

Remote final hearings and fact-finding hearings: the arguments for and against

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1. ‘The Road Ahead’ – McFarlane P – 9th June 2020

- Social distancing restrictions are likely to remain for many months
- It is unlikely that anything approaching a return to the ‘normal’ court environment will be achieved before the end of 2020 or even Spring 2021
- The Family Court must now seek to achieve the fair, just and timely determination of a high volume of cases with reduced resources in ‘sub-optimal’ court settings
- **Adjourning the case to await a full face-to-face hearing is unlikely to be an option.** The court must identify those issues and applications that need to be heard and then move on to determine them. (para 45)
- The Judge is engaged in an ordinary case management exercise to which the Overriding Objective applies
- **Parties will not be allowed to litigate every issue and present extensive oral evidence or oral submissions;** an oral hearing will encompass only that which is necessary to determine the application before the court. (para 46)
- **Have regard to the “Covid case management checklist”** - a one stop shop (page 12 para 49)
- P also suggests having regard to “Best Practice” section 6 of the Family Justice Observatory’s recent report (May 2020)
https://www.nuffieldfjo.org.uk/app/nuffield/files-module/local/documents/nfjo_remote_hearings_20200507-2-.pdf

Private and public children guidance

2. ‘The Remote Access Family Court’ – Macdonald J - 16th April update (v4)
3. ‘Communication’ from LCJ, Master of the Rolls & the President – 9th April
 - Indicators to assist Judges deciding which cases might/might not be undertaken remotely
 - N.B. This “does not amount to official guidance and is not intended to be directive”

Private and public children case law

4. Re EK (A Child) [2020] EWFC 25 - 2nd April
 - Mostyn J – contested care hearing conducted via Skype

- Dispute centred on welfare analysis and final care plan. Care and placement orders were made. Oral evidence heard from 5 witnesses
- Mostyn J commented at [5]: “Plainly, for as long as this emergency continues this will be the only way in which the majority of cases can be heard. It is reassuring that notwithstanding the national shutdown the wheels of justice have been enabled to turn”.

5. The President in *Re P (A Child remote hearing)* [2020] EWFC 32 – 16th April

At [24]: “The decision whether to hold a remote hearing in a contested case involving the welfare of a child is a particularly difficult one for a court to resolve. A range of factors are likely to be in play, each potentially compelling but also potentially at odds with each other.

The need to maintain a hearing in order to avoid delay and to resolve issues for a child in order for her life to move forward is likely to be a most powerful consideration in many cases, but it may be at odds with the need for the very resolution of that issue to be undertaken in a thorough, forensically sound, fair, just and proportionate manner.

The decision to proceed or not may not turn on the category of case or seriousness of the decision, but upon other factors that are idiosyncratic of the particular case itself, such as the local facilities, the available technology, the personalities and expectations of the key family members and, in these early days, the experience of the judge or magistrates in remote working. It is because no two cases may be the same that the decision on remote hearings has been left to the individual judge in each case, rather than making it the subject of binding national guidance.”

6. The Court of Appeal (the President, Peter Jackson LJ and Nicola Davies LJ) followed with the marginally more recent judgment of *Re A (Children) (Remote Hearing: Care and Placement Orders)* [2020] EWCA Civ 583 – 22nd April

At [3]: “Against that background we wish to stress the following cardinal points with the utmost emphasis:

- i) The decision whether to conduct a remote hearing, and the means by which each individual case may be heard, are a matter for the judge or magistrate who is to conduct the hearing. It is a case management decision over which the first instance court will have a wide discretion, based on the ordinary principles of fairness, justice and the need to promote the welfare of the subject child or children. An appeal is only likely to succeed where a particular decision falls outside the range of reasonable ways of proceeding that were open to the court and is, therefore, held to be wrong.

ii) Guidance or indications issued by the senior judiciary as to those cases which might, or might not, be suitable for a remote hearing are no more than that, namely guidance or illustrations aimed at supporting the judge or magistrates in deciding whether or not to conduct a remote hearing in a particular case.

iii) The temporary nature of any guidance, indications or even court decisions on the issue of remote hearings should always be remembered. This will become all the more apparent once the present restrictions on movement start to be gradually relaxed. From week to week the experience of the courts and the profession is developing, so that what might, or might not, have been considered appropriate at one time may come to be seen as inappropriate at a later date, or vice versa. For example, it is the common experience of many judges that remote hearings take longer to set up and undertake than normal face-to-face hearings; consequently, courts are now listing fewer cases each day than was the case some weeks ago. On the other hand, some court buildings remain fully open and have been set up for safe, socially isolated, hearings and it may now be possible to consider that a case may be heard safely in those courts when that was not the case in the early days of 'lockdown'.

