

REQUIREMENTS FOR JUDGMENTS IN CARE ORDER DECISIONS IN 8 COUNTRIES

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Introduction

The overview is organized in two parts. First part is a brief overview of the content of a written judgment in eight countries under study: Austria, England, Estonia, Finland, Germany, Ireland, Norway, and Spain. Second part is a detailed overview of sources.

The brief is based on desk research conducted in August 2019, with the input and feedback from country experts.¹ The research is based on the legislation in force as of September 2019 (where possible, reference is made to the translations of legislation), as well as the book *Child Welfare Removals by the State: A Cross-Country Analysis of Decision-Making Systems* (International Policy Exchange, Oxford University Press 2017) edited by Burns, Pösö and Skivenes.

Part I

The purpose of this brief is to establish what information we can expect to be present in written judgements about a care order in Austria, England, Estonia, Finland, Germany, Ireland, Norway, and Spain. We examine the formal requirements for a written judgement and especially wish to identify the requirements for justifying a decision. For instance, the main goal of the justification (reasoning, grounding) of judicial decisions may be to show how the decision was reached, to demonstrate the conformity of decisions with applicable legal norms, to show their compliance with the values underlying that legal system (see e.g. Aarnio 1983; Spaak 2003; Anderson 2013; Bernal 2013).

Six out of the eight countries have obligatory written judgments in care order cases and require that these judgments are justified. The exceptions are England and Ireland. The level of detail required in the justification differs between the countries: some impose only a general obligation, while others specify which elements the courts have to consider and include in the justification of the judgment. The current analysis looks only at written legal requirements and thus disregards legal theory or conventions that might also guide how judgements are justified in practice. We address this in another brief.

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Table 1 contains a summary of the formal requirements of written judgements by country. Each of the headings represents an element of justification required by the laws of one or more countries. We have organised them in the order courts typically analyse the cases – starting from the facts and ending with the assessment of the former elements. Justifying a care order requires first and foremost *an obligation* to give reasons (or grounds) of a decision. Some countries require that these reasons show, which were the decisive facts and evidence of the case, court’s statements relating to the different claims of the parties, listing central applicable legal provisions applicable to the facts, and the assessment of the above elements by the court. We have marked whether it is a formal, legal requirement, that the following elements should be included in the court’s justification:

1. *Obligatory reasoning – obligation to provide reasons for the decision.*
2. *Facts and evidence – an obligation to show, which were the relevant facts and evidence for the decision;*
3. *Requests of the parties – assessment of the central claims of the parties relevant for the dispute;*
4. *Legal grounds – legal norms which guided the decision; assessment;*
5. *Assessment of the facts in the light of legal norms.*

The ranking is based on simple reasoning that the more elements of justification are obligatory, the more comprehensive we can expect the reasoning and the information in the judgment to be.

Table 1: Elements of justification as required by the national legislation. Country ranking.

Country	Obligatory reasoning	Facts & evidence	Requests of the parties	Legal grounds	Assessment	Rank
Norway	Yes	Yes	Yes	Yes	Yes	1
Austria	Yes	Yes	Yes		Yes	2
Spain	Yes	Yes		Yes	Yes	2
Finland	Yes	Yes			Yes	4
Germany	Yes	Yes		Yes		4
Estonia	Yes	Yes		Yes		4
England						7
Ireland						7

Part II

Two out of the eight countries (England and Ireland) represent common law systems, where the legal tradition has great importance, four countries represent Continental-European legal systems with centrally codified legislation, and two of the countries represent Nordic legal systems.

We have identified three levels of legal requirements relevant for the current study: 1) procedural legislation governing family law cases, 2) care order-specific formal requirements, and 3) practice guidelines and legal conventions that are not formally binding.

