

REMOTE JUSTICE FROM THE PARENTS' PERSPECTIVE

A clutch of recent cases have been published which give some *illustrations* of the sorts of scenarios where remote justice is or isn't right – but each case is different.

Key point : decisions about whether and how to proceed are always FACT SPECIFIC.

Re P (A Child Remote Hearing) 2020 EWFC 32

(16 April 2020), McFarlane P.

Care proceedings following long private law. Full fact finding could not appropriately proceed - judge needed to see all the parties in the case when they are in the courtroom, in particular the mother. Decision expressly fact specific though treated as guidance. Demonstrates the evolving understanding of professionals and judges to the issues and difficulties in the early days – hearing initially thought to be appropriate because of early over enthusiasm / perceived expectations to go ahead – later reconsidered. Summarises key guidance up to that date.

See : <http://www.transparencyproject.org.uk/p-a-child-remote-hearing-rev-3-2020-ewfc-32-when-is-remote-justice-not-justice/> for more on this case

Re A (Children) (Remote Hearing : Care and Placement Orders) [2020] EWCA Civ 583)

(30 April 2020), McFarlane P.

Judge has wide discretion, based on the ordinary principles of fairness, justice and the need to promote the welfare of the subject child or children. Guidance is no more than illustration to support judicial decision. Guidance is temporary - things are changing all the time.

See : <http://www.transparencyproject.org.uk/alphabet-soup/> for more detail on this case.

Re B (Children) (Remote Hearing: Care and Placement Orders) 2020 EWCA Civ 584)

(30 April 2020), McFarlane P.

Public law case. ICO made by exhausted judge at the tail end of a telephone list set aside. Child returned from foster care to his special guardian (grannie). Case concerned a teenager

who was BPC. Guardian had waded in and through solicitor (she was absent) persuaded LA to seek removal of younger child half way through hearing, partly on grounds that covid made it difficult to monitor him. Firmly rejected as inappropriate – arbitrary process. It wasn't an emergency (risks were chronic not acute re younger child).

See : <http://www.transparencyproject.org.uk/alphabet-soup/> for more detail on this case.

A Local Authority v Mother & Ors [2020] EWHC 1086 (Fam)

(05 May 2020). Lieven J.

Care case. Fact finding hearing re dead sibling. Medical evidence completed – question was whether to continue with lay evidence. Father in MH crisis but assessed as having capacity – discussion re established use of video link to assist vulnerable witnesses under PD3AA pre-lockdown. “I do not think that it is possible to say as a generality that a remote hearing is less good at getting to the truth than one in a courtroom.” XX in this case would be gruelling whatever the format. F in fact preferred video link and docs could be read to him.

See : <http://www.transparencyproject.org.uk/the-magic-soup-stone-strikes-again-more-new-authorities-about-remote-hearings/> for more detail on this case.

Re Q [2020] EWHC 1109 (Fam)

(06 May 2020) McFarlane P.

Private law, DDJ said a FH hearing listed to consider change of residence in intractable contact dispute should go ahead, then changed mind in light of Re P – didn't misinterpret Re P but did get other things wrong (No explanation given for the apparent judicial change of approach to the issue of welfare, based decision on factors not canvassed with counsel).

Overtaken.

See : <http://www.transparencyproject.org.uk/the-magic-soup-stone-strikes-again-more-new-authorities-about-remote-hearings/> for more detail on this case.

REMOTE HEARINGS IN THE FAMILY JUSTICE SYSTEM: A RAPID CONSULTATION

Family Justice Observatory report published 6 May 2020.

See also President's View of same date (both docs at same link) :

<https://www.judiciary.uk/announcements/president-of-the-family-division-welcomes-nuffield-report-into-effectiveness-of-remote-hearings-during-covid-19/>

3% of 932 respondents were parents (25).

Mixed experiences and views re: remote hearings.

List of practical guidance for managing remote process well at page 37.

Further evaluation and guidance needed.

STOP PRESS 7 May : President has announced that the responsibility for arranging hearings is to revert to HMCTS (save those already arranged), but flexibility will still be needed due to ongoing staff shortages.

TRANSPARENCY PROJECT PARENTS' SURVEY

See <http://www.transparencyproject.org.uk/justice-on-the-altar/> for interim findings.