7. At [9-10] the President continued:

“9. The factors that are likely to influence the decision on whether to proceed with a remote hearing will vary from case to case, court to court and judge to judge. We consider that they will include:

- i) The importance and nature of the issue to be determined; is the outcome that is sought an interim or final order?
- ii) Whether there is a special need for urgency, or whether the decision could await a later hearing without causing significant disadvantage to the child or the other parties;
- iii) Whether the parties are legally represented;
- iv) The ability, or otherwise, of any lay party (particularly a parent or person with parental responsibility) to engage with and follow remote proceedings meaningfully. This factor will include access to and familiarity with the necessary technology, funding, intelligence/personality, language, ability to instruct their lawyers (both before and during the hearing), and other matters;
- v) Whether evidence is to be heard or whether the case will proceed on the basis of submissions only;

- vi) The source of any evidence that is to be adduced and assimilated by the court. For example, whether the evidence is written or oral, given by a professional or lay witness, contested or uncontested, or factual or expert evidence;
- vii) The scope and scale of the proposed hearing. How long is the hearing expected to last?
- viii) The available technology; telephone or video, and if video, which platform is to be used. A telephone hearing is likely to be a less effective medium than using video;
- ix) The experience and confidence of the court and those appearing before the court in the conduct of remote hearings using the proposed technology;
- x) Any safe (in terms of potential COVID 19 infection) alternatives that may be available for some or all of the participants to take part in the court hearing by physical attendance in a courtroom before the judge or magistrates.

10. It follows from all that we have said above that our judgment on this appeal should be seen as being limited to the determination of the individual case to which it relates. Each case is different and must be determined in the light of its own specific mixture of factors. The import of the decision in this case, in which we have held that the appeal must be allowed against a judge's decision to conduct a remote hearing of proceedings which include applications for placement for adoption orders, is that, on the facts of this case, the judge's decision was wrong. As will be seen, one important and potentially determinative factor was the ability of the father, as a result of his personality, intellect and diagnosis of dyslexia, to engage sufficiently in the process to render the hearing fair. Such a factor will, almost by definition, be case-specific. Another element, and one that is likely to be important in every case, is the age of the children and the degree of urgency that applies to the particular decision before the court. The impact of this factor on the decision whether to hold a remote hearing will, as with all others, vary from child to child and from case to case.”

8. A Local Authority v M and F [2020] EWHC 1086 (Fam) – 5th May
- Mrs Justice Lieven –whether to proceed with the lay evidence in a 15-day care fact-finding hearing, or whether to adjourn hearing heard the medical evidence.
 - Decided to hear the parties and other lay witnesses entirely remotely. To determine how a young baby who had suffered very extensive injuries had died and whether the mother or father was responsible. The medical cause of the death of the child appears to have been in issue as well as the possible perpetrator if non-accidental injury was established.

9. Re Q [2020] EWHC 1109 (Fam) – 6th May
 - McFarlane P – appeal of case management decision of DDJ O’Leary at the CFC.
 - The first appeal in relation to remote private child hearings – arguing misapplication of *Re P*
 - A long-running private law dispute concerning the welfare of child, Q, aged 6½. Whilst this concerns the decision to adjourn a remote hearing, the appeal is purely one of procedure and fairness.
 - Judgment is largely fact-specific – but reiterates whether to remote a remote hearing is one for the Judge and is case-specific.

