Neutral Citation Number: [2002] EWCA Civ 1736

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
(WILSON J)

Royal Courts of Justice
Strand
London, WC2
Thursday, 24th October 2002

B e f o r e :

LORD JUSTICE THORPE
LORD JUSTICE RIX
LADY JUSTICE ARDEN

T (A CHILD)

(Computer-Aided Transcript of the Stenograph Notes of
Smith Bernal Wordwave Limited
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

MR. N. MOSTYN Q.C. and MR T. BISHOP (instructed by Messrs Sears Tooth) appeared on behalf of the Appellant
MISS J PARKER Q.C. AND MISS D. EATON (instructed by Messrs Collyer-Bristow, London, WC1) appeared on behalf of the Respondent

---

HTML VERSION OF JUDGMENT

---

1. LORD JUSTICE THORPE: The parties to this appeal married on 24th September 1988. The appellant husband is a US citizen, aged 42. The respondent mother is British and aged 38. The only child of the marriage is JW who is almost 11 years of age, having been born on 31st October 1991. The marriage proved of short duration.

The mother left the London home with JW to return to her home county of Cheshire in January 1994. Almost immediately after the separation the father issued his first application for contact. That was the harbinger of much litigation between the parties. There was a contested ancillary relief application. Judgment was given by Singer J and subsequently that judgment was reviewed in this court. In the field of contact Singer J was the judge for nearly six years until recusing, in March 2001, when the mother filed a statement from the husband's niece M, whom Singer J had represented in historic proceedings between M's father, PT and M's mother. The contact regime which Singer J nurtured resulted in the father having half the school holidays and half terms, with additional weekends.

2. The summary of this period of the post-separation history is to be found in the judgment under appeal at page 29. Wilson J said:

> "But I am clear that there was fault on both sides, albeit perhaps in unequal proportions. The father was insufficiently thoughtful of the mother's natural concerns in respect of arrangements for her young son. The mother came, so I believe, to look upon the father's contact as an unwelcome source of trouble and anxiety, albeit as something which she accepted had to take place and which JW enjoyed, and she was not motivated in any way to exceed the strict parameters of what had been ordered or agreed."

The regime sanctioned by Singer J took its final shape by an order of 21st October 1999, and that endured until the mother's current application to suspend contact which is still a live application.

3. I move to the autumn of 2000 when the paternal grandmother, AT, died in the United States. That preceded JW's Christmas staying visit and undoubtedly contributed in some degree to the father's heavy drinking throughout that Christmas holiday period.

4. The relationships within the T family are unusually complex. That is demonstrated by an incident on 2nd March 2001 when the father was assaulted quite severely by his elder brother, P. The assault was the source of a major family battle. The father involved the police and his brother was charged with a criminal offence. Ten days after the assault the maternal grandfather in this jurisdiction, Mr JF, received a telephone call from PT, alleging that the father was essentially unfit to have continuing contact with JW as a result of his dependence on alcohol and prescribed drugs. Ten days after that the mother issued her application for the suspension of contact. An order was made by Black J seven days later. She set out a regime of testing of samples for drug and alcohol levels, and in the interim suspended direct contact. The testing regime which was set up pursuant to this order produced results that on their face were negative. The father on 3rd May issued a cross application for interim contact and for an early listing of the mother's prior application. That led to a conciliation hearing on 9th May in the Principal Registry, at which leading counsel for the parties agreed that it was unnecessary to direct a report from a children and family reporter since there was no issue as to JW's wish to spend time with his father. Accordingly, at a listing before Bodey J on 13th June a consent order was entered, on the basis that the father would agree to continuing tests and on the basis that staying contact would be supervised by a professional nanny, for contact from 29th June to 4th July at a hotel in Manchester. That contact duly took place and concluded on 4th

July. The relationship between father and child at that conclusion is described in his subsequent filed statement in these terms. He said:

> "The last time I had seen JW -- that is 4th July -- he had been hugging and kissing me and telling me how much he loved and missed me."

That evidence was not challenged at the trial before Wilson J.

5. The parties returned to court on 13th July when a further order was made by consent, again preceded by safeguarding directions. The consent order provided for the father to have two weeks staying contact between 27th July and 10th August, one week during the Michaelmas half term, together with a further weekend in the second half of the Michaelmas school term. On this occasion provision was made for a children and family reporter to prepare a report in relation to the issues in the case.

6. When the father travelled to Manchester on 27th July for the purposes of the contact ordered 14 days earlier, he was met with what must have been for him extraordinarily distressing opposition from JW. In his evidence he described it thus:

> "When I tried to speak to JW in the car park he told me I was a liar, was drunk all the time and that nobody liked me. He told me never to call him again."

That tragic development inevitably led to a return to the court. The parties were before Bodey J on 1st August when he set the case over to 6th August. On 6th August the case was listed before Johnson J. He arranged for the senior children and family reporter in the Royal Courts of Justice, Mr John Mellor, to assist the court by talking to JW and to the parties. He subsequently gave evidence to the judge. I draw the following extract from the transcript:

> "I found J to be a nine-year old boy, going on ten, very powerfully aligned with his mother, expressing a catalogue of criticisms of the father ... He talked about his father spending all day in bed (not telling the truth) being boring, taking J to places he didn't want to go to, sleeping all day, up all night, keeping him up all night. (He said): 'I wish he would give up and leave us alone.'"

