

Case law and guidance on remote hearings

St John's Family Forum

Sarah Phillimore, St John's Chambers

14th May 2020

Introduction

Our ways of working, overnight changed dramatically. No one has ever faced this situation before.

As the Nuffield Family Justice Observatory reported on May 6th 2020

In the two-week period between 23 March and 6 April 2020 audio hearings across all courts and tribunals in England and Wales (not only in family courts) increased by over 500%, and video hearings by 340%.

And of course there has been guidance upon guidance and guidance about guidance, which in different circumstances may have represented heaven for many lawyers as we argue about the precise meaning of *this* word in *this* context.

But I imagine that for most of us, this is a situation which is extremely stressful and even frightening – we are being asked to get to grips with brand new technology, worry about how our clients will participate and keep on top about how guidance is being interpreted in the courts.

So I am hopefully going to provide a useful aide memoire to the most significant recent guidance and cases and in so far as I can, extract some general principles to use as a starting point in your individual cases.

Always remembering of course that family cases even pre lockdown threw up an infinite variety of factual circumstances – case law is a guide and rarely ever the answer.

Summary of fundamental principles/checklist

THE ESSENTIAL QUESTION - how will you secure the overriding objective and compliance with Articles 8 and 6?

Your obligation is to act to process cases efficiently but justly. Often these two key principles are in direct tension.

You must assess the case in front of you. Guidance is not diktat or straight jacket. No one feature acts as a veto or a compulsion. Some cases are very well suited to remote hearings – short directions hearings for e.g. But the longer the time estimate and the more complicated the issues, the more important your assessment about whether or not fairness is being compromised.

If it helps, divide your assessment into stages.

The stages of your assessment

There will clearly be overlap between many categories but the 'check list' school of thought appears to guide against hasty and wrong decision making.

1. **Can the proceedings be conducted remotely?** If 'no' matter ends there.
 - a. Do the parents have access to necessary technology and a space to give evidence in private?
 - b. Are there 'hybrid' arrangements that might work, i.e. some parties meeting in another location?
 - c. Who is setting it up? On what platform? Can all access it? NB There is a real difference between a telephone and a video hearing – note para 35 CoA re B
 - d. How will parents access the bundle?
 - e. Will necessary assessments be completed in time? – see Government guidance on managing risks for social workers etc.

2. **Jurassic Park Principle: Should the proceedings be conducted remotely?**
 - a. Identify your 'magnetic factor': consider the factors in paragraph 9 of *Re A (Children) (Remote Hearing: Care and Placement Orders)* [2020] EWCA Civ 583
 - b. No one factor is a veto or compulsion – see para 11 in CoA re A and para 24 in Re Q. But if ALL the parties are against it, court will have to give cogent reasons to proceed - para 61 CoA re A.
 - c. All cases involving children re urgent – but some are more urgent than others. Are there immediate safety risks for a child?
 - d. What are the particular risks and benefits of an adjournment for the child?

3. **Plan effectively** - If going ahead, what do you need on the ground?

- a. Ground rules in place to ensure effective participation and back up plans if technology fails for some or all.
 - b. How are lay clients going to communicate with lawyers if not in the same room?
 - c. Advocates meetings, pre-hearing discussions and focused case summaries
4. And remember – **inconsistency and uncertainty is inevitable in such changing times**. See para 34 of re Q. There is no golden 'right answer' to be discovered. All you can do is show your workings and demonstrate that you have given sufficient thought to the relevant issues. Life can only be understood backwards – but it must be lived forwards.

Synopsis of guidance and case law – up to date as of 12th May 2020

This is not exhaustive. I may have missed something! But these seem to be the key cases and guidance.

