Justices' Reasons in the Family Proceedings Court in Children Act Cases

JOINT GUIDANCE FROM THE JUSTICES' CLERKS' SOCIETY THE MAGISTRATES' ASSOCIATION

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JCS
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JUSTICES' REASONS IN THE FAMILY PROCEEDINGS COURT IN CHILDREN ACT CASES

The Best Practice Guidance issued by the President of the Family Division in 1997 incorporated the guidance issued by Mr Justice Cazalet. The purpose of this document is to remind justices and their legal advisers of the content of that guidance, of statutory requirements, of guidance given in case law and to suggest Good Practice in relation to the detail to be contained within justices' facts and reasons.

This guidance has been drawn up by the Justices' Clerks' Society and Magistrates' Association and has the endorsement of the President of the Family Division.

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GUIDANCE APPLICABLE TO ALL CASES

1. There is a statutory duty upon the court to record and then give reasons for its decision whenever it makes an order or refuses an application.[2] This requirement applies equally to the hearing of an application for an interim order as it does to a final hearing,[3] to an application for leave[4], to the withdrawal of the application,[5] and to the refusal of a request to adjourn proceedings[6]. The court should give succinct reasons for making or refusing to make directions on a contentious matter after hearing full argument.[7] The justices' clerk must record, in writing, the names of the justice or justices constituting the court by which the application is made and, in consultation with the justice or justices, the reasons for the court's decision and any findings of fact.[8]

2. Justices should not be burdened with an unreasonable level of expectation to draft reasons that might be required of a professional judge; however there is a minimum level of expectation required from them[9]. Reasons must record the facts which the justices judged to be significant in the making of their decision and also the salient considerations which led them to their conclusion.[10] Reasons should also state their assessment of the credibility and reliability of the most important witnesses.[11] Justices are not required to spell out a detailed analysis of the documents they have read, the evidence they have heard or submissions made. Their duty is to give reasons for the decision they have reached, not to give reasons for every individual conclusion arrived at in the course of the decision. There needs however to be a balancing exercise to ensure that there are sufficient facts found and reasoning to justify and explain the decision reached.

3. Form C22 must also be completed identifying the child concerned in the proceedings; whether the hearing was on notice or ex parte; the reports and the statements the court has read; those persons whose oral evidence it has heard in reaching its decision; those in attendance at court during the hearing and identify their representatives if any.

4. Where the court exercises its discretion to proceed in the absence of a party it should address why in its reasons, dealing in particular with Article 6 of the European Convention on Human Rights.

5. Guidance has been given as to how the requirement to record reasons should be complied with.[12] The record of reasons should contain the following[13]:

    - Facts not in dispute
    - Disputed facts
    - Facts found
    - The extent to which the parties and witnesses were believed or disbelieved and the information on which the court relied in reaching its decision
    - Authorities cited by the parties
    - Whether a welfare report has been considered
    - The judgment or findings of fact in relation to each of the heads under the appropriate checklist for example, Section 1(3) Children Act 1989

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[2] Family Proceedings Courts (Children Act 1989) Rules 1991 Rule 21(6)
[3] F v R (Contact: Justices Reasons) 1995 1 FLR
[4] T v W (Contact: Reasons for Refusing Leave) 1996 2 FLR 473
[5] Re F (a minor)(Care Proceedings: Withdrawal) 1993 1 FCR 389
[6] Essex County Council v F 1993 1 FLR 847
[7] London Borough of Croydon v R 1997 2 FLR 675
[8] Family Proceedings Courts (Children Act 1989) Rules 1991 Rule 21(5)
[9] K v W All ER 10/7/07
[10] Hillingdon v London Borough Council v H 1992 2 FLR 372
[11] Re H (a minor)(Care Proceedings) 1992 2 FCR 330
[12] R (J) v Oxfordshire County Council 1992 3 All ER 660
[13] Re B (Procedure: Family Proceedings Court)1993 Fam Law 209 stated it would be helpful if Justices set out the relevant facts in chronological order or under convenient headings setting out what was in dispute and what was not and then making findings on disputed matters.