In a subsequent answer to the judge, Mr Mellor added this:

> "I asked JW to just imagine for a moment that his father did 'give up', as he put it, and didn't insist on continuing to meet with him. If that were the case I asked J, who he thought would be the happiest person in his whole family and he told me that was impossible to answer. I said: 'Why is it impossible to answer?' He said: 'Because everyone would be happy.' I said: 'Well, who's everyone?' He said: 'Well, by 'everyone' I mean mum, JJ', his grandfather, his grandmother, in fact everyone in his family. I asked whether anyone would be sad. He said: 'No, no one.'"

7. Having received that report Johnson J did not deliver a judgment. However, he made a firm order. He said that the father was to have contact immediately and lasting until 11th August. He said in addition that he should have contact later in the month to make up for lost days. The second spell should be from 29th August to 3rd

September. The first contact duly took place over the ensuing four or five days at a London hotel. The evidence of the nanny, who was present as a safeguard, was to the effect that the stay had been without any major complication. Accordingly, the father was naturally expecting to have JW again on the 29th. However, that arrangement was cancelled on the eve, on the basis that JW had not recovered from a gastric attack that he had picked up in the Canary Isles. No application was made to the court to enforce the order of Johnson J or to put anything in its stead. By that stage the children and family reporter had been nominated, a Mrs Cordwell, who was based in the north west in proximity to the mother's home. She had embarked upon her inquiries and in mid-September the mother sent to her a dossier which Mrs Cordwell quite properly returned, on the basis that it was neither conventional nor appropriate for the mother to seek to influence her by submitting material of any sort.

8. The parties were before the court on 10th October. His Honour Judge Colthart took a directions appointment, in the course of which the father applied for an order that the mother disclose the dossier which she had submitted to Mrs Cordwell. That application was refused and not appealed. Contact was due to take place shortly thereafter, commencing on 19th October, as directed by the order of 13th July. On the 19th, when an attempt was made to effect the transfer to the father's charge in Manchester, JW declined to co-operate or to accompany Mrs Cordwell. An application was made in this building and listed before Her Honour Judge Anwyl on 22nd October. She on that occasion gave Mrs Cordwell leave to instruct a consultant psychiatrist or psychologist to see the parents and JW and to report to the court in time for the fixture on 10th December. The judge also made firm orders to ensure that the transition took place on the following day.

9. The endeavour to implement the order on the following day led to extremely distressing scenes. They are described at first hand by Mrs Cordwell in her subsequent written report. She said that JW refused to go with his father, and when asked why he said, among other things, "because he gets drunk, stays in bed all day and is a homosexual." He added that he waved real guns about when at the family home in Florida. This serious situation simply could not be resolved despite Mrs Cordwell's efforts and despite all her experience. She describes in her report how JW's opposition seemed, if anything, to intensify, until reaching a pitch which she described as "a mantra of drink and drugs, guns, homosexuality". The impasse was reported to Judge Anwyl on the following day. She again directed a further attempt to take place in Manchester on 25th October. Her further order was no more successful than her first and JW's continuing obstinate refusal to have any dealings with his father ultimately won the day.

10. Thereafter, it is relatively easy to summarise the litigation history. The original intention of a trial in December was modified to a fixture to commence on 22nd April 2002. The arrangements for the filing of a report by Dr. Peden, who was the child psychologist in Manchester selected by Mrs Cordwell, was frustrated by the father's failure to co-operate in attending appointments. Equally the father failed to co-operate fully in the testing programme. He failed to co-operate fully in the disclosure of medical records and accordingly there were a number of interlocutory hearings and orders made against him. Even more significant were the tests taken on the father in both October 2001 and subsequently in May 2002. They showed clear evidence of liver changes that could only be explained by excessive alcohol consumption.

11. The trial before Wilson J commenced, I believe, on 22nd April, and ran over the course of some eight or ten days, at the conclusion of which he reserved his judgment, subsequently handed down on 14th June, and resulting orders were settled on 21st June. The principal order that resulted from the trial was preceded by a recital that the father agreed to submit himself to a psychiatric assessment by Dr. Jane Marshall and to blood and urine tests, to be conducted under her direction in July and September 2002. The order itself adjourned the mother's application for suspension of contact to 18th December for half a day for further directions, with a hearing thereafter fixed for final determination in February 2002, with a time estimate of three days. Paragraph 7 of the order provided that in the interim the father should have indirect contact on the telephone weekly and by fax once a month. The court also directed that the father should tape the telephone calls made pursuant to that order.

12. The application for permission was filed with this court on 28th June which was, I take it, the last day for filing without an application for extension. Mr Mostyn Q.C. says that he did not apply to the judge for permission because he was well aware of the provisions of rule 52.3(2)(a) and (b). He says that he was also well aware of the advisory terms of Note 52.3.4-6. However, he says that he took his practice from a judgment in a case of Re O. Whatever may have been said by me in the case of Re O time has since passed, and this court has much wider experience of the operation of the system whereby applications for permission are sifted and decided.

13. I can say with complete confidence that, in the vast majority of cases, practitioners should follow the guidance contained in the notes to the rule and apply to the trial judge at the point of judgment. Applications that come direct to this court without prior application to the trial judge usually result from a hand down without attendance, followed by the discovery that the trial judge is either then sitting in crime or has gone away for annual leave. Of course, there will always be cases in which, either the client is not available to give instructions or the client having initially instructed counsel not to apply, then changes his or her mind and requires an application to be made. So there can be no absolute rule, nor any sanction applied to those who neglect to apply to the trial judge. However, it seems to me that, as a matter of practice, when a judgment is handed down by a judge of the Family Division in this building, the aggrieved party should consider in advance of the hand down fixture whether or not an application for permission is to be made and if the decision is to apply, then the application should be made at the hand down. The judge thereby has an opportunity to give on the requisite form his or her reasons for rejecting the application, the statement of which may be of some value to this court if the permission application is subsequently renewed.