Case/Guidance	Key facts/principle
19 th March 2020 COVID 19 National guidance for the family courts	Over arching aim – 'Keep Business Going Safely' Situation will change rapidly – each case must be decided on case by case basis
23 rd March 2020 (and updated) 'The remote access family court' Mr Justice	Quotes President: <i>Can I stress, however, that we must not lose sight of our primary purpose as a Family Justice system, which is to enable courts to deal with cases justly, having regard to the welfare issues involved [FPR 2010, r 1.1 'the overriding objective'], part</i> <i>of which is to ensure that parties are 'on an equal footing' [FPR 2010, r 1.2]. In pushing forward to achieve Remote Hearings, this</i>

MacDonald.	<i>must not be at the expense of a fair and just process.</i>
<p>9th April 2020</p> <p>On 9 April 2020, the Lord Chief Justice, the Master of the Rolls and the President of the Family Division sent a message to all circuit judges and district judges concerning remote working during the 'lockdown'</p>	<p>If all parties oppose a remotely conducted final hearing, this is a very powerful factor in not proceeding with a remote hearing; if parties agree, or appear to agree, to a remotely conducted final hearing, this should not necessarily be treated as the 'green light' to conduct a hearing in this way;</p> <p>Where the final hearing is conducted on the basis of submissions only and no evidence, it could be conducted remotely;</p> <p>Video/Skype hearings are likely to be more effective than telephone. Unless the case is an emergency, court staff should set up the remote hearing.</p> <p>Parties should be told in plain terms at the start of the hearing that it is a court hearing and they must behave accordingly.</p> <p><u>In Family Cases in particular:</u></p> <p>Where the parents oppose the LA plan but the only witnesses to be called are the SW & CG, and the factual issues are limited, it could be conducted remotely;</p> <p>Where only the expert medical witnesses are to be called to give evidence, it could be conducted remotely;</p> <p>In all other cases where the parents and/or other lay witnesses etc are to be called, the case is unlikely to be suitable for remote hearing.</p>
<p>6th May 2020</p> <p>Nuffield Family Justice Observatory Rapid review - a handy over view of what's gone well and badly between with about 1K</p>	<p>Notes fundamental concerns of approx. 1,000 participants</p> <ul style="list-style-type: none"> • Difficulties arising from lack of face to face contact • Difficulty in ensuring full participation in a remote hearing • Concerns about lack of preparation for hearing • Issues of confidentiality and privacy – particularly hard for parents in the same house as the children subject to proceedings and for professionals sharing home with family • Concerns relating to the removal of new born babies • Concerns about whether or not cases are adjourned – carries risk and benefit . • Other factors relating to fairness – such as face to face

<p>responses from judges, lawyers, parents and social workers.</p> <p>https://www.nuffieldfjo.org.uk/app/nuffield/files-module/local/documents/remote-hearings-rapid-review.pdf</p>	<p>assessments etc.</p> <ul style="list-style-type: none"> • Think about your platform – hostilities are less easy to manage over the phone • Impact of remote hearings on health and wellbeing • For some hearings, remote working provides greater efficiency
<p>6th May 2020 Guidance for children’s social care services</p>	<p>www.gov.uk/government/publications/coronavirus-covid-19-guidance-for-childrens-social-care-services</p> <p>[and see The Adoption and Children (Coronavirus) (Amendment) Regulations 2020 http://www.legislation.gov.uk/uksi/2020/445/contents/made</p> <p>It is for all those delivering or with an interest in children’s social care, including local authorities, social care trusts, those who have corporate parenting responsibilities, all adoption agencies, independent fostering agencies and children’s homes, and local safeguarding partnerships who work together to safeguard and promote the welfare of all children in their area. It is also for social workers, residential care providers and staff, and those with safeguarding responsibilities.</p> <p>We expect that the sorts of circumstances where local authorities, local safeguarding partners and providers may want to make use of the additional flexibility that the secondary legislation amendments provide include:</p> <ul style="list-style-type: none"> • where staff shortages, due to sickness or other reasons, make it difficult or impossible to meet the original requirements • where making use of flexibilities to take a different approach

