
the barrister

Family court gridlock and online hearings

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Remote hearings have rapidly become 'the new normal' in family justice. There are a plethora of remote platforms; an ever-evolving array of judicial guidance and an increasing number of Court of Appeal^[1] and High Court^[2] decisions for each of us to interpret on any given day.

The pandemic has forced the profession to adapt at an unprecedented rate to ensure continued access to justice. This has accelerated the importance of e-bundling and paperless working; hopefully trailing suitcases of back breaking lever arch files on public transport will be a thing of the past. The variety of video-conferencing platforms available: Zoom, Skype for Business, Lifesize, and Cloud Video Platform to name a few, offer an array of different functions. The ability to have break-out rooms, counsels corridors, channels, and screen sharing have transformed the way we practice; enabling some of the most complex and urgent cases to continue. That said, to date the choice of platform remains for the individual Judge and many resort to the telephone which plainly lacks the same technological advantages.

The sometimes chaotic nature of remote working is that for many, days are spent agonising over the availability of consistent Wi-Fi; finding a quiet room away from incessant power tools; and how to make that ever-growing mop of hair look presentable. Despite everyone's best efforts there does seem to be an air of informality, especially when your opponent can't press mute quickly enough before their child or pet makes an uninvited appearance. Although this might sound flippant, the harsh reality is that there are a number of real and practical concerns surrounding remote hearings as carefully analysed by The Nuffield Family Justice Observatory^[3]. The overpowering consideration has to be the fairness of the process and the Article 6 rights of all parties. One needs to consider the ability to fully participate in hearings and give or obtain instructions. There is yet another obstacle for those with communication difficulties such as cognitive or hearing impairments; those requiring intermediaries or an interpreter. It is unclear how body language of witnesses and parties can be assessed during evidence when there is no direct contact. The ability to maintain privacy and confidentiality, monitor and enforce the rules of a court room and ensure special measures are implemented are further challenges. There is also the disparity of technological abilities to contend with which can add many minutes or hours to a hearing. This is not forgetting lay clients who may not have access to a computer or the internet to participate. Although the Family Court must keep working; to quote the President "*it must not be at the expense of a fair and just process*".^[4]

The number of cases in court lists has reduced due to the additional time required to convene remote hearings; it is not because the pandemic has halted fresh applications or those previously issued have disappeared. When observing the consolidated guidance of MacDonald J, it was the intention of HMCTS that there would be a prioritisation of family work: (i) that which must be done during the pandemic; (ii) will be done; and (iii) the court will do its best to accommodate. The truth is there are not enough Judges and insufficient court time to deal with all matters remotely, hence a ranking of work. However, notably least prioritised are financial remedy cases.

Mostyn J and HHJ Hess provided specific guidance for financial matters on 15 April 2020 stating:

"generally, the court should start from the position that a remote hearing is likely to be consistent with the interests of justice, especially so if the hearing will not involve live testimony....the court should be alive to the possibility that opposition to a remote hearing is motivated by a desire to delay the resolution of the case".^[5] The approach to remote hearings differs greatly between Circuits, Courts, Judges and areas of family practice; the word 'discretion' appearing to take on a whole new meaning. It is the unfortunate reality that the majority of financial cases have been adjourned to unknown dates; whether by a unilateral court order or agreement between the parties. Many query the incentive to resolve disputes when sitting in a home environment as opposed to the gravitas of entering court, which experience shows can really focus minds. However, for many there are very grave consequences of not proceeding. Already we are noting the depreciation of capital assets (property, investments, pensions); an increased difficulty in obtaining mortgages; furloughing leading to redundancy; reduced incomes and problems with childcare. This particularly impacts the 'needs' based financial claims and for many the ability to claim or provide maintenance. The pandemic thus has a real punitive impact on client lives and wellbeing.

There has been an increase in the number of enforcement hearings in respect of child arrangements; parents not heeding the government guidance issued alongside the Stay at Home Rules on 23 March 2020 namely *"where parents do not live in the same household, children under 18 can be moved between their parents' homes"*. Such cases will sadly only increase as courts will need to consider the reasonableness of parents' actions during the pandemic and whether the spirit of orders have been respected. Professionals also predict 'a divorce spike', an increase in domestic violence cases and public law children proceedings; doom and gloom for many and a logistical conundrum to resolve in terms of backlog, delay and process. So what do the coming weeks and months look like?

Risk assessments are being carried out by HMCTS, with various courts contemplating phased returns. Courts are opening up the larger courtrooms, allocating conference rooms and marking out areas to ensure social distancing is respected. However, this will require administration and hearings to determine which cases are of sufficient priority to warrant use of the limited courtrooms; a further logistical nightmare for the already overwhelmed system. It should be noted that the Bar Standards Board have stated *"following Government or Public Health England guidance is not a breach of the BSB Handbook"*.

^[6] Decisions for barristers whether to appear in person are easier said than done; we don't want to disappoint clients, solicitors or clerks, or miss out on new instructions. The move towards attended hearings may be met in the middle with the 'hybrid' or part attended hearing which Williams J considered.

^[7] With this will come another host of practical and procedural difficulties, but the Family Bar will undoubtedly endeavour to overcome the challenges.

It is likely remote hearings are here to stay in some form or another; the most obvious being for directions hearings, submissions, without notice applications, where parties have vulnerabilities preventing attendance in person and those cases which must be done. With this comes the need to ensure greater digital security and software training. Due to the inevitable backlog caused by adjournments, the influx of new applications and the harsh reality of the tremendous over listing of courts, some envisage we will be left with no option but to utilise additional public buildings, increase the workload of Deputy District Judges and Recorders, and perhaps even recall retired Judges. Although the current crisis will pass, are we just heading for the next one?

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[1] [Re A \(Children\) \(Remote Hearing: Care and Placement Orders\) \[2020\] EWCA Civ 583](#); [Re B \(Children\) \(Remote Hearing: Interim Care Order\) \[2020\] EWCA Civ 584](#)

[2] [Re P \(A Child: Remote Hearing\) \[2020\] EWFC 32](#); [A Local Authority v Mother & Ors \[2020\] EWHC 1086 \(Fam\)](#); [Re Q \[2020\] EWHC 1109 \(Fam\)](#)

[3] [Remote hearings in the Family Justice System: a rapid consultation 2020](#)

[4] [The Remote Access Family Court, 27 March 2020](#)

[5] [Financial Remedies Courts, Mostyn J and HHJ Hess, 15 April 2020](#)

[6] [Bar Standards Board Covid-19 Statement](#)

[7] [A Local Authority v The Mother & Ors \[2020\] EWHC 1233 \(Fam\)](#)

