

Hybrid Hearings:

Practical Points for Family Practitioners

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*Moving forwards, there are going to be more of what have become known as "hybrid" hearings (where some participants are in the court room and others are joined remotely) as a way of ensuring the **timely, fair and safe** determination of family cases. This document considers the present guidance and summarises practical considerations for professionals and lay clients.*

Courts are opening!

1. There is a press release on the gov.uk website titled "**more face-to-face hearings as courts reopen**". You can read it [here](#). On 8 June 2020, there were 184 court and tribunal buildings open for essential face-to-face hearings – that's 54% of those across England and Wales. It is understood all Family Court buildings should be open by early July.
2. You keep can keep up to date with which buildings are open², staffed³ or suspended⁴ using the "tracker list" [here](#). You can also keep up to date with the

¹ much of what is written in this note has been paraphrased / lifted from other documentation / guidance and credit has been given where possible

² those which are open to the public for essential face-to-face hearings

³ those at which HMCTS staff and judges will work from the buildings, but they will be closed to the public

⁴ those which are temporarily closed

HMCTS operational summary [here](#) which provides a weekly summary of HMCTS' operational position⁵.

3. Courts that opened in the South West and Wales this week are:

- Portsmouth Magistrates Court
- Salisbury Law Courts
- Swindon Magistrates Court
- Newport Crown Court
- Merthyr Tydfil Combined Court; and
- Llandudno Magistrates Court.

So, is it "pre-lockdown business usual" then?

4. The short answer is **no**.

5. On 9 June 2020, the President of the Family Division published *"The Family Court and COVID-19: The Road Ahead"* ("the President's Guidance"). It says that now is the time for us to take stock and consider the road ahead. You can read it [here](#).

6. The President makes clear that the most crucial change that must now be understood by us all relates to the **timescale** before the courts may return to full and ordinary operation. Stringent social distancing measures are likely to remain for many months and this will have a direct impact on how the Family Court functions. He says:

*"It now seems sensible to assume that social distancing restrictions will remain in place for many months and that it **is unlikely that anything approaching a return to the normal court working environment will be achieved before the end of 2020 or even the spring of 2021.**"* [emphasis added]

Court capacity

⁵ HMCTS aim to update this every Friday at 5pm

7. The requirement of social distancing will substantially reduce capacity. A limited number of courtrooms will be suitable for socially-distanced, attended hearings. There will be a limit on the total number of people who can be allowed in the courtroom and allowed in the public areas of the court building at any one time. Courtrooms are a precious commodity to be shared with civil, crime and tribunals.
8. For example, in Swindon the District Judges' courtrooms are too small so only Courts 3 and 4 in the main Combined Court Building can be used at this time. The writer understands that in Bristol only 8 courts out of 17 will be open for attended hearings.
9. Clearly, space will fill up quickly and longer hearings will reduce capacity further - what if there was a finding of fact hearing listed for 2 weeks? That is 2 weeks that a courtroom is potentially out of action.
10. There will also be a substantial demand on conference rooms – few are likely to be large enough to meet the present social-distancing requirements.
11. You will need to get this information direct from individual courts and keep it up to date because each court's capacity to undertake a greater number of fully attended or hybrid hearings will develop at different rates over time in line with social-distancing requirements as the layout of court buildings are all very different.
12. Work has begun to identify suitable venues to house so-called **"Nightingale"** courts. The idea being that we start to use public spaces, such as civic centres or university moot courts to host full hearings / allow parties, witnesses etc to attend remotely. This should therefore help to increase capacity to hear matters in full or in part. See article [here](#). The aim is some will be up and running by 1 August 2020. Do not hesitate to [contact our clerks](#) to see if we can assist with our facilities at St John's Chambers.

Backlog

13. The President describes that we now have the benefit of a bedrock of experience of remote working. We did not have this experience during the early weeks of the COVID-19 crisis, when most hearings were being adjourned due to

perceived unfairness of proceeding remotely at that time. However, at the time, it was likely hoped that such an adjournment would only be for a short period. Part of taking stock now is recognising that we must re-evaluate past decisions as well as evaluate present and future decisions against this much longer timescale.