14. In this appeal the paper application resulted in an order on 18th July for an oral hearing without notice. Unusually two hours were allowed for the application. In the event, the application listed on 12th September took something in the order of two and three quarter hours to determine. The order of the court on that day was the grant of permission, leading to the fixture before us on 21st October. In the interim, we have been told by Mr Mostyn that the appellant was admitted to the Priory Hospital on 7th October for treatment for his dependence on drink and perhaps prescribed drugs. He had a medical collapse on 14th October which led to his transfer, first to Kingston Hospital and then to St. Georges for angioplasty. Mr Mostyn informs us that that treatment has been successful and that his client has either returned to The Priory

or will do so at the conclusion of this appeal. I think I need only add, in terms of developments in the interim, that we have in the core bundle the transcript of the telephone calls attempted by the father in accordance with the direction of Wilson J. Those transcripts show a sad picture of continuing refusal on the part of JW to have any contact with his father.

15. The judge's task at the end of this relatively long trial was in one area simplified by the expert evidence. There could be no doubt that by May 2002 the father had significant liver damage caused by excessive drinking. Furthermore, in relation to the periods of staying contact in the United States, preceding the involvement of PT in this case, the husband eventually conceded in his oral evidence that he had indeed been drinking excessively. In relation to the prescribed antidepressant drug, it was conceded by counsel that he had been taking five tablets daily. Expert evidence established that two tablets a day was the normal dose and that five would impair judgment, concentration and coordination, an impairment that could be compounded by alcohol. The father admitted the ownership of handguns in the United States. The judge concluded that their possession, by a man often under the influence of drink and drugs, was a matter of great concern. As to the evidence from PT and a family maid that the father had had homosexual relationships, the judge made no finding, ruling that the issue was totally irrelevant. On a related charge that nude bathing with JW off Long Island amounted to exposure to or involvement in some homosexual coterie, the judge found only that the father had shown insufficient sensitivity to a child's awakening sexuality. Those findings disposed of the first issue in the case, namely the father's fitness and his conduct during past contact visits.

16. The second issue in the case was not settled by expert evidence. The issue was, what had caused JW's adamant refusal to stay with his father coupled with his angry condemnations? Had that development been induced by the mother and her family? The judge had no evidence from Dr. Peden whose report he excluded once the father had broken all his appointments. He considered that the assessment of Mr Mellor rested on too slight a knowledge of the background. He rejected the unequivocal view of the children and family reporter that JW had been led into rejecting his father by his mother and her family. He concluded his review of her work by saying that it had been "in a word, one sided." While devoting 16 pages of his judgment to reviewing the allegations against the father and the father's present condition, Wilson J does not specifically review the allegations against the mother. Such findings as he made on the father's allegations of alienation were largely to be found in the final section of the judgment, headed "Conclusions upon the real issue".

17. Before reviewing that section, it is convenient to record the submissions that we have had from Mr Mostyn QC for the father and Miss Parker QC for the mother. Mr Mostyn puts his case very high. He suggests that in March 2001 the mother seized on the malign intervention of PT as an instrument to terminate a necessity that she had always resented, namely her co-operation in contact arrangements. When the deployment of the allegations of drink, drugs and guns did not achieve more than reducing staying contact in America to supervised contact in England, she resorted to the trump card of inducing JW's renunciation of his father. He submitted that the vital area of judicial investigation was the child. What were JW's true wishes and feelings? Mr Mostyn relied on five European cases as establishing the proposition that the judge had to investigate such an issue directly. I cite two of those cases. Sahin v

Germany, Sommerfeld v Germany and Hoffmann v Germany are all conveniently grouped and here reported at [2002] 1 FLR 199. The court held in the first case that the local court's failure to hear the child breached the father's right to full involvement in the contact proceedings. I cite paragraphs 47 and 48 of the judgment:

> "In the court's opinion, the German courts' failure to hear the child reveals an insufficient involvement of the applicant in the access proceedings. It is essential that the competent courts give careful consideration to what lies in the best interest of the child after having had direct contact with the child. The Regional Court should not have been satisfied with the expert's vague statements about the risks inherent in questioning the child without even contemplating the possibility to take special arrangements in view of the child's young age."

The child in that case was 5. I continue the citation:

> "In this context, the court attaches importance to the fact that the expert indicated that herself she had not asked the child about her father. Correct and complete information on the child's relationship to the applicant as the parent seeking access to the child is an indispensable prerequisite for establishing a child's true wishes and thereby striking a fair balance between the interests at stake."

18. In the second case the court held that the local court's failure to order a psychological report on the possibilities of establishing contact revealed that the father had not been sufficiently involved in the decision making process. I cite from paragraph 43 of the judgment the following passage:

> "The court considers that, given the psychologist's rather superficial submissions in the first set of proceedings, the lapse of time and bearing in mind what was at stake in the proceedings, namely, the relations between a father and his child, the District Court should not have been satisfied with hearing only the child as to her wishes on the matter without having at its disposal psychological expert evidence in order to evaluate the child's seemingly firm wishes. Correct and complete information of the child's relationship with the applicant as the parent seeking access to the child is an indispensable prerequisite for establishing a child's true wishes and thereby striking a fair balance between the interests at state."

19. Finally, Mr Mostyn throws all his emphasis on the chronology of the emergence and growth of JW's antagonism. It is clearly established that

(a) supervised contact ended happily on 4th July;

(b) angry accusations of drink, drugs and guns were levelled on 27th July and 6th August;

(c) despite another period of successful supervised staying contact in August they revived with the new dimension of homosexuality on 23rd October. The father's

failings could not provide the explanation. The chronology could only be explained by the mother's deliberate indoctrination.