10. C (Children) (Covid-19: Representation) [2020] EWCA Civ 734 – 10th June
 - Lord Justice Peter Jackson – refusing mother’s appeal of the decision of Williams J in *A Local Authority v The Mothers & Ors* [2020] EWHC 1233
 - Appeal arose from decision to continue a fact-finding hearing where leading counsel for mother could not be physically present (as she is required to shield from Covid-19)
 - Jackson LJ concluded it is not unfair if advocates are required to cross-examine witnesses remotely, including lay party witnesses

Financial remedies guidance

11. ‘The Remote Access Family Court’ – Macdonald J – 16th April update (v4)
 - Endorses the document from Mostyn J and HHJ Hess dated 15th April 2020 clarifying the implication for finance cases of the 9th April ‘communication’.

12. Communication of Mostyn J – 17th March

13. Central Family Court: guidance of HHJ O’Dwyer
 - Stated to be for FR hearings listed between 6th April – 1st May. The CFC has set out what will be considered as an “urgent” and “non-urgent” application and hearing in respect of financial remedy applications during this time.

Urgent applications include:

- Maintenance Pending Suit
- Interim Maintenance
- Legal Services Payment Orders
- Applications under s.37 MCA 1973
- Enforcement by DK50 and D11

Non-urgent hearings include:

- First Directions Appointment
- Financial Dispute Resolution Appointment
- Final Hearing
- Directions Hearing
- Mention Hearing

14. Parties should be urged to make use of the Accelerated First Appointment procedure where possible – and explore private FDR and arbitration options.

Divorce case law

15. Paderno-Mernagh v Mernagh (Divorce- Nullity- Remote Hearing) [2020] EWFC 27; Williams J – 3rd April

- 1-day final hearing successfully conducted by Skype. Petitioner and respondent both gave evidence; neither were represented.
- Both parties expressed a wish for matter to be concluded as quickly as possible.

At [13]: “At the commencement of the hearing I set out the ground rules that I expected to be followed during the course of the remote hearing in order to ensure that each party was able to give evidence, make submissions and participate to the fullest extent possible. They were

Remote hearing commencement protocol

1. *Confirm all present who were expected and no one unauthorised, save that a person could be present to assist the Litigants in Person with managing technology but not to help with giving evidence or submissions [As it happened this being a divorce hearing it was technically in open court and I was robed so I informed the parties that other parties could be present. The husband required assistance on a couple of occasions when his Tablet appeared not to be charging and when he lost his wifi connection]*
2. *Confirm all can hear and see everyone*
3. *Confirm all in a quiet and private space.*
4. *Confirm arrangements made to record. Remind parties it is an offence under the Coronavirus Act 2020 to make any unauthorised recording of the proceedings either through skype or with any other equipment.*
5. *If your wifi disconnects you click back on the link to re-enter – any difficulties e-mail my clerk who would remain available but with audio/video muted.*
6. *Prior to giving evidence I would ask the parties to affirm the truth of their evidence with the usual form of affirmation.*
7. *Conduct of hearing*
8. *Mute your microphone when not your turn to speak*

9. *No one to speak when someone else is speaking – no interruptions*
10. *Only start speaking when invited to by me*
11. *Anything urgent indicate by palm up to screen*
12. *When evidence is being called the judge, the witness and the questioner microphones should be on.*
13. *Remind all that failure to follow ground rules would result in difficulties conducting hearing and if I conclude someone is disrupting the hearing I will consider excluding them and re-commencing the hearing without them participating. [The husband had been very disruptive at the previous hearing and had been, putting it mildly, extremely rude to at least 2 judges during earlier hearings]*
14. *Set out the 'Agenda' for the hearing.”*

General

16. A new pilot Practice Direction 36Q (pilot provision: modification of Practice Direction 12B: coronavirus) and amendments to other existing practice directions. From 23 April 2020:
 - PD 12B (child arrangements programme) has been modified to provide that local practices and initiatives can be operated differently in relation to applications for child arrangements orders during the coronavirus pandemic. The purpose is to ensure that applications can be started and progressed, and orders can be made, varied and discharged.
 - PD17A (statements of truth) has been amended to provide that, where a form is referred to in PD5A or is completed or generated online under Part 41 and allows for an electronic signature, references in PD17A to a statement of truth being signed should be read to include an electronic signature. Electronic signatures can be a tick box, a printed name, an image of a signature or a digital signature generated by commercial software, appearing next to the statement of truth.
17. Pump Court website resource section: <https://www.pumpcourtchambers.com/online-resource-hub/>