14. The President notes that the need to achieve finality in decision-making for children and families, the detrimental effect of delay and the overall impact on the wider system of an ever-growing backlog must form important elements in judicial decision making alongside the need for fairness to all parties. Further to this, it is reported that Family Court applications are pretty much at pre-Covid levels (which was already recognised as being an unprecedented level of applications) and it is anticipated that once children's services are able to function more normally and once more children come out of lockdown and return to school, the volume of child protection cases may surge. Again, these things all impact on the system's capacity to deal with matters in a timely fashion, but particularly in a fully attended or hybrid format. The Family Court's business priorities can be found [here](#).
15. In a recent meeting between counsel and the judiciary in Bristol the author understands that it was said that there is a huge backlog in Bristol of unresolved final hearings and through correspondence from the Western Circuit communicated to members by Kate Brunner QC, that the backlog and delay in all jurisdictions is "*growing at an alarming level*".

Arrangements in court

16. If you do have a fully attended or hybrid hearing, the "court experience" will be very different and you will need to prepare yourself and your client for this in advance.
17. I would suggest that consideration should be given to the individual court's risk assessments and HMCTS guidance alongside the government guidance at the time.
18. Each court building that is open has been risk assessed. According to the gov.uk website:

"We have comprehensively assessed risk to staff and users and are ensuring the safety of anyone who comes in to our buildings by applying published court and tribunal coronavirus safety controls, including an organisational risk assessment, assessment tool and additional guidance for regular court users. These have been endorsed by Public Health England and Public Health Wales".

19. There is some general guidance for court users on the gov.uk website [here](#).
20. Whilst risk assessments will of course be individual to each court, there are matters contained within them that will be of universal application. The details of HMCTS' risk assessment process can be found [here](#) and the assessment tool [here](#). Safety guidance is [here](#).
21. Tom Webb from 3PB has provided an article setting out his experiences of returning to court in Winchester. Whilst the matter he was dealing with was a Fast Track trial, the information is useful for all and can be accessed [here](#). He has commented that he felt reasonably safe throughout the hearing but *"you are in my view very likely to end up in quite close proximity to other people, even if just briefly. You are bound to touch doors, tables etc. that have not been cleaned since the last person used them, no matter how diligent the cleaners. If you / your client are vulnerable or living with somebody vulnerable, it is important to have this in mind when considering whether to accept instructions in my opinion"*.
22. It is understood that risk assessments should be available to everyone who are at court or going to or considering going to the court in the near future. They should be made available either by asking at the front desk, or by asking any member of the court staff by email. HMCTS are working to provide a response on the same day of the request but to assist the court staff we are asked to ensure requests are made before 3pm on the day before the hearing.
23. Apparently, there have been some problems with providing risk assessments because things are changing frequently (sometimes daily) and so the risk assessments need to be updated. HMCTS is understandably anxious to ensure that only up-to-date risk assessments are being circulated. You will need to make sure that you are working from an up to date version.
24. There was a meeting of practitioners in the Bristol area on Microsoft Teams on 4 June 2020 to discuss the way forward with hearings in Bristol. The panel was made up of HHJ Cotter QC, HHJ Wildblood QC, HHJ Marston, DJ Cope and the HMCTS management team from the Bristol Civil and Family Justice centre.

Practical information (as helpfully summarised by the Western Circuit) which gives you a flavour of what risk assessments may contain, included:

- (i) Individuals will be allowed through if they have the professional users pass but security will need to check bags so bring in as little as possible;
- (ii) There is a one-way system inside the building, including inside the courtrooms, with two metre distance tape markings on the floor;
- (iii) There is end of day cleaning and two extra cleaners throughout the day (to clean door handles etc);
- (iv) Hand sanitiser is in each courtroom for each court user. There will be no water available so bring your own water bottles;
- (v) There is technology in place to put a device on the witness box to use an electronic bundle. The Civil Justice Council report set out that almost half of the hearings experienced technical difficulties (44.7%) and that more difficulties were experienced during full video hearings than fully audio hearings;
- (vi) There are two conference rooms per case but there won't be enough for multi-party cases, most of rooms will hold only two people safely (only 2 rooms will take 6) and the advocates room has reduced seating capacity to 8 seats.