20. Miss Parker in response relied on the speech of Lord Nichols in Re H [1996] AC 563 as to the high standard of proof that serious allegations require. She relied also on the speech of Lord Hoffmann in Piglowska and Piglowski [1999] 1 WLR 1360, cautioning the appellate court from questioning the findings and discretionary conclusions of the trial judge. She offered us a comprehensive review of the evidence of the father's failings during US contact visits and generally, particularly from the evidence of his brother, niece and two former family retainers. She submitted that the alienation issue was essentially settled by the judge's findings as to the father's conduct. Finally, she submitted that the European decisions cited by Mr Mostyn added nothing to our own jurisprudence.

21. I turn to the judge's conclusions on what was undoubtedly the most difficult issue. (The difficulty has, if anything, deepened since the trial. The programme of indirect contact which the judge expected to sustain some relationship between father and son has proved arid.) The judge made two important assessments. Of PT he said:

> "It is hard to describe P in appropriately measured terms; for in truth he is utterly unscrupulous and deeply unpleasant. It is humbug for P to claim that his report to Mr Finlan about the father in March 2001 was born of concern for JW. It was part of a campaign of revenge and reflected his conviction that loss of contact with JW would hurt the father just as much as, or probably more than, any multi-million dollar lawsuit."

By contrast, of the mother he said:

> "P's malignity is obvious. But that the mother was malign was a charge which so distorted any proper overview of the case as almost to malign her."

22. From his section headed "Conclusions on the real issue", I can detect only the following. First, from paragraph 77:

> "The main difficulty is the father's growing problem with alcohol and drugs. ... The only solution, as he ultimately conceded in his oral evidence, is for the father to conquer the problem. ... That conquest probably means total abstinence at any rate from alcohol."

Second, he found that the mother was basically honest and certainly not malign. Third, he found that Mrs Cordwell's assessment of alienation was flawed and to be discounted. Fourth, he found that JW's hostile attitude was to be explained by five factors. Those factors are set out in paragraph 80 of his judgment, which is in many ways the most important paragraph for our understanding of the judge's assessment:

> "The crowning difficulty now lies in the hostile attitude of JW himself to the restoration of his relationship with the father. This presents an extraordinarily difficult problem which (it may be said) a judge with only legal qualifications is ill- equipped to resolve. I believe that JW's attitude is born of: (a) seeing the father in a bad condition in recent years; (b) blaming the father, to some extent

unfairly, for the taunting which so cut into him at school; (c) sensing the increasing anxieties of his mother and maternal grandparents both towards contact and indeed towards these protracted proceedings (a point conceded by Miss Parker) with the good judgment which is her trademark; (d) resenting the heavy pressure to engage in contact, applied particularly in October 2001; and (e) fearing that (as he would see it) some deranged judge would accede to the father's application that he should reside in the US with him or at least that he should attend some school in England other than P."

23. As to the what judge said in that paragraph, there are these difficulties: (a) the father's bad condition at contact dated back to the American visits after which there were no complaints. They were followed by successful supervised staying contact without hint of major difficulty until late July; (b) the taunting at school dated back to autumn 1999 and spring 2000; (c) the heavy pressure to engage in contact was the consequence of and not the prelude to JW's outbursts; (d) the father's application for a residence order was not issued until mid-November 2001. It was the complete breakdown of contact that impelled it.

24. I also see difficulty in what the judge has not said in this section of his judgment. Surely he should have addressed the prima facie case created by the chronology. Surely he should have considered whether the mother was the unwitting agent of P's malignity. Surely he should have considered whether the maternal family environment was a contributing factor. As Mr Mostyn has submitted, it is significant that JW's rejection of his father on 27th July and 6th August is explained by complaints of drink, drugs, guns and lies. While these complaints are repeated on 23rd October, the dominant theme of what Mrs Cordwell described as a mantra has become the charge of homosexuality.

25. Although Mr Mostyn fails to make good his high case, given the judge's findings as to the mother's good faith, he succeeds in his submission that the judge failed to address the issue of alienation sufficiently and to make sufficient findings on that issue. Miss Parker's survey of the long history of the father's failings during contact in America simply does not meet the emphatic point that all JW 's aggression and rejection emerge for the first time on 27th July, and then escalate significantly between 10th August and 23rd October. Her reliance on the case of Re H is inapt where the child's alienation is self-evident and the judge has the quasi-inquisitorial task to assess its origins. I reject her dismissive submission that the Strasbourg cases add nothing to the domestic jurisprudence. Those cases as they stand suggest that the methods and levels of investigation that our courts have conventionally adopted when trying out issues of alienation may not meet the standards that Articles 6 and 8 require. There are policy issues here that the government and the judiciary may need to consider collaboratively. Should judges see children to ascertain their wishes and feelings? If that is to become the norm, what training should judges receive? To what extent should separate representation be made available to the child at the heart of the case in private law proceedings? What services can CAFCASS be expected to provide in order to assist the forensic process to satisfy Convention standards? These European cases were not cited to the judge below. I do not in the present appeal found my conclusion upon them. The obligation to investigate the origins of alienation, rather than an allegation of malign alienation, in my judgment stems from our conventional domestic standards and not from higher standards arguably required by the cases cited

by Mr Mostyn. In fairness to the judge, he adjourned the mother's application for suspension of contact, with an exhortation to her and her family to work to restore contact. He posited the possibility of bringing in a mental health professional when he said:

> "There may well come a time, perhaps in December, when I will direct the parents to instruct a top London consultant child psychiatrist to see JW and the parents and report to the court."