6. In relation to the welfare checklist, it is not acceptable for a court to make the statement that it has "considered all aspects of the welfare checklist" without expansion, unless it has demonstrated elsewhere in its reasons that it has applied its mind to the relevant factors. In D v R (Interim Contact Order) 1995,[14] it was held that where justices' reasons were otherwise inadequate, the bare assertion that the welfare checklist had been considered was unacceptable and on that basis the appeal was allowed.

7. If the recommendations of the CAFCASS officer are not followed then it is important that the reasons are given for departing from those recommendations.[15]

8. If the justices, when dealing with an interim application, decide that they cannot make findings of fact and deliberately refrain from detailed investigation as part of the overall strategy of reaching a final conclusion only on the final hearing, they should explain this reasoning.[16]

9. It is important that justices articulate their assessment of witnesses, findings of fact and reasons. Failure to do this may mean a successful appeal against their decision.[17] In addition, on appeal to the High Court, the only findings of fact and reasons that may be relied on to support the decision of the justices under appeal are those announced by the justices at the time. Reasons cannot be added to on receiving notice of appeal.[18]

10. The court's findings of fact and reasons for its decision must be stated by the court or one of the justices constituting the court.[19] Findings of facts and reasons must be announced at the time of giving the decision. It is not permissible to split this process even though the parties may agree to such a course[20].

11. Justices must ensure that the facts and reasons stated in court are the same as those recorded in writing. There is however no legal obligation on them to read out verbatim the whole of the document so long as they comply with their obligations under rule 21(6) to state orally their findings of fact and the reasons for the courts decision. If there is no objection they can paraphrase or summarise the contents of the written document. This might be particularly relevant to a lengthy judgement in highly contested and emotional public law proceedings. To reduce possible distress for parties in such cases the court would be entitled to discuss with the legal representatives the possibility of providing full written reasons and giving a short oral summary of the judgement and decision. If this approach is adopted then full written reasons should be issued to the parties there and then to avoid any implication that they were discussed or drawn up post decision.

12. Courts are advised to bear in mind a number of additional matters when dealing with any private law case involving allegations of domestic violence. Where domestic violence has been alleged the guidance in Re L[21] should be applied. It is a matter for the court to decide whether, if proved, that violence would be relevant to the issue of contact. If the court decides that it would be relevant then, when those allegations are disputed, the court must decide whether they are proved or not, making findings of fact and giving reasons. Justices should ensure that there is sufficient detail within the reasons to explain their findings of fact and should include a chronology of relevant facts together with an assessment of the credibility of witnesses[22]. In its reasons the court should always explain how its findings on the issue of domestic violence have influenced its decision on the issue of contact; and in particular where the court has found domestic violence proved but nevertheless makes an order for contact, the court should always

[14] 1995 1 FCR 501
[15] Re L (Residence: Justices Reasons) 1995 3 FCR 684 and Mr Justice Cazalets Guidance at paragraph 9

[16] F v R (Contact: Justices Reasons) 1995 1 FLR 227
[17] Re M (a minor) (Contact: Conditions) 1994 1 FCR 678. See also K v W All ER 10/7/07
[18] Hillingdon LBC v H 1992 2 FLR 372
[19] Family Proceedings Courts (Children Act 1989) Rules 1991 Rule 21(6)
[20] Re K (minors) (Justices Reasons) 1994 1 FCR 616
[21] Re L (Contact: Domestic Violence) Re V (Contact Domestic Violence) Re M (Contact Domestic Violence) R H (Contact Domestic Violence 2000 2 FLR 334
[22] K v W All ER 10/7/07

13. Explain, whether by way of reference to the welfare checklist or otherwise, why it takes the view that contact is in the best interests of the child[23]. Having made findings of fact the hearing is then 'part heard' and the same magistrates should return for the final hearing.

14. Courts should be particularly aware of allegations of domestic violence in relation to consent orders. Where relevant allegations have been raised, the court should not make final orders, whether or not by agreement, without determining the truth or otherwise of the allegations and assessing their impact on any contact proposed. The Risk Assessment Checklist[24] is of assistance. The Family Justice Council has recommended that in any case where the response to an application for contact makes allegations of domestic violence the case should not automatically be listed for conciliation, but should instead be listed for directions for consideration of whether there should be a fact finding hearing to establish the nature and extent of the domestic violence alleged[25]. Any fact finding hearing should be fixed as expeditiously as possible and the court should make appropriate directions for the hearing. The court will need to consider what further directions, if any, are needed following fact finding[26].

