

# Remote family hearings have changed the game



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*Will we look back and wonder why we ever did it any differently?*

Many of us who practise in family law have been long aware of the immense pressure that the family court system has been under. *The Family Court Statistics Quarterly* for October to December 2019 notes that:

- annually, there were 266,059 new cases started in family courts, up 1% from 2018;
- the number of domestic violence remedy order applications increased by 21%;
- in private law cases the average time to first disposal was 33 weeks, up three weeks from 2018; and
- in public law cases the average time for a case to reach disposal was 34 weeks in October to December 2019, up two weeks from the same quarter in 2018.

In 2016 the government set out its vision for a digital court service (*Transforming our justice system*), saying:

"the revolution in technology will characterise tomorrow's justice system. We will provide online access by developing a single online system for starting and managing cases across the criminal, civil, family and tribunal jurisdictions... Over time, the work of the courts will use online, virtual and traditional hearings as best meets the circumstances of the case. As new technologies bed down, we anticipate that more and more cases or parts of cases will be carried out virtually or online."

In May 2018 Munby P talked about the fundamental need for a radical change in the culture of the family courts ("The Family Bar in a Digital World"). It was long overdue for the court process – probably kicking and screaming – to be brought into the modern electronic world.

By mid-2019 the online divorce application was up and running, and many practitioners had moved to electronic

bundles and computers at court. However, a remote court system seemed a very remote possibility.

That all changed in March this year when the Covid pandemic and lockdown struck. The early weeks saw hearings being adjourned. However, there was a very quick move to digital business-as-usual with the likes of Zoom, Microsoft Teams, and Skype for Business coming into their own. In June the cloud video platform (CVP) began to be rolled out in the Family Court. Since the lockdown has eased we have seen hybrid hearings becoming the norm.

## The pros of digital working

At the top of the list is the reduced travel time and the ability to work from home. Gone are the long commutes, the rush-hour traffic and early train journeys to get to court. Instead, working from home has become the new office, provided that you have a room that you can use where nobody else is able to listen to or see the hearing. And I won't even mention the new court attire, where we all seem to dress for court top half only, with a variety of jeans, shorts or even pyjamas worn where the camera can't see.

The court process has also become more efficient. Hearings are no longer listed as block listings with a number of cases listed at the same time, and numerous lawyers and parties idling in the court waiting room. Instead each case has an allocated window. The result has been to make us all more focused and prepared; a position statement is now mandatory for each hearing, addressing every issue that needs resolved.

Our own geographical location has become less important. With remote technology it is now perfectly possible to do a hearing in London in the morning and Manchester in the afternoon.

Some practitioners report that these benefits have resulted in a decrease in stress levels; others report that they are working

all hours. The reality is probably very subjective; it depends if you are embracing working from home or living for work.

## The cons of digital working

The new working conditions have had significant disadvantages too.

Some of these have been logistical and learning to get to grips with the technology and the hardware needed to be able to properly work remotely. There have been horror stories of the internet going down and unstable connections. Screen fatigue is commonplace. Any complicated hearing now requires three screens: the first for the video platform, the second to make notes and deal with emails, and the third for the electronic bundle. My experience of hybrid hearings is that you will probably require a fourth screen so that your client has a device that they can access the hearing on too. Some of the platforms have feedback issues, and in some courts everyone, including the judge, is encouraged to wear earphones coupled with muting when not speaking. I suspect that these matters will be quickly addressed as the platforms improve and practitioners become better educated about technology.

The more profound issue is how digital court hearings impact access to justice. We have all grown up with the mantra "justice needs to be done and be seen to be done", but does a digital platform have limitations for the lay client's right to a fair trial?

In *Re P (A child: Remote hearings)* [2020] EWFC 32 the President stressed the importance of a hearing allowing effective engagement and participation by the parent with the court and the court with the parent.

It is now second nature to consider how a lay client may access and engage in the hearing. For my part, in every case, I consider:

- Is the client able to access the hearing in a meaningful way? Many clients will only have phones and in anything but a straightforward case management hearing, this is simply inadequate.
- Does the client have access to the bundle for the hearing? A hard copy of the bundle should be provided to them by their solicitor.
- Is the client able to emotionally cope with undertaking the hearing remotely, alone and often from their own home? The Family Court makes life-changing decisions and for many lay clients the hearing will be a time of heightened anxiety.
- If the client's preference is to attend the hearing remotely, how will instructions be taken? Will this involve break-out rooms, a second video platform, text messages or phone calls? There is simply no remote substitute for a client tapping counsel on the back to ask a question, or counsel turning over their shoulder to take instructions.

- Does there need to be a pre-hearing discussion with the client to answer any questions that they may have and take updating instructions?
- Does there need to be a post-hearing debrief with the client to make sure that they have understood what has happened in the hearing?
- For those cases where a client is not able to manage the hearing remotely, is the client able to attend court? If so, this should never be alone, and their counsel or legal representative should always attend with them to make sure they are well supported.
- Where home and court are not an option, is it possible for a different venue to be found for the remote hearing? I recently attended a remote hearing at a solicitor's office where my solicitor, my client and I all sat in a windowless room with masks donned to ensure that the client was meaningfully represented.

There is also the question of perceived bias. The starkest example of this is *C (A child)* [2020] EWCA Civ 987, in which Justice Judd left the courtroom and made private comments about a mother without realising that they were being fed back to the court room and heard by the parties. The Court of Appeal held that what happened was undoubtedly a consequence of the tremendous pressure under which family judges at all levels find themselves at present. All over the country judges are trying, against powerful odds, to "keep the show on the road" during the pandemic for the sake of the children involved. However, the troubling aspect is whether a fair-minded and informed observer, having considered the facts, would conclude that there is a real possibility that the judge was biased.

## The future

The digital family court revolution has been the game changer which has allowed the Family Court to continue to function during the pandemic. The likelihood is that we will see an ever-increasing workload in the next few months. The UN has described the worldwide increase in domestic abuse as a "shadow pandemic" alongside Covid-19, with cases increasing by 20% during lockdown. At the same time some law firms have reported a 40% increase in divorce as families have been forced to spend increased amounts of time together.

The Covid-19 pandemic has reinforced the importance of reform and modernisation of the justice system. The *Covid-19: Overview of HMCTS Response of July 2020* suggests that digital and hybrid courts are here to stay, at least for the foreseeable future. My prediction is that for all case management hearings and any hearings that do not require oral witness evidence, we will simply come to accept that a digital video platform is the appropriate vehicle. We may well look back and wonder how we ever did it any other way.

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