That instruction was much more urgently required. This was an exceptionally serious breakdown in one of JW's vital relationships.

26. By the end of the case the judge had neither children and family reporter nor any mental health expert to guide him. Further, the terms of the judgment handed down might be understood or contended to limit the investigation of JW's alienation to the five factors advanced in paragraph 80 of the judgment. My conclusion is that Mr Mostyn has demonstrated a sufficiently serious deficiency in the judgment to warrant the success of the appeal. To allow the appeal on this ground is not to invalidate in any way the judge's finding that the mother's evidence was generally truthful and that she was far from malign.

27. There are lesser criticisms advanced by Mr Mostyn upon which I do not think it necessary to rule. This judgment is delivered under some pressure since the welfare of the child demands an earlier result than a fully reserved judgment would achieve. The conventional remedy is retrial. That is, however, in the circumstances of this case not a real option. Costs, inevitable delay and stress all militate against it. Further, the nature of the issue is in many respects more suitable for investigation by a mental health expert than by a judge. An expert is not confined by the walls of the court. He can visit the home and talk directly to JW and the relevant adults in whatever circumstances he thinks fit. He has the qualifications and the experience to perceive the underlying realities to which even the adults themselves may be blind.

28. I would set aside the directions laid down by the judge in the order of 21st June. I would direct the parties to settle immediately joint instructions to a consultant child psychiatrist to be agreed by them and approved by this court. I would direct the father to file within 14 days reports as to his treatment since admission on 7th October, his present condition and the prognosis for his immediate future. I would invite the President to arrange an early directions appointment before her or another judge of the Division nominated by her. The appointment must be fixed as soon as practicable and without reference to counsels' convenience. At that hearing the future course can be set. By then the expert's timetable must have been ascertained. Consideration can also be given to whether JW should be separately represented and whether there should now be disclosure of the dossier that the mother sent to Mrs Cordwell. As well as giving directions, the court can consider whether anything can be done to establish some positive communication between JW and his father. Mr Mostyn's submission that this court should immediately order JW to be brought to this building to be passed to the father for a period of staying contact, subject to supervision and safeguards, is manifestly unrealistic. His client's present treatment programme requires first priority and plainly precludes any immediate consideration of direct contact. Those are the reasons for which I would allow this appeal.

29. LORD JUSTICE RIX: I agree. Plainly, the judge rejected the father's case, which has been raised again on this appeal, that the mother had made a malign and ruthless attempt to alienate JW from the father and that there had been a "marriage of malignity" between the father's brother and the mother (see para 78 of his judgment). Rejection of such a case is not something which this court could overturn save perhaps in exceptional circumstances which are not present here. However, it is potentially consistent with the facts found by the judge and those mentioned by Thorpe LJ that the mother had, from what she may well have considered for herself to be the best of motives, and driven by her anxiety for JW, become the albeit subconscious instrument of the brother's malignity, a malignity which the judge found to be "obvious" (see para 78). The mother made use of the brother's evidence as part of her case for the suspension of contact. In one sense, seeing the high level at which the father's case was pitched, the judge cannot be blamed for rejecting that case and leaving it at that. But, as the judge has himself recognised, he plays a quasi-inquisitorial role. For the reasons therefore given by Thorpe LJ, I am satisfied that, for all the care which he gave to his decision, the judge erred in not giving proper expression to his conclusions on the question, so plainly raised by the facts and issues in this case, whether the mother had, even if prompted only at a subconscious level, nevertheless deliberately engaged in alienation. After all, his judgment was intended to be the platform for the future judicial supervision of contact.

30. I agree with the dispositions which my Lord has indicated.

31. LADY JUSTICE ARDEN: In this case the judge made no express finding that the mother was responsible for JW's alienation from his father in the period July to October 2001, although that allegation had formed a major plank in the father's case. On one reading of the judgment, the judge rejected the father's case that the mother alienated JW from his father. JW's hostility first emerged on 26 July 2001, the day before JW was due to go on supervised contact with his father. He refused to go on the day fixed and the judge found that the mother tried to persuade her son to go with the father. Such a finding is inconsistent with alienation by the mother (judgment, paragraph 28). On the next attempt at contact, on 6 August 2001, the judge made a specific finding that the mother had not set JW against the father (judgment, paragraph 31). Again, such a finding is arguably inconsistent with alienation by the mother.

32. On the next occasion fixed for access (29 August 2001), JW was unfit and the judge so found although he considered the case "borderline" (judgment, paragraph 33). The next occasion for access was 22 October 2001. Although the judge found that the mother told the nanny employed to supervise contact was that it would be "her worst week's work", the judge acquitted the mother of alienation (judgment, paragraph 78). He considered that the mother suffered from "wholly understandable anxiety" and that "her acute anxiety … has … in the event proved largely justified" about her son being left with his father, even if contact was supervised (judgment, paragraph 78). The judge gave a list of reasons for JW's alienation (judgment, paragraph 80). None of them included pressure by his mother or her family. The reasons did include the absorption by JW of the increasing anxieties of his mother and her family. Again, mere absorption of anxiety from his mother would arguably be a different explanation from alienation by the mother. As a separate point, as I read the judge's list of causes, he was speaking of JW's attitude at the date of the hearing and thus was justified in

referring to matters which had occurred after 26 July 2001, and before the date of the hearing and which could have caused his attitude to be maintained.

33. In addition, while the judge was satisfied that the father's brother, in making allegations about the father's condition, to the mother, had acted out of malignity, the judge expressly acquitted the mother of this (judgment, paragraph 78).