- Responses predominantly parents in private law cases, majority of hearings by phone. Some final hearings but largely case management or interim hearings.
- Joining by phone seems to be relatively easy for most – though some completed survey having been completely excluded from a hearing, which went ahead in absence.
- Mix of positive and negative comments.
 - Some quite pleased not to have to be in same location as abusive ex and found it less stressful and inconvenient and efficient.
 - Some found it less effective and reported difficulties with privacy or childcare. Some found it distant and unsettling.
- A lot of parents reported not having the papers and not knowing who was on the line. Some reported difficulties communicating with their advocates during the hearing or didn't like not meeting their advocate before the hearing.
- Parents at the bottom with vulnerabilities, poor IT skills or connectivity issues are unlikely to have been able to complete our online survey. TP currently working with HMCTS to ensure that their work on remote hearings captures vulnerable parents who may not have Equality Act vulnerabilities but may have overlapping multiple vulnerabilities.

Please support and encourage clients to complete the survey :

<https://www.surveymonkey.co.uk/r/familycourtreMOTEhearingsSM>

PRACTICAL SUGGESTIONS FOR SUPPORTING PARENTS TO ACCESS JUSTICE THROUGH REMOTE HEARINGS

Consider interconnected / overlapping vulnerabilities. Several low level vulnerabilities can create quite a significant barrier to access to justice.

- Mental health / anxiety / confidence
- Experience of abuse
- Language / literacy / technical capability
- Cognitive issues
- Hardware, connectivity, credit
- Deprivation and isolation – alone with no support or no privacy?
- Difficult / emotional subject matter / time of crisis

When lawyer is not in the same room to reassure, explain and check in – a litigant shares some of the vulnerabilities of a LiP :

- May not understand, or unable to hear / follow (including through lack of documents)
- May lack confidence to say
- May interject inappropriately and put foot in it
- More nervous / agitated etc
- May not absorb or retain information

Video generally preferable to phone

- (but sometimes phone is less anxiety inducing?)
- Which platform matters – breakout rooms and hand wave helpful

Papers –

- How will they access and view them?
- having a full bundle may be unnecessary and overwhelming – consider identifying key documents. Most hearings now involve a PS from each party and a case outline.
- Check they can navigate them.

- Alert advocates to the need to screen share their bundle pages or read out.

Before the hearing

Consult, prepare and test – either build in conference with counsel OR take steps yourself and include them in your brief. Not all of the below can be achieved on the day of the hearing and is best done before the advocates' meeting.

- Build in time to
 - Give a framework of expectation of how a remote hearing works – initial notices, privacy, turn taking, muting, no interrupting, use of documents etc. Some judges ask clients if they want to comment – prepare client for that and urge caution!!
 - Discuss what format and adjustments might work for them (or if a remote hearing is likely to be impractical or unfair – hybrid hearing? adjourn?). They may be vulnerable in this context where before they would have been able to cope w/ supportive sol or paralegal or mum outside court. Remember, it takes time to set things up;
 - Where will they take the hearing? Who will watch the kids / how will they occupy them? Avoid squalor in background!
 - Use pre-hearing discussions to function as a dry run to troubleshoot, check the plan works and to reduce anxiety – make a plan if they are cut off;
 - Make a plan for in-hearing communication with advocate – text based if appropriate (WhatsApp etc);
 - If possible book a conference with counsel to cover these issues – meeting counsel by video before the hearing is reassuring;
 - take instructions;
 - explain what has arisen in advocates' meetings / check queries;
 - talk through case outlines/position statements – much is taken as read and not spelt out.

In-hearing Communication options

- WhatsApp?
- ask for breakout – hand wave?
- If video – monitor visual cues of client
- If not possible to give mobile number to client or text-based communication is not workable for them – zoom may be preferable due to breakout room functionality. Alternatively, pause or mute hearing (both ends) and do phone call / zoom call.

During the hearing

- If a parent joins by phone only they are at a disadvantage and can't match face and label with voice and role. Remember, advocates often recognise one another's name, face and voice. ALL participants should speak their name every time they speak and give their role in plain English : Mrs Smith's barrister (not counsel for the second respondent). Insist on this on client's behalf.
- Frequent checking in (prompt if judge doesn't) – are you hearing / seeing / following / do you need a break / to speak to counsel?
- Regular breaks – they will tire / lose focus before you. It's unfamiliar to them.
- Be ready to ask for a break to explain, check or update instructions
- Consider requesting plain English or a slower pace as you may not be able to spot if your client is not following (pressure of time means advocacy style can be fast, clipped and only make sense by references to papers)
- Monitor visually for distress – and regular text check ins to ensure they're following.

After the hearing

- Post hearing debrief (and in some cases welfare check) really important
- Have they understood? Do they have questions?
- Are there deadlines / action points for them?
- Are they ok? Is anyone around to support them?

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