The summary presented in Table 1 shows the key formal requirements as present in the legislation or written tradition of each country. It includes the following characteristics:

- 1) the type of decision-making body (court or other bodies);
- 2) whether the care order decision has to be in a written form;
- 3) whether the law or practice guidelines specify a format for such judgments;

- 4) whether such a decision has to include information on the previous procedures;
- 5) whether the decision has to indicate central claims of the parties;
- 6) whether the decision has to provide relevant facts and evidence;
- 7) whether the court has to provide reasons for the decision;
- 8) whether the final resolution has to be included in the decision;
- 9) whether the court can refer to the documents without describing the exact content of them;
- 10) whether some of the decision-makers may write a dissenting opinion to the judgment;
- 11) whether there is a separate care order that the court adopts

Table 1: Summary of formal requirements of the care orders in 8 countries

Country	Decision-making body	Obligatory written form	Formal req.	Previous procedure	Claims of the parties	Facts and evidence	Reasons	Resolution	References to documents	Dissent	Separate care order
Austria	District Court	Yes	Legislation	-	Yes	Yes	Yes	Yes	-	No	-
England	Family Court	No	Practice*	-	-	-	Yes*	-	-	No	Yes
Estonia	District Court	Yes	Legislation	-	Yes	Yes	Yes	Yes	-	No	-
Finland	Administrative Courts	Yes	Legislation	Yes	Yes	Yes	Yes	Yes	Yes	Yes	-
Germany	Family Court	Yes	Legislation	-	Yes	Yes	Yes	Yes	-	No	-
Ireland	District Court	No	Practice	-	-	-	-	Yes	-	-	Yes
Norway	County Social Welfare Board	Yes	Legislation	Yes	Yes	Yes	Yes	Yes	-	Yes	
Spain	Tutelage Commission	Yes	Legislation	-	-	Yes	Yes	Yes	-	No	-

* - the requirement has a limited extent.

Country profiles

In this section, we provide a summary for each country based on their national legislation.

Austria

The necessary procedural steps and the content of the judgments in family law matters are regulated in the Non-Contentious Proceedings Act (NCPA),² and in matters not regulated therein, the Austrian Code of Civil Procedure (CCP)³ applies.

According to s. 36 NCPA, the written form is obligatory for such decisions; however, the court can make interim and partial decisions when necessary. The written decision has to be sent to all the parties to the proceedings (s. 38). According to s. 417 CCP and s. 39 NCPA, a written judgment contains:

1. the name of the court and the names of the judges who contributed to the decision
2. the names, occupation, place of residence, party status, and the date and place of birth of the parties, as well as the names of their representatives;
3. the verdict;
4. the reasons for the decision.

The reasons for the decision summarise the main arguments and the claims of the parties, the substance of the dispute, facts of the case, the assessment of the evidence and the legal assessment. Admissible and inadmissible arguments, as well as admissible evidence, must be stated in the judgment. However, when the parties agree with the decision, the statement of reasons may be waived (s. 39(4) NCPA).

Estonia

The form and substance of the orders in non-contentious procedures (including orders relating to parental rights and adoption) is regulated in the Code of Civil Procedure⁴ (CCP). Section 478(2) CCP provides that all orders in parental rights and adoption cases have to be in written form and reasoned. The written orders have to include the following information (s. 465 CCP):

- 1) the name of the court which made the order and the names of the judge and judicial clerk;
- 2) the time and place of making the order;
- 3) the number of the case;
- 4) the names of the participants in the proceedings and their representatives, if the participants in proceedings can be determined at the time the order is made;
- 5) the object of proceedings in which the order is made;
- 6) the object of the order;
- 7) the conclusion, and the procedure and term for appeal;
- 8) the reasons on the basis of which the court reached its conclusions; reference to the legislation according to which the court acted.

England

There is no primary law regulating the format or formal requirements of care order judgments in England. There is also no obligatory written form for the judgments, and thus, written judgments are available only at the discretion of the judge.

² <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20003047> (accessed 4 September 2019).

³ <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001699> (accessed 4 September 2019).

⁴ <https://www.riigiteataja.ee/en/eli/512042019002/consolide> (accessed 4 September 2019).