34. Another reading of the judgment is that the judge did not intend to make a finding on responsibility for alienation and intended to wait until he had seen a psychiatric report on the family instead. Although he made no direction for a psychiatric report, he gave an indication that he might be giving such a direction at the next hearing (judgment, paragraph 81(d), second judgment, paragraph 7). He took the view that in the meantime there was little that could be done. JW was about to change schools and would be going to a boarding school in September for the first time. The mother needed to recover from the stress of the hearing. The father needed time to take treatment for his drink and drugs problem (judgment, paragraph 81(b)). The father would have to meet with the psychiatrist and co-operate in a psychiatric investigation if a psychiatric report was to be produced and the father had been unwilling to do this in the past. The father still had indirect access to his son and if he wanted contact he could make use of that avenue, although there were practical difficulties organising telephonic contact when JW was at school and in the light of JW's hostility to him. The father seems to have made little use of indirect contact.

35. Another possibility is that the judge was unable to reach a conclusion as to the cause of JW's alienation. This was a course open to him (compare Rhesa Shipping v Edmonds [1985] 2 All ER 712). The findings on the mother's conduct and attitude do not exclude the possibility that she had deliberately alienated JW behind the scenes. It is to be noted that the judge did not accede to the mother's application to suspend contact. He merely adjourned it to a date in December 2002.

36. It seems to me that the judge was minded to reject the father's case on alienation (see, for example, judgment, paragraph 78, the second judgment, paragraph 5). If this was his view, in my judgment, he did so somewhat obliquely, and without either reasons which addressed the father's main case (that there was no other explanation for the sudden change in JW's attitude) or in a way which considered the evidence as a whole, rather than as a series of separate episodes. However, I do not consider it necessary to express a final view on the question whether or not the judge rejected the father's case on alienation. The fact is that, in the absence of a clear finding, one way or another, with essential reasoning directed to the principal issues as to whether the mother was actively responsible for JW's alienation, the position is obscure. The judge should have made the position clear. One course open to the parties after judgment was to have asked the judge to clarify the position. If they had done so that might have prevented the need for this appeal. Alternatively, this court of its own initiative or on application by the parties could have invited the judge to clarify the position, and, if he wished, to give any further reasons that he had at the time but did not clearly express.

37. Miss Judith Parker QC, for the respondent, drew the court's attention to English v Emery Reimbold & Strick Ltd [2002] EWCA Civ 605. In that case, this court considered the requirement for a judgment to give reasons. The principles laid down

in that case as to the need to give reasons apply, at least as a minimum, in these care proceedings, and accordingly, I set out the relevant passages in full. This court held:

> " As to the adequacy of reasons, as has been said many times, this depends on the nature of the case: see for example Flannery at page 382. In the Eagil Trust case, Griffiths LJ stated that there was no duty on a Judge, in giving his reasons, to deal with every argument presented by Counsel in support of his case:
> 'When dealing with an application in chambers to strike out for want of prosecution, a judge should give his reasons in sufficient detail to show the Court of Appeal the principles on which he has acted, and the reasons which led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge in giving his reasons to deal with every argument presented by Counsel in support of his case. It is sufficient if what he says shows the parties, and if need be the Court of Appeal the basis on which he acted … (see Sachs LJ in Knight v Clifton [1971] 2 AER 378 at 392-393, [1971] Ch.700 at 721).'" (p.122).

38. In our judgment, these observations of Griffiths LJ apply to judgments of all descriptions. But when considering the extent to which reasons should be given it is necessary to have regard to the practical requirements of our appellate system. A Judge cannot be said to have done his duty if it is only after permission to appeal has been given and the appeal has run its course that the court is able to conclude that the reasons for the decision are sufficiently apparent to enable the appeal court to uphold the judgment. An appeal is an expensive step in the judicial process and one that makes an exacting claim on judicial resources. For these reasons permission to appeal is now a nearly universal prerequisite to bringing an appeal. Permission to appeal will not normally be given unless the applicant can make out an arguable case that the Judge was wrong. If the judgment does not make it clear why the Judge has reached his decision, it may well be impossible within the summary procedure of an application for permission to appeal to form any view as to whether the Judge was right or wrong. In that event permission to appeal may be given simply because justice requires that the decision be subjected to the full scrutiny of an appeal.

39. It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the Judge reached his decision. This does not mean that every factor which weighed with the Judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the Judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon.

40. The first two appeals with which we are concerned involved conflicts of expert evidence. In Flannery Henry LJ quoted from the judgment of Bingham LJ in Eckersley v Binnie 1988) 18 Con L.R. 1 at 77-8 in which he said that 'a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a

coherent reasoned rebuttal'. This does not mean that the judgment should contain a passage which suggests that the judge has applied the same, or even a superior, degree of expertise to that displayed by the witness. He should simply provide an explanation as to why he has accepted the evidence of one expert and rejected that of another. It may be that the evidence of one or the other accorded more satisfactorily with facts found by the Judge. It may be that the explanation of one was more inherently credible than that of the other. It may simply be that one was better qualified, or manifestly more objective, than the other. Whatever the explanation may be, it should be apparent from the judgment.

41. When giving reasons a Judge will often need to refer to a piece of evidence or to a submission which he has accepted or rejected. Provided that the reference is clear, it may be unnecessary to detail, or even summarise, the evidence or submission in question. The essential requirement is that the terms of the judgment should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the Judge's decision."

42. Thus, where the English case applies, perfection is not required of the judge. The test is pragmatic, and depends on the nature of the case. But the bottom line is that the essential findings and reasoning must be clear. It is on the basis of the English case that I reached the conclusion expressed in the last paragraph of this judgment with respect to the principal issue relied on by the father, namely alienation by the mother. This is not a case where there is any additional obligation due to the fact that these are care proceedings.