	<p>is the most sensible, risk-based response in light of other demands and pressures on services; this might involve focusing services on those most at risk</p> <ul style="list-style-type: none"> • where there is a consequential reason to make use of flexibilities, for example due to limited capacity in other providers or partners making it difficult or impossible to comply with the original requirements <p>Contact issues</p> <p>We expect that contact between children in care and their birth relatives will continue. It is essential for children and families to remain in touch at this difficult time, and for many children, the consequences of not seeing relatives would be traumatising.</p> <p>Contact arrangements should therefore be assessed on a case by case basis taking into account a range of factors, including the government's social distancing guidance and the needs of the child. Where it may not be possible, or appropriate, for the usual face-to-face contact to happen at this time and keeping in touch will, for the most part, need to take place virtually. Where face-to-face contact is not possible, we would encourage social workers and other professionals to reassure children that this position is temporary and will be reviewed as soon as it is possible to do so.</p> <p>We expect the spirit of any court-ordered contact in relation to children in care to be maintained and will look to social workers to determine how best to support those valuable family interactions based on the circumstances of each case.</p>
<p>7th May 2020 Message from the President of the Family Division:</p>	<p>HMCTS now responsible for setting up remote Family Court hearing arrangements</p> <p>Hearings that have already been arranged by another party should not be cancelled and rearranged by HMCTS, the resources available are still extremely scarce and HMCTS are keen that they are not unnecessarily used to rearrange existing hearings</p>
	<p>CASE LAW</p>
	<p>FACTS: Long running proceedings involving girl now aged 7 and</p>

<p>16th April 2020</p> <p>Re P (A Child Remote Hearing) [2020] EWFC 32</p>	<p>allegations of FII. 15 day final hearing due.</p> <p>Emphasises importance of primary purpose, to deal with cases justly – which requires parties to be on ‘equal footing’</p> <p>President clear this case was NOT suitable for remote hearing. Magnetic factor was need for Judge to assess the mother – not just as she gave evidence but in her reaction to the evidence of others. (but note disagreement about forensic value to be attached to this in Re Q below)</p> <p>COMMENTARY: Para 8. The ‘Jurassic Park principle’</p> <p>Establishing that a hearing can be conducted remotely, does not in any way mean that the hearing must be conducted in that way.</p> <p>Para 24 Each case is likely to involve a wide range of factors and some will be in tension</p> <p><i>The need to maintain a hearing in order to avoid delay ...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.</i></p>
<p>30th April 2020</p> <p>Re A (Children) (Remote Hearing: Care and Placement)</p>	<p>FACTS: Case involving the youngest 4 of 6 siblings. The plan was for 2 to remain in long term foster care and for youngest two to be adopted. Judge determined that case was suitable for ‘hybrid’ final hearing in face of parents’ opposition. Appeal allowed and hearing fixed vacated.</p> <p>Para 49 appeal succeeded on following basis</p> <ul style="list-style-type: none"> • Mr A’s inability to engage adequately with remote evidence

<p>Orders)</p> <p>[2020] EWCA Civ 583</p>	<p>(either at home or in the courtroom);</p> <ul style="list-style-type: none"> • The imbalance of procedure in requiring the parents, but no other party or advocate, to attend before the judge; • The need for urgency was not sufficiently pressing to justify an immediate remote or hybrid final hearing. <p>COMMENTARY</p> <p>'Cardinal principles'</p> <ul style="list-style-type: none"> • The decision about holding a remote hearing is a case management one for the Judge • Guidance is just that – guidance • Guidance may have a temporary nature and circumstances will continue to develop <p><i>Para 11: We wish to state with total clarity that our decision does not mean that there can be no remote final hearings on an application for a care order or a placement for adoption order. Neither is our decision to be taken as holding that there should be no 'hybrid' hearings, where one or more party physically attends at a courtroom in front of a judge. The appropriateness of proceeding with a particular form of hearing must be individually assessed, applying the principles and guidance indicated above to the unique circumstances of the case.</i></p> <p>Magnetic factor here was 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.</p> <p>Para 9 – likely factors to influence decision</p> <ol style="list-style-type: none"> 1. The importance and nature of the issue to be determined; is the outcome that is sought an interim or final order? 2. 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; 3. Whether the parties are legally represented;
---	---

