



Ensuring a thorough, regular and fair hearing in times of virus: a cardinal message

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TRANSCRIPT

Family court proceedings are generally less formal than their criminal counterparts. This is to be encouraged because the process in the Family Court is supposed to be less adversarial and more inquisitorial with all parties generally focussing on the welfare of the child. During the COVID-19 pandemic a significant number of courthouses across the UK have had to close and the administration of justice in all areas has necessarily seen unprecedented delays. Inevitably crucial decisions in the area of family justice have still had to be made, albeit online, and ss53-57 of the Coronavirus Act 2020 deal with the use of video and audio technology in courts and tribunals during the outbreak.

This legislation does not, however provide specific guidance on the use of remote hearings by the Family Court or the Family Division of the High Court and it is against this backdrop that Mr Justice MacDonald published version 4 of *The Remote Access Family Court* on 16th April 2020 which provides some guidance as to what a remote Family Court hearing might look like. In addition, the Court of Appeal in two recent cases, has responded to the challenges that remote hearings can create.

Mr Justice MacDonald's guidance deals with a wide range of issues which includes the need for any remote hearing to ensure it maintains both the fairness and solemnity expected of any court proceedings and although protecting the safety of court users is critical this should not preclude the possibility of 'live' (albeit remote) hearings wherever possible. There is advice in the guidance on how to deal with witnesses, the recording of proceedings, the use of intermediaries and the need to be transparent (especially in cases where the press would normally be present). There is also an important recognition that for the increased number of litigants in person the digital divide is likely to be particularly prescient. Not all court users will have functioning Wi-Fi or an appropriate space for any hearing attendance to take place and the Family Court needs to be mindful of this when deciding to proceed or not. Although the guidance also deals with financial remedy cases the key concern here is for the cases concerning children where the stakes are arguably higher and the obligations to protect more imminent. This is most likely to be required in urgent applications in private law children cases, interim care orders, secure accommodation orders and emergency protection orders.

In terms of Mr Justice MacDonald's practical guidance, some broad indicators suggest that firstly if hearings are likely to be hearings by submissions only (i.e. without live testimony) then they can properly be undertaken remotely. This would especially be the case where there is a final hearing and the plan is for it to be conducted by submissions only. Secondly, whilst a lack of consent from all parties does not prevent proceeding remotely, uniform objection is deemed a 'powerful factor' to deter continuing with a remote hearing. On the flip side just because all parties do want the hearing to take place remotely this should not be treated as a 'green light' to proceed. Thirdly the use of video conferencing software is thought to be more effective than the telephone. Fourthly in public law cases if parents oppose a local authority's care plan but the

only witnesses are the social worker and the Children's Guardian then the final hearing could be heard remotely. Fifthly if the only witnesses in a hearing are medical experts then the final hearing could be heard remotely and finally in all other cases where the parents and/or other lay witnesses are to be called to give evidence then the case is unlikely to be suitable for a remote hearing. When considering both the fairness of proceedings and any concerns about the potentially disproportionate interference with the right to family life, this final indicator would appear appropriate. Clearly alternate strategies will need to be employed if the welfare of the child is likely to be compromised in any way and the Family Court is reminded that 'one size will not fit all'.

Two weeks after this guidance was published the Court of Appeal handed down two judgments which illustrate some of the problems that can emerge around remote hearings. In *Re A (Children)(Remote Hearing: Care and Placement Orders)* [2020] EWCA Civ 583 particularly complex proceedings involving six children, which had already taken a year, were due for final hearing at the end of March. The hearing was vacated because of COVID-19 and alternate 'hybrid' arrangements involving both attendance at court and a remote hearing were directed. Although the local authority was initially in support of these alternative arrangements, they later withdrew that support. One of the parents was unable to access a remote hearing due to their own learning difficulties and they did not have access to suitable technology. As this parent could still attend court in person the court maintained the decision to conduct the hearing as planned. The Court of Appeal allowed the appeal against the hearing proceeding citing what it saw as a party's inability to engage adequately, the imbalance of procedure in that the parents would attend the court, but legal representatives would not and the need for urgency was not outweighed by the need for a remote hearing in these circumstances.

At the same time in *Re B (Children)(Remote Hearing: Interim Care Order)* [2020] EWCA Civ 584 an application for an interim supervision order for one child and an interim care order for another by the local authority was altered, midway through a short remote hearing, following advice from the Children's Guardian. Counsel for the children's grandmother, who was their special guardian and had granted but then withdrawn consent for the children to be voluntarily accommodated, noted the shift in local authority position and asked for an adjournment to take instructions about this change. This application was refused. The grandmother appealed the court's decision to make two interim care orders and the Court of Appeal allowed her appeal. Mindful that whilst the circumstances of the hearing were pressurised, these circumstances should not compromise fundamental legal and procedural principles. The decision to switch applications, although not unheard of, was deemed by the Court of Appeal to be 'arbitrary' and not made out by the evidence presented and as the grandmother's first language was not English the Court of Appeal suggested that it would have been more appropriate to move from a telephone to a video conferencing platform where participation would have been more inclusive.

The cardinal message from both Mr Justice MacDonald's guidance and the Court of Appeal is that just because a hearing can, subject to a range of requirements, be heard remotely does not mean that it must be heard. Highlighting that whilst delay which is injurious to a child's welfare must be avoided so the fundamental principles concerning participation in proceedings and the ability to present evidence (key Article 6 rights) should not be compromised in a way that either can or potentially will, disproportionately interfere with the right to family life under Article 8 of the European Convention on Human Rights. This view is also endorsed by the Nuffield Foundation's recent report (published in May 2020) on their rapid consultation on remote hearings in the family justice system. Concerns about fairness and justice of remote hearings along with concerns around access to technology for court users are noted as key issues to be mindful of when using remote hearings.

The overriding objective of the Family Procedure Rules 2010 is to deal with cases justly, having regard to the welfare issues involved. The President of the Family Division in March 2020 confirmed that 'in pushing forward to achieve Remote Hearings, this must not be at the expense of a fair and just process' Time will tell how integral remote hearings will become part of the 'New Normal'. Evidence to date would suggest that there is a need to be both principled and pragmatic. The balance between the two is not always an easy one to strike. Thank you and Stay safe!