

4. Control of the court

4.1 General

Exercising the family jurisdiction makes demands on judges quite different to those in other jurisdictions. Most family cases are not intellectually particularly demanding but do require special resources of patience, sympathy, firmness and humanity. It is a jurisdiction that should never be exercised by anyone who does not want to do so.

Litigants in family proceedings are often under considerable emotional pressure not only because the subject matter is emotional but also because many are subject to unseen pressures from within their wider family group. The atmosphere of the court is therefore crucial. It needs a blend of informality which enables parties to relax and give of their best, with a formality which lays down clear boundaries of acceptable conduct.

It is vital that the judge feels at ease. You may have no choice over whether you sit in a room or a court but you will have freedom of choice over what you wear and the tone you set. There are no rules, as we are all different. Your task is simply to enable cases, vital to the litigants, to be fairly heard and justly determined.

4.2 Case management

Case management is a crucial skill and this is not the place for detailed consideration. However, the following points may be worth keeping in mind.

1. If a case is not finally disposed of, parties should not leave court without a specific date having been set for the next hearing.
2. A final hearing date should ordinarily be fixed at the first directions appointment and the timetable arranged around that. Given waiting times, this is essential.
3. The parties should be invited to keep an updated bundle of documents, with a case summary and a chronology, so that the judge and every party has all the relevant information at each appointment.
4. It is essential that both you and the parties should keep in mind the current procedural Practice Directions issued by the President (e.g. as to bundles and the European Convention on Human Rights). These may be found in the Red Book, and at the back of this Bench Book.
5. It is important to be aware of local practices. Protocols or informal arrangements may well be negotiated locally, e.g.
 - a) for determining whether CAFCASS or the local authority should provide a section 7 report;

- b) for mediation arrangements, whether by court officers or an outside agency;
 - c) for exchange of information with police and CPS.
6. It is important to deal with any potential issues like disability or communication problems.

These should always be followed unless compelling reasons to the contrary exist in individual cases.

4.3 Unrepresented parties

Unrepresented parties are an increasingly familiar phenomenon. Some are pursuing hopeless cases from which public funding has been withdrawn. Some are acting from choice, but most are representing themselves because they are outside the eligibility limits and cannot afford private representation. Most such litigants are anxious and are grateful for the assistance you can give them. Some points you may care to bear in mind are laid out below.

1. The usual rules of procedure may need to be revised and relaxed; you are in charge of your own procedure.
2. These parties will usually need to continue a relationship as parents after the hearing. Every effort needs to be made to avoid or at least strictly control the cross-examination by the litigant of their partner.
3. Cross-examination is a foreign concept to most non-lawyers. If you are assiduous to get the unrepresented party to tell you his case at the outset, many will not then want to cross-examine. You may prefer to take the unrepresented party's evidence first if you can.
4. It is essential to check that the unrepresented party understands every step in the proceedings and you will almost certainly have to say much more than you would (or should) usually do. In particular your judgment should be in such terms that every part can be understood.
5. Courtesy and fairness do not preclude firmness. No judge should hesitate to prevent an unrepresented party from oppression of or discourtesy to any other party in the case. Likewise it is right to restrain irrelevant or inadmissible evidence whilst showing latitude where the litigant is clearly trying to follow your guidance.
6. Very valuable guidance is to be obtained from Chapter 10 of the JSB's *Equal Treatment Bench Book*.

4.4 Sitting hours

Because emotional tension is high and sometimes proceedings are urgent, you may feel under pressure to sit longer hours or sit late. You may wish to consider the following, if so asked.

1. The children whose futures you are determining deserve your best and you should try not to sit for longer than you can give of your best.

2. Court staff and others should be considered and consulted if you are thinking of sitting late.
3. If you decide you do need to sit late, consider leaving over your judgment until the next day or some other convenient occasion.

4.5 Restraining further applications: Children Act 1989, section 91(14)

This section gives the court power to restrain further applications. If you are considering using this power:

1. inform the parties and allow representations to be made;
2. consult and refer in your judgment to the Court of Appeal guidelines, laid down in *Re P (Section 91(14) Guidelines) (Residence and Religious Heritage)* [1998] 2 FLR 573.

4.6 *Ex parte* and interim orders

You will often be asked to make *ex parte* (without notice) or interim orders. If you are, you may wish to consider the following.

1. An *ex parte* order is very much the exception, especially in a case under the Children Act 1989. Too often has the story been different when both sides have been heard and the original *ex parte* order shown to have been clearly wrong.
2. If the case is urgent, always consider very short notice (even a telephone call). It is rare that a case cannot wait until later in the day or next morning.
3. In particular be wary of being pressured by enthusiastic advocates painting pictures of dire risk if *ex parte* orders are not made. Caution does not imply underplaying risk but does imply that you will not disturb children unless satisfied that it is essential to do so.
4. If you make an interim residence order to a father who does not have parental responsibility, you will, by virtue of section 12(1) of the Children Act 1989, give him a freestanding order; you may not intend to do so and will have to consider whether a residence order is actually necessary.
5. The risk (mentioned above) of cases that may raise a Hague Convention point.