25. As well as getting copies of the risk assessment, it is worth checking if the court/judges have created any of their own rules/guidance. For example, Swindon has adopted a set of "Covid-19 House Rules" to be strictly followed by all those attending the court. The document sets out that it is expected that they will be taken seriously and enforced – the rules include things like arrival and entry, bag searches, social distancing in the building and court rooms and facilities, hygiene and cleaning.

26. In addition to what is stated above, I would suggest some further practical considerations for attending court:

- if you are eligible for a professional users pass, get one;

- consider whether anyone who is due to attend court / considering it would benefit from having a site visit – it is understood that this is/was being offered at some courts, like the Central Family Court;
- give yourself plenty of time – clearly things are going to take longer e.g. security checks and also hearings as there are likely to be handwashing breaks timetabled throughout the day. Bristol Court recommends that you arrive at court no less than 30 minutes before the start of the hearing;
- take your own food and drink with you – cafés etc in/around the court building are likely to be closed initially and water carafes are unlikely to be provided in court. If there is a supermarket nearby you may be ok, but this would mean having to leave the court and then go through security again as you come back in! Tom Webb says that in Winchester they were provided with their own bottle of hand sanitiser, wipes for the table and a bottle of water – but this is unlikely to be the service in every court (Bristol Court has asked people to bring their own water bottles);
- with that in mind, you may also want to bring your own hand sanitiser, anti-bacterial wipes for surface and tissues. You might want to wear a mask when in communal spaces;
- consider what things you ordinarily do at court which would now not be compatible with the social distancing rules and try to get them done before attending. Tom Webb suggests as examples:
 - it is very difficult to maintain a safe distance of 2m when trying to view video footage with a client in conference – could you watch this at the same time remotely instead?
 - if you need a client to check / sign a document (this will inevitably involve handing over and then taking back a document) – is there a way to arrange this separately? will an electronic signature or “approved but unsigned” suffice?
 - likely to be difficult to utilise conference rooms in the current circumstances to have private conversations with your client / opponent. Tom Webb suggests these things are done in advance by remote / safe means (Bristol Court guidance says that 2 conference rooms will be designated for each court but “you should try and arrange pre-court conferences away from the Court building”);
 - you will not be able to hand anything up to the judge or to a witness so things will need to be filed/served in advance;
- Tom Webb’s article also identifies that the toilets at Winchester Court were “one in, one out” which is something that needs to be considered as buildings get busier if you/your client/a witness are likely to need to use the facilities fairly frequently;

- stay alert - Tom Webb's article also identifies that there are times when social distancing slips – e.g. going through doors when the instinct is to hold the door open for others. What about getting into lifts? It is understood from the Bristol Court guidance that there will be 2 marshalls on each floor to assist with movement through the building and ensure compliance with the requirements of the risk assessment;
- in the Civil Justice Council report there were technology issues in nearly half of the cases. Check whether your technology is compatible with the court's and others involved in the case. Consider whether a test-run of the technology is required to ensure it works for those in court and those attending remotely, simultaneously;
- if a witness is giving evidence, they may have to affirm rather than give the oath as the oath requires the handling of a holy book – this might be important to some clients.

27. In the context of the circumstances above, the message from the President is this:

"The reality to be faced is that the Family Court must now, for a sustained period, seek to achieve the fair, just and timely determination of a high volume of cases with radically reduced resources in sub-optimal court settings".

How will this be achieved?

28. The President's Guidance states:

*"The Family Court will now be moving from working almost totally via remote hearings to a situation where at least **some, and increasingly more, hearings will be either fully attended by all parties or 'hybrid' (where some of the parties attend and the remainder engage with the court process remotely)**. This change in working practice will develop over time and is very much work in progress. It will in part depend upon the availability of a COVID-safe working environment in courtrooms and court buildings. Such resources will be in short supply and may fall to be shared with the criminal, civil and tribunal jurisdictions...*

Even if attendance at court increases, it is plain that a good deal of the day to day work of the court will still have to continue to be undertaken remotely during the coming months." [emphasis added]