[23] Extract from Guidelines for Good Practice on Parental Contact in Cases where there is Domestic Violence – Prepared by the Children Act Sub-Committee of the Lord Chancellors Advisory Board on Family Law April 2002

[24] Report to the President of the Family Division on the approach to be adopted by the court when asked to make a consent order where domestic violence has been an issue (following Lord Justice Walls report to the President on 14/2/06) – Family Justice Council, December 2006 at Annex 4 www.family-justice-council.org.uk/docs/Reportoncontact.pdf

[25] "Everybody's Business" – How applications for contact orders by consent should be approached by the court in cases involving domestic violence. The Family Justice Councils Report and Recommendations to the President of the Family Division – February 2007 http://www.familyjusticecouncil.org.uk/docs/contactsummary.pdf.

[26] A Practice Direction is to be issued by the President of the Family Division on Domestic Violence and Consent Orders

GOOD PRACTICE IN RELATION TO CONTESTED CASES

The following is to assist justices and their legal advisers in relation to the detail to be contained within facts and reasons:-

Names of parties and application(s) under consideration

Whilst there is no formal requirement to set out the names of the parties or the application under consideration, this information should be included in the facts and reasons unless already contained in a separate document annexed to them.

Documents read and evidence heard

These should be referred to in form C22 and do not therefore have to be specifically referred to. If required, then the C22 can be annexed to the reasons.

Background of case

Brief but relevant details of the history of the case need to be given. It is not necessary to detail a full chronology of events in the child's life.

Facts not in dispute

This section should be limited to facts relevant to the application. This information can often be provided by the parties on direction in the form of an agreed schedule. It is important for the purposes of case management that there is identification of what is and what isn't in dispute in advance of any contested hearing. Where the background history of the child and/or parents is not in dispute the need is only to make specific reference to the undisputed facts relevant to the application. There is no need to recite background details which are irrelevant or superfluous to the application being determined.

Facts in dispute

This section should be limited to the key issues which are in dispute and which are relevant to the application. A short summary of the competing assertions of the parties will usually suffice. Parties can again be directed to provide this in advance of the hearing.

Assessment of Witnesses

Justices may find it useful to makes notes against the facts in dispute as they hear from a witness. Going through this process will act as an aide memoire and will assist justices in formulating their findings of facts and reasons at the conclusion of the evidence and submissions. In assessing whether a witness's evidence is credible, it is helpful at the end of each session for justices to spend a little time writing or agreeing their assessment of that witness (with a final review at the conclusion of all the evidence). This is of particular assistance where justices hear evidence from witnesses over a number of days. Reasons should then deal with the court's assessment of the credibility and reliability of the most important witnesses.

Findings of fact

This should lead on from the facts in dispute and should indicate which of the competing assertions on each issue the court preferred and why. Any competing arguments should be set out and then the court's findings and reasons for those findings should be detailed.

Statutory/Threshold criteria

The court should indicate which of the findings of fact lead it to find (or not find) the statutory/threshold criteria met (or not). It is important that reasons state why the criteria have been met (or not), not just the fact that they have. The court should relate the threshold criteria to the facts, stating for example, what specific harm the child has suffered/is likely to suffer, the reason for this harm and the causative link to the care given/likely to be given.

Welfare checklist

It is not sufficient for justices to include a blanket statement that "we have considered the welfare checklist". It would suffice for justices however to state "we have considered the welfare checklist and in particular ….." highlighting and applying the factors within the checklist most relevant to the application before them and the order being made (or refused). As part of their considerations justices will generally have a social worker's statement or CAFCASS/guardians report which examines the welfare checklist. If, as part of their application of the checklist, justices come to the same conclusions as the guardian/social worker etc they can state in their reasons that they adopt the checklist (or identified parts of it) as detailed in that statement/report. They should however ensure that if doing so it is consistent with their findings of fact and the order being made.

Human Rights Act

The HRA should be addressed whenever human rights issues have been raised by the parties. Article 8 of the European Convention on Human Rights should always be addressed where the court is making an interim or final care order empowering an authority to remove a child from its family[27]. Bald statements however such as "we have considered the Human Rights Act " add little on their own.