43. In the same case, this court also considered whether it was appropriate for a judge to be invited to amplify his reasons:-

"Amplification of reasons

44. In Flannery at p383 the Court made two suggestions with a view to preventing unnecessary appeals on the ground of the absence of reasons. It suggested that one remedy open to the appeal court would be to remit the matter to the trial Judge with an invitation or requirement to give reasons. In Flannery this was not considered appropriate because more than a year had passed since the hearing. The delay between hearing and appeal will normally be too long to make a remission to the trial Judge for further reasons a desirable course. The same is not true of the position shortly after judgment has been given.

45. The other suggestion made by the Court in Flannery was that the respondent to an application for permission to appeal on the ground of lack of reasons should consider inviting the Judge to give his reasons, and his explanation as to why they were not set out in the judgment, in an affidavit for use at the leave hearing if leave be granted.

46. We are not greatly attracted by the suggestion that a Judge who has given inadequate reasons should be invited to have a second bite at the cherry. But we are much less attracted at the prospect of expensive appellate proceedings on the ground of lack of reasons. Where the Judge who has heard the evidence has based a rational decision on it, the successful party will suffer an injustice if that decision is appealed, let alone set aside, simply because the Judge has not included in his judgment adequate reasons for

his decision. The appellate court will not be in as good a position to substitute its decision, should it decide that this course is viable, while an appeal followed by a re-hearing will involve a hideous waste of costs.

47. Accordingly, we recommend the following course. If an application for permission to appeal on the ground of lack of reasons is made to the trial Judge, the Judge should consider whether his judgment is defective for lack of reasons, adjourning for that purpose should he find this necessary. If he concludes that it is, he should set out to remedy the defect by the provision of additional reasons refusing permission to appeal on the basis that he has adopted that course. If he concludes that he has given adequate reasons, he will no doubt refuse permission to appeal. If an application for permission to appeal on the ground of lack of reasons is made to the appellate court and it appears to the appellate court that the application is well founded, it should consider adjourning the application and remitting the case to the trial Judge with an invitation to provide additional reasons for his decision or, where appropriate, his reasons for a specific finding or findings. Where the appellate court is in doubt as to whether the reasons are adequate, it may be appropriate to direct that the application be adjourned to an oral hearing, on notice to the respondent.

The approach of the appellate court

48. Where permission is granted to appeal on the grounds that the judgment does not contain adequate reasons, the appellate court should first review the judgment, in the context of the material evidence and submissions at the trial, in order to determine whether, when all of these are considered, it is apparent why the Judge reached the decision that he did. If satisfied that the reason is apparent and that it is a valid basis for the judgment, the appeal will be dismissed. This was the approach adopted by this Court, in the light of Flannery in Ludlow v National Power plc 17 November 2000 (unreported). If despite this exercise the reason for the decision is not apparent, then the appeal court will have to decide whether itself to proceed to a rehearing, or to direct a new trial."

49. The English case was not of course a decision in care proceedings in the Family Division, which unlike normal civil litigation have a quasi-inquisitorial nature (see the judgment of Wilson J in Re L [2001] 1 WLR 100). However, I do not see why the principle that a judge might be invited to amplify his reasons if they are not clear should not equally apply in such proceedings too. Mr Nicolas Mostyn QC, for the appellant, did not suggest that the decision of this court in English had no application to this case.

50. In a complex case, it might well be prudent, and certainly not out of place, for the judge, having handed down or delivered judgment, to ask the advocates whether there are any matters which he has not covered. Even if he does not do this, an advocate ought immediately, as a matter of courtesy at least, to draw the judge's attention to any material omission of which he is then aware or then believes exists. It is well-established that it is open to a judge to amend his judgment, if he thinks fit, at any time up to the drawing of the order. In many cases, the advocate ought to raise the matter with the judge in pursuance of his duty to assist the court to achieve the overriding objective (CPR 1.3, which does not as such apply to these proceedings); and in some cases, it may follow from the advocate's duty not to mislead the court that

he should raise the matter rather than allow the order to be drawn. It would be unsatisfactory to use an omission by a judge to deal with a point in a judgment as grounds for an application for appeal if the matter has not been brought to the judge's attention when there was a ready opportunity so to do. Unnecessary costs and delay may result. I should make it clear that there are general observations for assistance in future cases, and that I make no criticisms of Counsel in this case.

51. The judge was well aware of the desirability of contact between JW and his father being restored. At paragraph 76 of his judgment, the judge said

> "I am convinced that it is in JW's interest that his relationship with the father is somehow restored. Close links with both sides of a child's family are valuable for him during childhood and to take into adult life. Only in rare cases, of which this is not one, is that proposition displaced by other considerations. On the contrary, this father has in principle the capacity to make a contribution to JW's life which is well above average in terms of love, support, commitment and creative benevolence."

52. That was a strong finding which was re-affirmed in paragraph 81(c) and (d) of the judgment, which is significant also because it contains an exhortation against alienation to the mother and her family:-

"(c) I hope that at the hearing in December it will be possible for one to order, whether by agreement or otherwise, limited face-to-face contact on one or two occasions in the succeeding weeks. Its success or otherwise will be surveyed at the hearing in about February 2003, at which I hope to chart a fuller and longer programme for face-to-face contact.