29. It is clear from all guidance that the decision on whether a particular case justifies an attended/hybrid hearing and how the details of it are to be worked out, will be taken by the Judge as a judicial decision (usually at a directions hearing of some sort).
30. There is no definitive criteria for cases which should be heard in person or remotely. Decisions will need to be made on a case-by-case basis. You also need to consider whether *all* of the hearing needs to be dealt with in-person or just *part* of it. Early discussions with others on the case will be crucial.
31. On a local level, on 5 June 2020, a message was circulated from HHJ Hess (DFJ for Wiltshire) about the resumption of family hearings in Swindon ("the Swindon document"). The Swindon Combined Court Centre will be opening for attended family cases from today onwards. It confirms that:

"we will be reintroducing a limited service of attended hearings in family cases in Swindon Family Court for those cases which really cannot be dealt with remotely"

32. It appears that the expectation at the moment is that fully attended or "hybrid" hearings will only be a minority of selected cases and so we need to give consideration to whether our case really *needs* an attended or hybrid hearing, rather than it just being a preference.
33. In the President's Guidance we are again reminded that we (and the court) should always have regard to ADR and this is all the more important at this time – when it is clear that the court will struggle to cope with the volume of cases in a restricted working environment. He urges us to familiarise ourselves with the options available and to be prepared to identify those cases which may be suitable for one or other form of ADR. In the current climate, ADR may well be a very important resource available (though it may come with its own, different, considerations which are outside of the scope of this document).

What does my case need?

34. The starting point for your consideration is the President's Guidance. The good news is it confirms that the overwhelming view of the judiciary and legal

profession is that the Family Court does not need any further directive or proscriptive guidance on case management at this time, stating:

"It is thought that the President's Guidance issued on 19 March⁶, coupled with the joint letter from the three Heads of Jurisdiction on 9 April⁷ and subsequent clarification through the appeal process⁸ and otherwise has achieved a workable and settled understanding that allows each judge, magistrate or legal adviser the discretion to make bespoke case management decisions on a case by case basis.

The only change to the previous guidance that is now necessary is to revise sub-paragraph (g) in the Heads of Jurisdiction letter to judges dated 9 April 2020 which read:

(g) 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."

This passage should now read: "(g) In all other cases where the parents and/or lay witnesses etc are to be called, the case may not be suitable for a fully remote hearing.

Consideration should be given to conducting a hybrid hearing (with one or more of the lay parties attending court to give their evidence) or a fully attended hearing.

⁶ <https://www.judiciary.uk/announcements/covid-19-national-guidance-for-the-family-court-message-from-president-of-the-family-divison/>

⁷ <https://www.judiciary.uk/wp-content/uploads/2020/04/Message-to-CJJ-and-DJJ-9-April-2020.pdf>

⁸ For example: *A Local Authority v Mother & Ors* [2020] EWHC 1086 (Fam) (05 May 2020), *Q, Re* [2020] EWHC 1109 (Fam) (06 May 2020), *A Local Authority v The Mother & Ors* [2020] EWHC 1233 (Fam) (15 May 2020), *P (A Child: Remote Hearing), Re (Rev 3)* [2020] EWFC 32 (16 April 2020), *A (Children) (Remote Hearing: Care And Placement Orders)* [2020] EWCA Civ 583, *B (Children)(Remote Hearing: Interim Care Order)* [2020] EWCA Civ 584 (30 April 2020) and the new Court of Appeal judgment that came out yesterday: *C (Children: Covid-19 Representation)* [2020] EWCA Civ 734

Where it is not possible to conduct a hybrid or fully attended hearing, the court may proceed to hold a remote hearing where, having regard to the child's welfare, it is necessary to do so; in such a case the court should make arrangements to maximise the support available to lay parties."

35. Consideration of the welfare of the child always includes consideration of delay. The President's message on delay is firm and clear: the child's journey **must not** be delayed – delay in decision making is likely to prejudice the welfare of a child who is subject of court proceedings. There is a need to consider delay in all cases, and to revisit it in cases that have already been adjourned during the crisis. In respect of children cases, the President says:

"In the early days of lockdown, it was understandable and acceptable for cases to be adjourned for a short period in the hope that a more normal court process could then be undertaken. A short adjournment to meet the needs for fairness and due process might not unduly compromise the need to achieve a final outcome for the child. Now that we are facing many more months of straitened resources it is likely that nettles will need to be grasped for the sake of the child's welfare, with final hearings fixed for remote or hybrid determination, and with steps taken to maximise the fairness of the process.