4.7 Interpreters

Many judges will encounter family cases where a party cannot confidently communicate in English and has brought a family member along to interpret. In the interim, you may have to accept that, bearing in mind that you may not get a dispassionate translation. What is necessary, however, is to plan ahead in these cases and insist that a recognised interpreter is available for the next hearing. All courts should have lists of such persons. Special arrangements, of course, exist in relation to the use of the Welsh language in court.

4.8 Parties

You will frequently have applications by relatives to be joined as parties. In deciding that issue, you may wish to consider the following:

1. A natural parent should be joined unless there is an exceptional and compelling reason to the contrary.
2. Other relatives should not be parties unless good reason exists to make them such.
3. Do they have a separate case to present which may be in the child's interests to consider? If they are being supported by a parent or providing a 'long stop', they may not need separate party status.
4. Do they need to be joined now or have the issues not yet sufficiently crystallised to answer that point?
5. If they do need to be joined now, should their status be reviewed at some future point in the proceedings?

4.9 Parallel criminal proceedings

You will sometimes encounter a children case in which there are parallel criminal proceedings in which usually the child is a complainant and one of the parties a defendant. These can cause delay and confusion if there is no adequate liaison between the two sets of proceedings. It may be worth considering the following.

1. Family proceedings must be heard as soon as they are ready and only delayed to follow criminal proceedings if such delay offers an identifiable benefit to the child.
2. Each court should be aware of the other's orders so as to prevent duplication of expert evidence or conflicting orders as to disclosure.
3. Some centres have a judge authorised to undertake joint management of the two cases. For example, there are specific schemes in London, Liverpool and Norwich. Is one available in your case?
4. If you have any influence in the criminal proceedings, it will almost always be in the interests of a defendant to conclude the criminal proceedings before the family case.
5. Public interest immunity issues may arise in these cases. If they do, it may be useful to consider the following:
 - a) the court cannot make an order against an authority (e.g. the CPS or the police) who is not on notice and/or before the court. However, permission may always be given to release documents;

- b) in most areas a protocol will exist for the disclosure and interchange of information with which judges (especially those visiting) should be familiar;
- c) parties should be pressed at the earliest stage as to whether PII or disclosure issues are likely to arise and, if so, a timetable and directions are given to deal with such issues expeditiously.

4.10 Judgment in open court

Under the Human Rights Act, you may find that you are asked, especially in a public law case, to give judgment in open court. There is no settled guidance on such an application, save that:

1. it would not usually be necessary for everyone to robe; and
2. any judgment so given should be thoroughly anonymised as to names, addresses, schools, etc.

If you have doubts about giving judgment in open court, do seek the advice of the local designated family judge or the Family Division liaison judge. In the light of the recent ECtHR ruling in *B & Another v United Kingdom (Applications 36337/97 and 35974/97)*, there is no obligation to give any judgment in open court.

4.11 Expert evidence

Applications for expert evidence are increasingly common in family proceedings. There are many issues on which such evidence may be illuminating, indeed essential. The instruction of experts, however, increases both the cost and the time involved in a case and they should therefore not be used unnecessarily.

If an application for expert evidence (even by consent) is made, you may wish to consider the following.

1. Have the parties clearly defined the issue(s) which the expert evidence is to address?
2. Have the parties clearly defined the expert discipline which it is said is necessary?
3. Is the instruction of an expert actually necessary or, for example:
 - a) is the issue actually one for the court to determine as an issue of fact, or
 - b) is the expertise already available in the case (a social worker or guardian *ad litem*?)
4. Have the parties identified the particular expert whom they wish to instruct? If they have not done so you may well be reluctant to sanction disclosure of the papers until they have done so.
5. Have the parties confirmed that the expert can meet the timetable laid down by the court? If the expert cannot do so, you may have to push the parties to look elsewhere or even consider not giving leave at all. It is only when you are satisfied that this expert's evidence is essential to the welfare of the child that a timetable should be extended to accommodate it.

6. Is it the intention of the parties jointly to instruct an expert, and:
 - a) if so, have they agreed the timetable for the letter of instruction and who is to be the lead solicitor, or
 - b) if not, are you satisfied that limited party instruction is justified?

NB: It should always be a condition of instructing an expert that that expert's report is to be disclosed whether or not a party proposes to rely on it.

7. Is it necessary for the expert to see the parties and/or the child or can the opinion properly be given on the papers (e.g. an expert review of medical findings at examination)?
8. If there is more than one expert, have arrangements been made (or are they necessary) for experts to meet or communicate to provide a schedule of matters agreed/disagreed and their reasons? If so, have the parties agreed as to who will arrange such a meeting?
9. Is the expert to be instructed one with current experience of 'ordinary' cases, e.g. a hospital paediatrician as opposed to a retired practitioner specialising in 'abuse'.

Experts are a precious resource to the court, to be used only when necessary and, even then, only to the extent that it is necessary. Specific arrangements should also be made to 'timetable' them into a hearing so that unnecessary waiting and expense are avoided.

