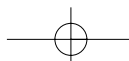
Before you embark upon giving judgement, consider whether you are ready. There is no harm in taking a short adjournment or even postponing overnight in order to prepare your papers and thoughts and consider how you are going to express yourself in the vital or delicate parts of the judgement. Consider even drafting acutely sensitive passages in longhand. Do not 'ad lib' at the vital stages. In a longer case, it can be wise not to give judgement straight away, even if you have decided the outcome. You can inform the parties of the result and give reasons after a break. Avoid the impression of haste or making it look as if you have not really listened to or closely considered the submissions of a particular party, especially if that party is going to 'lose'.

Drafting of orders. Not all court centres are expert in drafting what you have ordered. In a complex case, you can either ask counsel to draft the order or, perhaps better, draft the order in court with counsel and the clerk. It is your responsibility to make sure that what you have ordered is drawn up to be followed. It is not easy to be asked days or weeks after you have tried a case what you intended. However, it frequently happens and a clear note in your book of what you have ordered saves much embarrassment.

Checking. If someone is to draft the order after you have risen, it saves time and trouble in the long run if you check it as soon as it has been drawn or drafted.

12.3.13 Transcripts and editing

There are two usual reasons why you will be asked for a transcript to be made of the judgement: because someone wants to appeal or because the case is ongoing and those responsible for future decisions want to have your actual words available.



Unlike criminal cases, you are allowed to edit out repetitious and infelicitous remarks, provided that you do not alter the sense of what you have said nor the reasons for saying it. Editing does not mean rewriting, but it does allow for greater clarity. It is very rare for an oral judgement not to contain slips or inelegant erudition.

12.3.14 Reserved Judgements

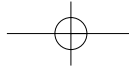
If you are going to adjourn before giving judgement for an appreciable time, you should consider giving a typed copy of the judgement out when you deliver it or hand it down. The Presiding Judges have issued Directions about the need to deliver judgement promptly and for reserved judgements to be delivered within 28 days from the date on which the case finished.

12.3.15 Who tells the children?

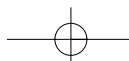
This can be a thorny problem. If the parents are at considerable odds with each other, can you trust the 'custodial' parent to give a fair summary of what you have said and why you have reached a particular decision? If not, a suggestion: get the parties to agree a note of what you have said and invite the CAFCASS officer to see the children and explain it all to them.

Schedule 1 - Checklist for judgments in children cases

- **Applications**
 - party issuing
 - date
 - nature
- **Parties**
 - names, ages, occupation, relationship to children
 - representation
- **Hearing**
 - length and dates
- **Evidence**
 - oral witnesses heard
 - statements read
- **Background**
 - history and disputes (in a page)



- **Issues**
 - each party's essential contentions
 - orders sought by each party
- **Findings**
 - restricted to essential facts with reasons
 - include profile of main witnesses
- **Experts**
 - names, expertise, summary of evidence, areas of disputes, and conclusions with reasons
- **Law**
 - cite sections, relevant parts of checklist, and principles from cases and articles
- **Decision**
 - consider whether to give it early or late
 - identify the general form of orders which follow
 - include any continuing injunctions, undertakings or contact if relevant
- **Children**
 - decide who tells them and when



Schedule 2 – Sample judgement

Introduction; applications; what is the case about?

In these Private Law proceedings, there are cross applications for residence, consequential contact and the father seeks a Parental Responsibility Order for the children. These applications arise from fraught issues concerning contact arrangements.

The family dynamics

The children for whom I am concerned and whose welfare is my paramount consideration are Harry and Hermione Potter. Harry was born on the 13 May 1998 and is now 5 years and a month of age. Hermione was born on the 15 June 2000 and is now just 3 years of age. Their mother, with whom they presently reside, is Petunia Potter born in February 1978 and their father is Vernon Dursley born in September 1977. They are not and never have been married to each other. Hence the father applies for parental responsibility.

Chronology

The parents met in July 1997 at a pop festival. The attraction between them was immediate and physical: there seems to have been little by way of a meeting of the minds. When mother became pregnant shortly afterwards, they set up home together. The actual cohabitation was during university holidays, since father commenced a law degree in September 1997, graduating shortly after Hermione's birth. The reality of cohabitation then dawned and by December 2000, the parties had separated.

There was never any problem about contact for the first two years, until about November 2002. At or about that time, mother discovered that father had settled into a new relationship with Petunia Weasley, a friend of mother's with whom she had been at school. According to both parties, albeit each for different reasons, contact became a problem. Until then father had been permitted liberal contact, which included taking both children out for the day, unsupervised. Father had been made welcome at the former cohabitational home. There had been occasional and, apparently, problem free overnight contact at father's new home.

In December 2002, mother stopped contact completely. She alleged that father had been violent to her during their relationship and that he had sexually abused Hermione. She was particularly bitter about Ms Weasley. Following the guidance issued in and as a result of *Re L (Contact: Domestic Violence)* [2000] 2 FLR 334, a judge heard mother's allegations and rejected them as untrue. Mother remains unrepentant and hostile to the concept of contact. As a result of a court order, the Children and Family Reporter, Mrs Circumference, observed two periods of contact between the father and the children. She reports that, when they saw him, they rushed into his arms and a successful period of contact occurred on each occasion. Both children had to be prised from him at the end of the sessions.

The issues

The father's application for residence is said on his behalf to have been made out of frustration at the mother's obduracy over contact. He accepts that she is a good mother to both children and, contact apart, he has no quarrel with her parenting. If she were to allow sensible contact, he would not have pursued his application for residence. He seeks alternate weekend staying contact from after school on Fridays until 1730 hours on Sundays and half the school holidays. He also seeks alternate major festivals. He claims that he is committed to the children absolutely and that they are wholly attached to him. In the light of the difficulties that mother has now put in his way, he would like his status as the children's biological father recognised.