Whilst a court is not required to hold the child's welfare as the paramount consideration when making case management decisions, the child's welfare and the need to avoid delay will always be a most important factor and may well be determinative in many cases. Making a timely decision as to the child's further care is in essence what each case is about. The child's welfare should be in the forefront of the court's mind throughout the process". [emphasis added]

36. So, the major change in the guidance, is that the starting point in cases where parties/witnesses are going to be called to give evidence is no longer that such a case is unlikely to be suitable for a remote hearing. Now, remote hearings in such cases **may** not be suitable and there is a mandatory requirement to consider conducting a hybrid hearing or a fully attended hearing. Where it is not possible to conduct a hybrid or fully attended hearing, the court may proceed to hold a remote hearing where, for welfare reasons it is necessary to do so and, in such cases,, the court should make arrangements to maximise the support available to lay parties.

37. Upon that change having been made, the guidance mentioned is the broad "framework" within which the Family Court will operate for the foreseeable future. The President has made clear that much of what he describes is aspirational, untried and likely to depend upon the ability of a range of agencies and professionals to deliver resources or to work in ways which will be new. Its aim is to identify the **basic priorities** and **ground rules** and to offer a **checklist** for case management decision making. It is intended to be **supportive** rather than **restrictive** so as the potential for local resources to change and improve over time, the court system can be **agile** in reviewing how it undertakes work.

38. The Framework is below.

The Framework

THE KEY MESSAGE: Time Management – a significant change needed

"42. Drawing the matters referred to above together, the following is clear:

- i. The current restraints (or variants of them) are likely to obtain for many months to come;*
- ii. The volume of work in the system is very high;*
- iii. The Family Court was not coping with the pre-COVID workload and radical steps aimed at changing professional culture and working practices were about to be launched when the pandemic struck;*
- iv. The ability of the system to process cases is now compromised by the need to conduct most hearings remotely;*
- v. Whilst there will be some capacity for the courts to conduct face- to-face hearings, the available facilities will be limited;*
- vi. Remote hearings are likely to continue to be the predominant method of hearing for all cases, and not just case management or short hearings;*
- vii. Delay in determining a case is likely to prejudice the welfare of the child and all public law children cases are still expected to be completed within 26 weeks;*
- viii. Adjourning cases indefinitely or for a period of many months will not, therefore, be an option.*

43. If the Family Court is to have any chance of delivering on the needs of children or adults who need protection from abuse, or of their families for a timely determination of applications, there will need to be a very radical reduction in the amount of time that the court affords to each hearing. Parties appearing before the court should expect the issues to be limited only to those which it is necessary to determine to dispose

of the case, and for oral evidence or oral submissions to be cut down only to that which it is necessary for the court to hear."

CASE MANAGEMENT

*44. Clear, focussed and very robust management of cases will be vital in the coming months. The case management judge will have the difficult role of **balancing the welfare of the child, the need for a fair and just process and the limited resources of space, time and format with the need to conclude the proceedings.***

*45. **Adjourning the case to await a full face-to-face hearing is unlikely to be an option.** The court must identify those issues and applications that need to be heard and then move on to determine them.*

*46. Parties will not be allowed to litigate every issue and present extensive oral evidence or oral submissions; **an oral hearing will encompass only that which is necessary to determine the application before the court.***

47. It is important at this time to keep the 'overriding objective' as set out in Family Procedure Rules 2010, r 1.1 in mind...

In these times, each of [the] elements is important, but particular emphasis should be afforded to identifying the 'welfare issues involved', dealing with a case proportionately in terms of 'allotting to it an appropriate share of the court's resources' and ensuring an 'equal footing' between parties.