	<ol style="list-style-type: none"> 4. 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; 5. Whether evidence is to be heard or whether the case will proceed on the basis of submissions only; 6. 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; 7. The scope and scale of the proposed hearing. How long is the hearing expected to last? 8. 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; 9. The experience and confidence of the court and those appearing before the court in the conduct of remote hearings using the proposed technology; 10. 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. <p>Para 61: Court endorsed LCJ's message of 9 April at sub paragraph (a): <i>'If all parties oppose a remotely conducted final hearing, this is a very powerful factor in not proceeding with a remote hearing'. Whilst in the present case it is true that the Children's Guardian did not oppose proceeding with the planned hearing, all of the other parties, including the local authority, did. In such circumstances, when the applicant local authority itself does not support a remote contested final hearing, a court will require clear and cogent reasons for taking the contrary view and proceeding to hold one.</i></p>
30 th April 2020	FACTS: A 9 year old boy was removed from his grandmother's care

<p>[2020] EWCA Civ 584</p> <p>Re B (Children) (Remote Hearing: Interim Care Order)</p>	<p>and placed in foster care following a telephone hearing on 3rd April.</p> <p>CoA agreed the order should not have been made and child returned to grandmother.</p> <p>COMMENTARY - The problems here arose because the local authority changed its care plan in the middle of a remote hearing and because an application that was not urgent was treated as if it was. A hearing that had come about to regulate the position of his older sister took on a momentum of its own; the Recorder who made the wrong decision had, by the time he made it been working for over 10 hours remotely, and facing a stream of documents electronically.</p> <p>The LA changed their care plan on the basis of recommendations from the Guardian who wrongly saw the situation as 'urgent' and had not carried out a balanced welfare analysis.</p> <p>Para 34 – the remote hearing was part of the problem:</p> <p><i>Our further observation is that, no doubt partly because of the exigencies of the remote process, there was a loss of perspective in relation to the need for an immediate decision about Sam. This was a classic case for an adjournment so that a considered decision could be taken about removal, if indeed that option was going to be pursued after reflection. An adjournment would have enabled the parties and the court to have all the necessary information. As it was, crucial information was lacking and its absence was overlooked by the court.</i></p> <p>Para 35 – there is a real distinction between a telephone and a video hearing</p> <p><i>There is a qualitative difference between a remote hearing conducted over the telephone and one undertaken via a video platform. If the application for an interim care order for Sam had been adjourned, it may well have been possible for the adjourned hearing to have been conducted over a video link and that single factor might, of itself, have justified an adjournment in a case which, in our view, plainly was not so urgent that it needed to be determined on 3 April</i></p>
<p>5th May 2020</p>	<p>FACTS: Involved a 4 year old child whose sister had died at home and was later found to have suffered 65 fractures. Case had already been significantly delayed and child in foster care.</p>
<p>[2020] EWHC</p>	<p>The court heard the medical evidence over 5 days then adjourned</p>

<p>1086 (Fam) A Local Authority High Court</p>	<p>to consider if hearing should continue via Zoom to hear the lay parties. The father also sought an adjournment on grounds of mental health issues which were unrelated to the issue of remote hearings.</p> <p>COMMENTARY: Judge referred extensively to Re P and CoA authorities. Did not share the President's view about the importance of direct observation of lay witnesses:</p> <p><i>Para 27: "...in my own view is that is not possible to say as a generality whether it is easier to tell whether a witness is telling the truth in court rather than remotely. It is clear from <u>Re A</u> that the Court of Appeal is not saying that all fact finding cases should be adjourned because fact finding is an exercise which it is not appropriate to undertake remotely. I agree with Leggatt LJ that demeanour will often not be a good guide to truthfulness. Some people are much better at lying than others and that will be no different whether they do so remotely or in court. Certainly, in court the demeanour of a witness, or anyone else in court, will often be more obvious to the judge, but that does not mean it will be more illuminating."</i></p> <p>Relied in factors in re A at [9] and determined that hearing should go ahead - but decision may have been different if parents were trying to follow proceedings only via a phone screen.</p>
<p>6th May 2020 Re Q [2020] EWHC 1109 (Fam)</p>	<p>FACTS: Appeal against refusal to continue remote hearing with regard to a girl aged 6 who was subject of long running private law proceedings. Allegations of sexual abuse raised by M against F; clear finding that this did not happen and in March 2020 expert advised that child should move to live with F. The final hearing was set for April 22nd. The DDJ initially agreed it must continue but two days later reversed that decision after reading the decision in re P again and considering the very serious issues at stake in this hearing. The father appealed –it went before the President because of 'perceived need' to clarify the decision in Re P.</p>