The court should always make clear in its reasons that a balancing act of all the parties' rights under the Act has been undertaken and that any order is both necessary and proportionate and that no other less radical form of order would achieve the essential end of promoting the welfare of the children. It should also address Article 6 where it has proceeded in the absence of a party.

[27] Re B (2004) 1 FCR 463

GOOD PRACTICE IN RELATION TO UNCONTESTED CASES

In relation to agreed private law orders, although the court has an overriding judicial duty to investigate proposals which are put to it by consent, the depth of that investigation must reflect the consensus between the parties[28]. The court is fully entitled to adopt reasons drafted by the parties. Where the court intends to depart from the agreed reasons, it must first tell the parties the nature of the proposed departure and allow submissions. The practice adopted in the higher courts, particularly whereby the parties submit a draft consent order setting out the agreed terms is commended. In relation to private law applications, although the justices are not bound to rubber stamp an agreed order there must be truly exceptional circumstances for them to discard arrangements sensitively negotiated between the parties with the assistance of legal advice[29]. This is subject to the guidance given in paragraphs 12 and 13 above in relation to cases involving domestic violence. Where justices adopt an agreed document as their own they should sign it and indicate that it has been so adopted. A covering sheet with the court crest on, annexing the agreed document, is commended as a means of authentication.

Where an order is agreed and the justices have adopted the agreed facts and/or draft reasons drawn up by the parties, there is no requirement for the justices to repeat these, save to say that they adopt them as their own. This is subject to the caveat that each party confirms that the document has been read by (or to) him.

Where the justices propose amending the draft reasons they should indicate the nature and extent to the parties and ensure that the amendments are read out in court.

[28] See for example Devon CC v S and Others 1992 2 FLR 244 where the Justices insisted on hearing oral evidence at some length on an agreed interim care order application and then a further full day to convert the interim order to a final order. This was held to be inappropriate.
[29] S v E (Access to Child) 1993 1 FCR 729

GOOD PRACTICE CASE MANAGEMENT IN THE RETIRING ROOM

Case management does not end at the conclusion of the evidence and representations. It continues into the retiring room during the assessment of the evidence, the decision making process and in the drawing up of facts and reasons. It is only when the final decision is announced and the findings of fact and reasons are read out that case management ends. It is therefore important that retiring room discussions are focussed and that time is used constructively. Facts and reasons should be relevant to the issues in the case. Whilst they should contain sufficient detail to justify the decision reached, 'reasons for reasons sake' should be avoided. Similarly, it is not a constructive use of time to re-write into reasons passages contained in reports and statements. It is therefore permissible to refer to and adopt the contents of documents annexed, or to particular sections of reports/statements, provided that facts and reasons do not become disjointed as a result. Directions such as the following given in advance of the hearing may assist in the preparation of facts and reasons:-

- Local Authority to prepare an agreed case summary detailing the background to the case and the agreed threshold document. These can then be added to the relevant part of the reasons and referred to as an annex.
- Respondents to prepare agreed and disputed facts. Again, these can be annexed to the relevant part of the reasons.
- In private law cases, parties to prepare agreed draft order and agreed facts.

GOOD PRACTICE IN RELATION TO IT AND TEMPLATES

Justices and their legal advisers are increasingly using IT and templates for the preparation of facts and reasons. IT or template facilities may not always be available and, where they are, IT skills levels may be such that it would be more time consuming to type reasons than to record them manually. Using IT however has many advantages, for example reasons can be easily altered, are legible and can be printed off immediately for the parties. Using templates can assist in the structuring of reasons and in providing an aide memoire of the statutory criteria to be applied. This helps to facilitate the drawing up and delivery of reasons in a timely manner and the avoidance of unnecessary delay in the retiring room.

Justices and their legal advisers are encouraged to make use of IT and templates wherever facilities and skills permit.

Whilst the use of templates is encouraged, pre-prepared templates should contain no more than the headings for consideration and a reminder of the statutory criteria. Care should be taken to ensure that these are properly personalised for example, taking out gaps and page breaks and ensuring that paragraphs are consecutively numbered. Tick box templates should not be used.