4.12 Delay

The Children Act makes it plain that delay in family proceedings is usually inimical to the welfare of children. The court is required to do all that it can to obviate delay.

Judges know, however, the enormity of the consequences of their decisions in family proceedings to the parties and their children. They quite rightly only want to take such decisions when satisfied that all the information and advice that they need is available.

The management of delay is therefore a fine balance between the above matters. When considering the conduct of a case in relation to time to be taken, you may wish to consider the following.

1. You will have regard to listing possibilities. If you force your case in (and you are entitled to do so) that will delay another.
2. Is any prospective delay purposive, e.g. arranging observed contact, or trying out a contact centre?
3. The real enemy is drift, i.e. a case in which a difficult decision is being postponed or fudged simply because it is a difficult decision or a case in which no clear plan of management has been put before the court.

4. Is delay in the interest of a child, or is it being occasioned by the dictates of adult convenience (time needed for reports, etc.)? If the latter, it should not be easily accepted.

As well as delay before a hearing, there is always the question of delay within a hearing. Cases that have to be adjourned or go part-heard unexpectedly, rarely serve the interests of the children concerned and may well delay others. Care cases should not be allowed to go part-heard. There is a particular danger if a judge moves around different care centres as part of his itinerary that a part-heard care case will become substantially delayed.

Remember that listing is a judicial function and you should use that power to ensure that a part-heard case is not the subject of delay.

Where the case is a long one then the Practice Direction and Witness Template conditions should have been complied with. These will, however, rarely apply to the ordinary half-day private law case in the County Court.

Parties should expect that you will hold them to their time estimate and the hearing may be handled accordingly. You know what you need to make a decision and you should have no qualms about requiring parties to focus on those matters whatever their own agenda might be.

At the same time, many a long-running contact case might have been avoided had the parties' concerns been heard at an earlier stage. It is a matter of nice judgment spotting this type of case.

Every case needs time to be prepared and the volume of work is increasing. It is avoidable delay and drift that judges should be seeking assiduously to avoid.

4.13 Requests for the judge to see the child

Sometimes you will be asked to see the child in the course of family proceedings. The essential guidance is that this simply should not be done. Judges are not qualified in this skill; it usurps the role of guardian or court welfare officer; you cannot offer confidentiality; and it is sometimes difficult to discern the real reason for the request.

Exceptionally, you may be convinced of the need to see the child. It is essential that all should be clear as to the purpose of the meeting: is it to ascertain the child's wishes and views, or is it simply a case of a child wishing to meet the person making major decisions about that child's life? You may be more readily convinced by the latter reason. Moreover, you must be satisfied that it is the child who wants this meeting.

If you decide to see the child, you should only do so after consulting the parties' legal representatives and always with a member of the court staff present. You should emphasise to the child that the final decision is not the child's, but yours. Also, you should point out to the child that the child's parents and the guardian, if relevant, will be informed as to what you have been saying to each other, since otherwise it would be unfair to them.

The parents should subsequently be informed as to the contents of the conversation so that they should be able to make submissions on those matters - see *E v E* (1985) *The Times*, 2 December. It is difficult to envisage any possible exception, unless it involved any danger to the child as a result of what they have divulged. In such a case, there should be discussion with the legal representatives as to what steps to take to afford the child adequate protection. This should be done without divulging what the child has said, since a legal representative is professionally bound, unless given specific dispensation by his client, to inform him what the judge has told them.

4.14 Attendance of the child at court

This is potentially a difficult area and one in which it is increasingly likely, requests will be made. As a general rule, attendance in court during the hearing is discouraged as not being in the interests of the child. However, a request by an older child (perhaps a teenager) may have to be looked at more closely. You might find it helpful to consider the following:

1. Why does the child want to be there?
2. What is the likely effect on the child of being present or of being refused permission to be present?
3. If the child is to be present, for how much of the proceedings should that be?
4. Generally it would be very unwise for any child to be present whilst any family member was giving evidence.

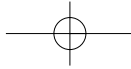
The test is, of course, the welfare of the child. Before reaching any decision, it would be necessary to take into account the views of all parties in the case.

You may wish to note the publication by the NSPCC in 2001 of two binders of information, called 'power packs', one for younger children and one for older ones involved in public family cases. Those packs describe the courts processes and their possible involvement in it. It is intended that they will be given to the children by the children's guardian.

4.15 Requests by advocates to see the judge

Any request by advocates to see the judge in the absence of the parties should always be viewed with caution. It can suggest collusion between advocates and judge and may appear to be contrary to the rules of natural justice. Be prepared to say that the matter ought to be considered in their presence.

However, sometimes such a request ought properly to be granted. Perhaps the case is in a mess and you wish to make comments without undermining the confidence of the parties in their representation or it may be that the advocates wish to raise a specific problem with you. If you do decide to see them without the parties being present, you may wish to consider the following:



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Family Bench Book

1. see the advocates in court as chambers so that there is an accurate record of your discussions;
2. invite them to convey the gist of your discussions to the parties;
3. do not be pressed into expressing a view on any issue unless and until you feel ready to do so and are willing for it to be conveyed to the parties.