(d) How is JW to be brought to look more positively at a restoration of contact? There may well come a time, perhaps in December, when I will direct the parents to instruct a top London consultant child psychiatrist to see JW and the parents and report to the court; prior to that hearing the father should nominate three such psychiatrists, of which either the mother or I may choose one. But it would be wrong to burden JW with exposure to another professional at this stage, so soon after exposure to Mrs Cordwell and Dr Peden. For the time being I confine myself to this exhortation to the mother, to Mr Finlan and to Mr Hargreaves (to each of whom the mother is at liberty indeed is requested to show a copy of this judgment): please accept this judgment; accept that the issue of the father's contact with JW will not evaporate and that it will be far better for JW and your family if ultimately it can be resolved or partly resolved by agreement; and do your best during the next six months gently to inculcate in JW a realisation not only that he will resume contact with the father but that you consider it right that he should do so. The mother should file statements from Mr Finlan and Mr Hargreaves in respect of these matters prior to the hearing in December and they should attend the hearing in about February. "

53. The judge took the view that it was unwise to take any step to re-establish direct contact in the immediate future because of the father's illness, the stress which the proceedings had had on the mother and the fact that JW was about to change schools and go to a boarding school for the first time. In my judgment, this was a decision which he was entitled to make (see G v G [1985] 1 WLR 647). Mr Mostyn submits

that if the judge had felt unable on the evidence placed before him by the parents to come to a conclusion one way or the other as to responsibility for alienation, and the judge was not reminded to re-establish immediate direct contact, there should have been an order for a psychiatric report instead. There are some possible objections to this. JW had been subjected to several meetings with psychologists and court welfare officers, including Dr Peden, Mr Mellor and Mrs Cordwell. The preparation of a psychiatrist report would probably have involved the co-operation of the father and there would be some question whether the father would be able to do this as well as undergo the treatment for drink and drugs which he was expected to undergo in that period. He had failed to co-operate with Dr Peden. For my part I do not consider that the appellate court can form a view on these points, nor can they form a valid criticism of the judge to whom it appears such an application was not made.

54. The judge saw the real issue in this case to be the fitness of the father to undertake even supervised contact with his son (judgment, paragraph 77). The judge did not think that the father, in his present condition, was capable of participating properly even in supervised contact in the longer term. A nanny could only "guard (JW's) safety to some extent" (judgment, paragraph 78). As the judge had the advantage of seeing the witnesses, in my judgment, it was open for him to decide that a period should be allowed to the father to put his house in order before contact was resumed (judgment, paragraph 81(d)). His doubts about the father were not wholly misplaced since it was only in the days leading to this appeal that the father started treatment for his alcohol problem. In my judgment, what the judge was intending to do was to allow time for the father to demonstrate his commitment and then to revisit the matter at the adjourned hearing in December 2002.

55. Was the failure of the judge to make a finding in favour of the father on responsibility for alienation perverse? The father says that the only explanation for JW's recent hostility can be alienation by the mother. In my view that goes too far. I agree that an inference of parental alienation must arise with some force from the fact that JW started making allegations against his father on 26 July 2001 and used the adult term "homosexual" when the matter said to be distressing him had come to his knowledge some time before, and other matters, in particular the report prepared by Mrs L Cordwell, children and family reporter, and the advice of Mr J Mellor, senior children and family reporter. (Mrs Cordwell gave evidence before the judge and Mr Mellor gave evidence at the earlier hearing before Johnson J). However, it does not follow that his mother had caused him to be alienated from his father. For instance, the teasing at school (which started in 2000) could have gone on and had caused him increased distress. He had virtually no friends at school and his school work was poor. Moreover, if the position was as clear as Mr Mostyn suggests, I cannot see any reason why the judge would not have said that he was satisfied that the mother was responsible for JW's alienation. It must be an exceptional case for this court to reject an actual finding of fact (Piglowska v Piglowski [1999] 1 WLR 360) and the same approach should in my judgment inform this court's approach for the absence of such a finding. In all the circumstances, I do not think that it would be right for this court to conclude that there was no conclusion that the judge could reasonably have reached other than that the mother had deliberately caused the alienation.

56. However, as I have concluded that the judge failed to make a finding or sufficiently reasoned finding on alienation by the mother or to make it clear that he was not making such a finding, I consider that this appeal should be allowed.

57. I should like to add this postscript. JW's alienation from his father is worrying. As the judge recognised, it is important that it should be addressed as soon as possible. Obviously the matter will have to be considered by the judge to whom this matter is now remitted but it is to be hoped that conditions can be devised so that contact can be restored between JW and his father as soon as possible. There will be an opportunity at that hearing to address a separate point, which has not been raised on this appeal, as to the representation of JW in these proceedings. The interests of JW are paramount (Children Act 1989, section 1). These proceedings have now become a dispute between JW's parents, and in that dispute many allegations and cross-allegations have been made of a very personal nature, which must inevitably cause great hurt and emotion. I have no doubt that the judges of the Family Division have great experience of this situation, but it may be that in these special circumstances and given the evident ability of the parents to pay for that representation, consideration should be given for JW to be separately represented. This may be a way, in the particular circumstances of this case, in which the wishes of JW can be ascertained in accordance with the recent jurisprudence of the European Court of Human Rights on article 8 of the Convention.

58. I agree with what has fallen from my Lord, Lord Justice Thorpe, that where a judgment is handed down by a judge of the Family Division sitting in the Royal Courts of Justice, the application for permission to appeal should be made to him or her. In my judgment, the same practice should also, where possible, be followed in the case of unreserved judgments. In my experience that is the practice normally followed in the Chancery Division of the High Court. That practice has the advantage that, if an advocate is not clear about the judge's findings or his reasons on a material matter, the advocate can immediately raise the matter with the judge. I do not think that often happens but the advocate must be alive to that possibility as it may well save time and costs later. For the reasons given in writing I, too, would allow the appeal.

Order: appeal allowed; no order for costs in this court or in the court below.