*48. In keeping with the overriding objective and the elements highlighted in paragraph 47, judges should (after canvassing the point with the parties) **consider whether giving a short judgment will be sufficient and proportionate in any particular case.** In a short judgment the court will not be expected to set out a detailed recital of the evidence, save for those key elements which support the court's findings and decision. There should not, however, be any reduction in the content and scope of the judge's description of their analysis and reasoning.*

49. Regard should also be had to the following:

COVID Case Management Checklist:

A Narrowing the Issues:

- i. What issues are or can be agreed?*
- ii. Which of the remaining issues in the case is it necessary for the court to determine?*
- iii. Can those issues be determined without an oral hearing?*
- iv. If not, for which issues is an oral hearing necessary?*
- v. What oral evidence is necessary to determine those issues?*

- vi. *The time estimate for each witness (including cross-examination) is to be reduced to the likely minimum necessary for the court to determine the issues to which it relates.*

B Hearing Format:

- i. *Can the issues be determined fairly and justly at a fully remote hearing (having regard to the measures set out at C below)?*
- ii. *Is it necessary to conduct all or part of the hearing with some of the parties in attendance at court ['a hybrid hearing']?*
- iii. *Where a remote or hybrid hearing is to be held, it should be undertaken by video link, unless the court determines that a telephone hearing will be sufficient or a video link is not available;*
- iv. *Where a telephone hearing is to take place, it should be undertaken via BT MeetMe Dolby Plug-in, if available;*
- v. *Consideration should be given to access to the hearing by media or legal bloggers [FPR 2010, r 27.11, PD27B and PD36J];*
- vi. *Where in ordinary circumstances arrangements would be made for a child to meet the judge, the court should strive to establish a means by which the judge and the child may 'meet', albeit that this may, in some circumstances, have to be via a video link rather face-to-face;*
- vii. *The court should give at least 3 days notice of the platform that is to be used for any remote or hybrid hearing.*

C Optimising fairness of remote hearings:

- i. *The court should consider what options are available to support lay parties and enhance their ability to engage in a remote hearing. The options may include:*
 - 1. *Attendance at a venue away from the party's home (for example a room at court, solicitor's office, counsel's chambers or a local authority facility);*
 - 2. *Arranging for at least one of the party's legal team to accompany them (whilst observing the need for social distancing);*
 - 3. *Establishing a second channel of communication between the lay party and their lawyers (for example by email, communication app or telephone during the hearing);*
- ii. *Cases should be clearly timetabled with a start and planned finish time - where a witness template has been completed by the advocates and approved by the judge, it must be complied with save in exceptional circumstances;*

- iii. *Regular short breaks should be provided in a hearing of any length;*
- iv. *The overall length of the hearing should be reasonable, taking account of the need for breaks and of the acknowledged additional pressure of engaging in a remote court process;*
- v. *Prior to the start of the hearing, all advocates should have communicated with their clients and with each other in an advocates meeting;*
- vi. *All participants should be logged in and ready to start at the appointed hearing time;*
- vii. *Advocates should ensure that they are available not only for the proposed length of the hearing but also for a reasonable period thereafter to de-brief their client and communicate with other advocates over the drafting of the order and any ancillary matters;*
- viii. *At the start of each hearing the judge should make a short statement explaining the ground rules for the remote hearing;*
- ix. *The judge should ensure that there is a means for a party to give instructions to their advocate during the hearing;*
- x. *Where the hearing involves a litigant in person the judge should 'check in' regularly with any litigant in person to ensure that they are hearing, understanding and following the proceedings;*
- xi. *At all times a remote hearing should be conducted with the degree of seriousness and respect that is evident at a fully attended hearing;*
- xii. *The court should consider how best to arrange for the involvement of any interpreter or intermediary in the hearing;*
- xiii. *The court should ensure that lay parties have access to the electronic bundle (unless this is not necessary, for example by reason of the hearing being an interim hearing where a party is represented and not required to give evidence).*

BEST PRACTICE: FJO Report Section 6

50. In addition to the specific matters set out in the checklist at paragraph 49, regard should be had to the Best Practice suggestions that are helpfully set out in Section 6 of the FJO Report.