Mother's case is that she is the appropriate person to have a residence order. She retracts nothing from what she has said about the father's behaviour and the reason that she remained silent for so long and permitted generous contact was out of fear of crossing father. She is prepared to allow supervised contact in an appropriate contact centre, but no more: no staying and no holidays. She says that father never really took any great interest in the children and is only seeking parental responsibility out of spite and to control her life. She has commenced a relationship with Albus Dumbledore, which she described as 'magical' and she maintains that father cannot accept this and hence has brought these proceedings. She denied any hostility or bitterness towards Ms Weasley; after all, she herself has commenced a new relationship.

The evidence

I have read the Bundle and the evidence filed. I have heard oral evidence, in addition, from father, mother and Mrs Circumference. I shall consider each of the parents' cases in turn. First to be called, however, was Mrs Circumference.

Mrs Circumference was a Children and Family Reporter of the old school. She held a firm view which she expressed robustly. She believed that mother had wholly manufactured her claims against father and that the children were at risk of losing his input in their lives. She believed that father's influence on the children was wholesome and benign and, from her observations, there was nothing improper in that relationship and it should be preserved. On the subject of residence, she believed that it was premature to make a change: if mother was prepared to 'see sense' and permit sensible levels of contact (and in this regard she supported father's proposals), then there was no justification in changing residence. There was no question of the two children being separated and on that, at least, both parents were agreed. On the other hand, if mother persisted in her opposition then the court had to make a stand for the sake of the children's welfare. Ultimately, a change of residence might have to be affected.

The mother's oral evidence was a repetition of her previous claims. She protested that the judge who had conducted the trial on domestic abuse had been unsympathetic and peremptory in his dealings with that issue. She accepted, in cross examination, that she had never reported her allegations to the police, never consulted her GP, nor had she confided in her family or close friends. She denied that she was motivated by jealousy because the father

had commenced a new relationship. She maintained her stance that supervised contact was the only safe and child centred way forward: she was not against contact of that kind. When asked by me whether she would abide by an order of the court if such an order did not reflect her views, she said that she had always been a law-abiding citizen and she would remain one.

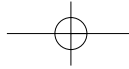
Father's evidence was calm and dignified. He said that he regretted the turmoil in the family relationships that these proceedings had brought. There was no truth in mother's allegations about him. He wanted a proper relationship with his children to whom he was devoted. Further he wanted his status as their father legally recognised by the granting of parental responsibility. In cross-examination, he accepted that he had sought a residence order out of frustration but had made the necessary preparations for such a change if or when it was necessary. He has discussed that aspect with his new partner who was pregnant with their first child and she was agreeable.

Findings

There is no doubt that both parents are devoted to their children. The problem at the present time is that they can no longer effectively work together for the children's welfare. I am satisfied, having seen both of them, that fundamentally both are loving and loved parents with differing skills and approaches to their parenting. If they could be enabled to get past the present hurdles, there is no reason why each should not valuably contribute to the children's future wellbeing. For the immediate future, at any rate, it is clear that it is better for the children for orders to be made.

I have reminded myself that each child's welfare is my paramount consideration. I have considered the Welfare Checklist - as did the Children and Family Reporter. I accept that the children, although loving their father, are apprehensive about a change of residence to a new home and a new mother figure whom they scarcely know. Whilst I have no concerns about father's ability to care for the children physically, I am concerned about their emotional welfare if they were to move home. These are two young children: Harry has just started full time primary school education and that is a significant new demand upon him. Hermione is at play and nursery school. Both have always lived with their mother and that is relevant in comparison to the time that they have spent with father. I agree with Mrs Circumference that there are no compelling reasons for a change of residence.

At present, neither child has suffered any harm. I am satisfied - *Re R H (Minors) (Sexual Abuse: Standard of Proof)* [1996] 1 FLR 80 - that the mother's allegations of domestic abuse and sexual abuse of Hermione are without foundation. I am concerned that she has seen fit to raise them again and persist in them. That is a serious matter and, because of it I am satisfied that there is a future risk of harm if mother persists in them and in causing difficulties over contact. Such a state of affairs would justify further consideration of the issue of residence. For the present, I intend to make a mandatory defined Contact Order to father. In view of mother's evidence, which I see no reason not to accept, I shall not attach a penal order at this stage.



However, since there have been interruptions to the pattern of contact, I consider that a gentle and age appropriate step by step approach is best. Contrary to the views of Mrs Circumference, in my judgement a less robust approach is called for bearing in mind the children's respective ages. In this regard I respectfully differ from and depart from her recommendations. The mother will make both children available for contact with father as follows: for the first four weekends on Saturdays from 0930 until 1730 hours; thereafter on alternate weekends, on the next four occasions, from 1000 Saturdays to 1500 Sundays; finally, and thereafter, on alternate weekends from Fridays after school, 1500 hours in the school holidays, until 1700 hours on Sundays. School holidays will be evenly divided and the major festivals alternated. There will be an added provision for such further or other contact as the parties may agree between themselves: it is not my intention for contact to be rigidly confined. I hope also that it will be possible for the parties to agree, in time, for some weekday contact.

On the subject of parental responsibility, I have considered *Re RH (Parental Responsibility)* [1998] 1 FLR 855 and *Re S (Parental Responsibility)* [1995] 2 FLR 648. I am satisfied that father fulfils the so-called three tests and more. I do not consider that he is likely to misuse the order - *Re M (Contact: Parental Responsibility)* [2001] 2 FLR 342, per Black J. Accordingly, I grant him a Parental Responsibility Order from today.

Counsel will draw the orders in the light of this judgement.