English family court procedure is partially regulated by written legal tradition that is summarised in the Practice Directions. Practice Direction 12A⁵ sets out the order of different stages of the process of the care order proceedings. Furthermore, standardised forms exist in the English legal system that have to be submitted by the applicants in the case, as well as the care order format.⁶

There are a number of Practice Directions that govern different types of proceedings, some of which include more precise instructions relating to the format of the judgments. For instance, the Practice Direction 12J⁷ regulates child protection arrangements relating to domestic abuse and harm and in section 40 provides that the court should always make clear how its findings on the issue of domestic abuse have influenced its decision on the issue of arrangements for the child. In particular, where the court has found domestic abuse proven but nonetheless makes an order which results in the child having future contact with the perpetrator of domestic abuse, the court must always explain why it takes the view that the order which it has made will not expose the child to risk of harm and is beneficial for the child.

Finland

The form and obligatory substance of administrative judgments in Finland is regulated by the Administrative Judicial Procedure Act (AJPA, 586/1996).⁸ Such decisions have an obligatory written form, and they have to be reasoned both on factual and legal grounds.

According to Section 54 of the Act, the decision has to contain:

- 1) the name of the court and the date of the decision;
- 2) parties to the proceedings and the application made by the social services;
- 3) to the extent necessary, an account of the course of previous proceedings;
- 4) an account of the claims of the parties and, to the extent necessary, the grounds on which they are based;
- 5) to the extent necessary, an account of the evidence given in the matter;
- 6) a statement of reasons indicating which facts and evidence have affected the decision and on which grounds it is based, and the final resolution;
- 7) the names of the persons participating in the decision-making and notification of a vote taken, or the dissenting opinion, which is appended to the decision.

The elements of the decision described above can be fully or partially replaced with copies or extracts of the application from social services, provided that this does not affect the clarity of the decision.

Germany

The form and obligatory substance of judgments in family law matters is regulated by the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (FamFG),⁹ while the German Code of Civil Procedure¹⁰ (ZPO) applies to issues that are not specifically regulated in the FamFG. Section 38 FamFG and s. 313 ZPO provide the form and content of the judgment:

⁵ https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_12a (accessed 4 September 2019)

⁶ See e.g. <https://formfinder.hmctsformfinder.justice.gov.uk/c110a-eng.pdf> (accessed 4 September 2019)

⁷ https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_12j (accessed 4 September 2019)

⁸ As of 1 January 2020, this act is replaced by a new Administrative Judicial Procedure Act (808/2019). In Finnish: <https://www.finlex.fi/fi/laki/ajantasa/1996/19960586>; as there have been no amendments to the Section 54, the English translation of the Act of the Section 54 is available at:

https://www.finlex.fi/en/laki/kaannokset/1996/en19960586_20150891.pdf (Both accessed 4 September 2019).

⁹ <https://www.gesetze-im-internet.de/famfg/index.html> (accessed 4 September 2019)

¹⁰ <https://www.gesetze-im-internet.de/zpo/>; in English: https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html (accessed 4 September 2019)

1. Names and legal positions of the parties, their legal representatives;
2. The designation of the court and the names of the judges contributing to the decision;
3. The date on which the court proceedings were declared terminated;
4. The operative provisions of a judgment;
5. The merits of the case;
6. The grounds and reasons on which a ruling is based.

Family law judgments concerning parentage or custody issues have to include the grounds for the decision. The section addressing the facts and merits of the case has to summarise the demands and claims of the parties together with the evidence provided. The details of the circumstances and facts, as well as the status of the dispute thus far are to be included by reference to the written pleadings, the records of the hearings, and other documents. The reasoning of the judgment should contain a summary of the considerations of the facts and circumstances of the case and the legal aspects on which the decision is based.

Ireland

There is no legislation regulating the format or formal requirements of care order judgments in Ireland.

Irish legal tradition is available in written Family Practice Directions provided by the High Court. The procedure followed in family law proceedings is regulated in the Family Practice Direction (HC51).¹¹ Furthermore, there are District Court Rules adopted by the District Court Rules Committee that relate to children in care: S.I. No. 469/2008 - District Court (Child Care) Rules 2008;¹² S.I. No. 5 of 2006 - District Court (Children) Rules 2006;¹³ S.I. No. 93/1997 – District Court Rules, 1997, Order 84 on Child Care;¹⁴ and S.I. No. 143/2015 - District Court (Child Care) Rules 2015.¹⁵ These rules regulate the forms, procedures and documents required during care order proceedings, but do not regulate the form of the final judgments.