	<p>Appeal allowed and matter remitted to DDJ to determine how and when the hearing was to take place.</p> <p>COMMENTARY: Para 24 Neither the guidance that has been issued, nor the decision in <i>Re P</i>, establish a veto to the holding of a remote hearing where a parent objects, or expert evidence is to be called.</p> <p>The appeal succeeded not because of a failure to interpret re P correctly but because of a failure of process and error in approach re the welfare issue.</p> <p>The Judge was concerned that the father had raised new issues in his position statement which might change the temperature of the final hearing – but had not raised this before counsel. Nor did the Judge explain why her welfare analysis shifted so starkly in only two days.</p> <p>Para 34 – a degree of inconsistency and uncertainty is inevitable:</p> <p><i>...each judge or magistrate must consider the individual case before the court and determine whether or not it should proceed remotely in whole or in part. It is to be accepted that a consequence of this approach is that different courts may take a different view on similar cases and that this may inevitably give rise to some inconsistency from court to court, or even from judge to judge.</i></p>

Further reading

Useful article on how to identify risk of infection here
<https://www.erinbromage.com/post/the-risks-know-them-avoid-them>

Indoor spaces, with limited air exchange or recycled air and lots of people, are concerning from a transmission standpoint. We know that 60 people in a volleyball court-sized room (choir) results in massive infections. Same situation with the restaurant and the call center. Social distancing guidelines don't hold in indoor spaces where you spend a lot of time, as people on the opposite side of the room were infected.

The principle is viral exposure over an extended period of time. In all these cases, people were exposed to the virus in the air for a prolonged period (hours). Even if they were 50 feet away (choir or call center), even a low dose of the virus in the air reaching them, over a sustained period, was enough to cause infection and in some cases, death.

Social distancing rules are really to protect you with brief exposures or outdoor exposures. In these situations there is not enough time to achieve the infectious viral load when you are standing 6 feet apart or where wind and the infinite outdoor space for viral dilution reduces viral load. The effects of sunlight, heat, and humidity on viral survival, all serve to minimize the risk to everyone when outside.

When assessing the risk of infection (via respiration) at the grocery store or mall, you need to consider the volume of the air space (very large), the number of people (restricted), how long people are spending in the store (workers - all day; customers - an hour). Taken together, for a person shopping: the low density, high air volume of the store, along with the restricted time you spend in the store, means that the opportunity to receive an infectious dose is low. But, for the store worker, the extended time they spend in the store provides a greater opportunity to receive the infectious dose and therefore the job becomes more risky.

Basically, as the work closures are loosened, and we start to venture out more, possibly even resuming in-office activities, you need to look at your environment and make judgments. How many people are here, how much airflow is there around me, and how long will I be in this environment. If you are in an open floorplan office, you really need critically assess the risk (volume, people, and airflow). If you are in a job that requires face-to-face talking or even worse, yelling, you need to assess the risk.

If you are sitting in a well ventilated space, with few people, the risk is low.

If I am outside, and I walk past someone, remember it is "dose and time" needed for infection. You would have to be in their airstream for 5+ minutes for a chance of infection. While joggers may be releasing more virus due to deep breathing, remember the exposure time is also less due to their speed.

While I have focused on respiratory exposure here, please don't forget surfaces. Those infected respiratory droplets land somewhere. Wash your hands often and stop touching your face!

As we are allowed to move around our communities more freely and be in contact with more people in more places more regularly, the risks to ourselves and our family are significant. Even if you are gung-ho for reopening and resuming business as usual, do your part and wear a mask to reduce what you release into the environment. It will help everyone, including your own business.

Sarah Phillimore
14th May 2020
St. Johns Chambers