Useful Tips for remote hearings

18. Time estimates:
 - Remote hearings take longer
 - If interpreters involved – even longer still
 - Some Judges favour short 5-minute breaks every hour during video hearings

19. The ‘usual’ rules still apply:

- Remind clients in advance that this is still a court hearing – dress and behave appropriately
- Check client will be joining hearing from a private and quiet location
- Reassure client is the ‘packaging’ rather than the ‘substance’ of the hearing that is different remotely. The Judge will still have the benefit of all the papers and be testing the oral evidence

20. Tech issues:

- Warn clients video-link hearings rarely run entirely smoothly – be prepared for intermittent signal-failures and connectivity issues
- Practice client’s use of the video platform if possible
- Remind client to ‘mute’ during hearing

21. Communication with advocates during the hearing:

- Means of immediate instructions – ‘passing a note’ equivalent
 - Consider setting up a temporary WhatsApp group to enable quick messaging between client/solicitor/counsel during the hearing
 - Email is the alternative
- Zoom allows a breakout room which can be very helpful.
- When using CVP – can use a separate Zoom call to allow quick chat to take instructions e.g. in short breaks between witnesses

22. Guidance on pdf bundles – document from the President 20th May 2020

<https://www.judiciary.uk/wp-content/uploads/2020/05/GENERAL-GUIDANCE-ON-PDF-BUNDLES-f-1.pdf>

- Bundles must be OCR’ed so they are word-searchable
- Numbering must be electronic, not numbered by hand
- Includes links to YouTube videos of guidance on ‘creating an e-bundle’

23. Orders in publicly funded cases: include recital for LAA billing:

“UPON the court having required the advocates’ remote attendance at [time] in advance of the hearing listed at [time] on [date]. The hearing finished [at time]. The bundle for today’s hearing was [number of pages].”

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23rd June 2020

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DRAFT ORDER TEMPLATE: Appendix 3 to guidance of Macdonald J – 16th April 2020

UPON the Court determining that in the exceptional circumstances of the current national public health emergency this case is suitable for hearing remotely (‘remote hearing’) by means of [video link]/[Skype]/[telephone]/[other].

AND UPON the parties and the court having identified and settled on the following communications platform to be used to conduct remote hearings in this case _____.

BY ITS OWN MOTION / BY CONSENT

IT IS ORDERED THAT:

1. All hearings in this matter shall take place by way of remote hearing pursuant to FPR 2010 r 4.1(e) unless the court directs otherwise.
2. The parties and their representatives shall attend all hearings by way of [video link]/[Skype]/[telephone]/[other].
3. No unauthorised person may be present at this hearing. When asked, each legal representative must be able to confirm that no unauthorised person is in attendance or able to listen to the hearing.
4. This matter shall be listed for a remote hearing on _____ at _____ before _____ sitting at _____ with a time estimate of _____.
5. The parties shall arrange and attend remotely an Advocates Meeting no less than 48 hours before the hearing listed above.
6. The [applicant / respondent] shall be responsible for arranging with the Judge’s clerk (via _____) the necessary facilities to conduct a remote hearing, allowing sufficient time for any necessary testing to take place. This will include provision to the court of the necessary contact details for the parties and their representatives where these are needed to facilitate the remote hearing.
7. The [applicant / respondent] must confirm the details of the arrangements for the hearing to the other parties by no later than 24 hours prior to the remote hearing taking place.
8. The applicant shall by 1600 hrs on the day before the hearing electronically file a PDF bundle prepared in accordance with the requirements of paragraph 20 of the Protocol For Remote

Hearings in the Family Court and Family Division of the High Court, which e-bundle must include:

- (a) A case summary and chronology;
- (b) The parties positions statements;
- (c) The previous orders that are relevant to the remote hearing;
- (d) All essential documents that the court requires to determine the issues that fall for determination at the remote hearing;
- (e) A draft order;
- (f) Completed advocates' forms together with the single address that the signed and sealed forms are to be returned to for distribution to the advocates.

9. [Further Directions]...

Dated _____