In the Irish legal system, there is a separate document for a care order. The form 84.400 on Care Order¹⁶ provides a format for the care order and mentions the following elements:

- a) The case number, court, date and judge;
- b) Parties to the proceeding;
- c) Statement of hearing the evidence;
- d) Statement on the need for protection of the child;
- e) Orders of the Court, including, when necessary, dates these orders are in force;
- f) Directions of the Court.

Norway

According to section 7-19 Child Welfare Act (CWA)¹⁷ of Norway, the procedure in the county Social Welfare Boards follows the civil procedure as set out in the Civil Procedure Act (CPA).¹⁸

Section 19-6 CPA provides that the ruling has to be in a written form and include:

- 1) The name of the court, time and place of the proceedings, parties and the court reference number.
- 2) The ruling is in writing and signed by the members of the board.

¹¹ <http://revisedacts.lawreform.ie/eli/1991/act/17/revised/en/html#PARTIV> (accessed 4 September 2019)

¹² <http://www.irishstatutebook.ie/eli/2008/si/469/made/en/print> (accessed 4 September 2019)

¹³ <http://www.irishstatutebook.ie/eli/2006/si/5/made/en/print> (accessed 4 September 2019)

¹⁴ <http://www.irishstatutebook.ie/eli/1997/si/93/made/en/print> (accessed 4 September 2019)

¹⁵ <http://www.irishstatutebook.ie/eli/2015/si/143/made/en/print> (accessed 4 September 2019)

¹⁶ <http://www.courts.ie/rules.nsf/53bd32841fc5bbf280256d2b0045bb5d/72a65525facd27258025763c003cfae6?OpenDocument> (accessed 4 September 2019)

¹⁷ <https://www.regjeringen.no/en/dokumenter/the-child-welfare-act/id448398/> (accessed 4 September 2019)

¹⁸ <https://lovdata.no/dokument/NLE/lov/2005-06-17-90> (accessed 4 September 2019)

- 3) The ruling state whether it is unanimous. If there are dissenting votes, the ruling states who dissents and the issues to which the dissent relates.
- 4) The judgment has to be grounded. The grounds shall include:
 - a. a presentation of the case,
 - b. the parties' prayers for relief and the grounds upon which the prayers for relief are based, and
 - c. the assessment of the court.
- 5) The description of the case and the grounds upon which the prayers for relief are based contain a brief account of the legal issue that is the subject matter of the action, the background to the case and the parties' legal and factual arguments to the extent necessary to explain the ruling. The court hereafter gives an account of its assessment of the evidence and the application of law upon which the ruling is based.
- 6) Judgments and interlocutory orders shall contain a conclusion that accurately state the outcome of the ruling that is made.

Spain

Formal requirements of care order decisions are regulated in the Spanish Civil Code¹⁹ and further specified in the Organic Act 1/1996.²⁰

Section 172(1) of the Civil Code requires that the decisions relating to care are formalised in an administrative resolution. It further requires that such resolution includes the reasons for the intervention and effects of the decision adopted. Section 2(5)(d) of the Organic Act 1/1996²¹ further specifies that any decision adopted in child welfare includes in its reasoning the criteria used, the elements applied for weighting the criteria against each other, and any other present or future interest, and procedural guarantees observed.

¹⁹ Código Civil (Spanish Civil Code) (Spain 24071889), <https://www.boe.es/buscar/pdf/2015/BOE-A-2015-8470-consolidado.pdf> (accessed 25 September 2019).

²⁰ Protección Jurídica del Menor (Legal Protection Of Children And Young People) BOE 15 1996 (Spain 1501996).

²¹ <https://www.boe.es/buscar/act.php?id=BOE-A-1996-1069> (accessed 4 September 2019)