The report can be read [here](#). [emphasis added throughout]

Suggested key practical points

Time management

39. As practitioners, we need to be taking the initiative and raising the possibility of an attended / hybrid hearing at the earliest possible stage and reviewing earlier decisions. It is anticipated that Judges will be doing the same (HHJ Hess warns in the Swindon document that judges are likely now to be reviewing cases which have been put to one side in the last couple of months because of the perceived need for an attended hearing).
40. Check your case against the guidance and the checklists. What do you think? What does the other side think? What do the lay parties think?
41. The final decision can only be made by the court. There will likely need to be a hearing unless the Judge is willing to deal with it on the papers. How this issue is dealt with court to court will be different. The writer understands that some Judges have been willing to accept an email requesting a directions hearing in front of the trial Judge and then put a directions hearing in at times around their list i.e. 9:30am or 4:15pm and dealt with it remotely. Some Judges may require a formal application to be made.
42. Going through this process will inevitably have an additional cost for privately paying clients, in addition to the costs of all the pre-hearing work that would need to be done as identified above. Clients may need to be warned in advance and then kept updated about costs more regularly throughout the case. Alternatively, legal aid certificates will need to be reviewed regularly.

Hearing format - can the issues be determined fairly and justly at a fully remote hearing (having regard to the measures set out at C below)?

43. There is no definitive criteria for cases or issues which should be heard/dealt with in person or remotely. Decisions will need to be made on a case-by-case basis. You need to consider whether all of the hearing needs to be dealt with in-person or whether parts of the hearing can be dealt with in person and others by remote means.
44. The President has set out a remote hearing "hierarchy" of sorts as follows:

Despite the necessarily moving picture that I have described, it is nevertheless possible to provide the following very firm steer:

a. In terms of remoteness, a remote hearing over the telephone is the most remote option other than a paper or an email based process.

b. Telephone hearings may be well suited to short case management or review hearings, they are unlikely to be suitable for any hearings where evidence is to be given or where the hearing is otherwise of substance

c. Where a suitable video platform is an available and viable option, video, rather than telephone, should be used for the conduct of a remote hearing

d. It is not a good use of a judge's time for the judge to be responsible for dialling in each participant for a BT Meet Me hearing. HMCTS has accepted that the task ought to be undertaken by staff and they are working hard to achieve this in all courts.

e. Experience has shown that BT Meet Me Dolby Plug-In (which channels the phone call through the judicial computer) is preferable to the basic BT Meet Me service and it should be used where available when a hearing is to take place over the telephone.

f. The two video platforms currently supported by HMCTS are Skype and CVP; of these two CVP is more effective than Skype and should be used where it is available.

45. A helpful guidance document has been prepared for the Somerset DFJ area which states that in cases involving vulnerable parties where there is an intermediary appointed to assist a party or recommendations have been made by a psychologist/intermediary/other as to measures which need to be adopted to enable a party's full participation in a contested order then at least 6 weeks before a contested hearing, that party's legal representative shall apply for a direction that the psychologist/intermediary/other is to be asked for views on whether that party can fully participate in a remote hearing by phone or video and, if so, what additional measures are necessary to able full participation.

46. It goes on to say that in any other cases where a party has any vulnerability not covered by the above which may impact on their ability to participate in a remote hearing, their legal representative shall apply to the court for directions, and that in considering whether the hearing can be heard remotely, and in what form, the following factors need to be considered:
- a. Does any party or witness have learning difficulties or any condition (including any mental health condition) which would make it difficult for them to participate in a remote hearing
 - b. Is an intermediary or interpreter necessary
 - c. What are the views of any intermediary on whether a remote hearing can be conducted, and what measures will be necessary.
 - d. Where will witnesses and lay parties attend the hearing from
 - e. If home, who else will be present in the house
 - f. Are there children present in the house
 - g. If children, who will be able to care for them during the hearing
 - h. Have there been any previous concerns over any relevant adult sharing information inappropriately with the children
 - i. Can the hearing be confidential given the venue of any party/witness attending the hearing
 - j. Do all witnesses and lay parties have suitable devices to use to attend the hearing
 - k. Are the witnesses and lay parties able to download any necessary software
 - l. Do all witnesses and lay parties have sufficient broadband to enable the hearing to be conducted through a video means
 - m. Do all witnesses and lay parties have sufficient funds to enable the hearing eg credit on phone, data charges.
 - n. How will witnesses and parties access the bundle, if necessary
 - o. Are there any concerns over the integrity of any evidence given in these circumstances due to (inter alia) the possibility of influence by another person present, intimidation by another person present or because a remote hearing is likely to impact on any party's or witness's ability to give full and frank evidence
 - p. The impact on the likely time estimate of the hearing being conducted remotely

- q. The impact of delay on the children/parties if the matter cannot be heard remotely.

47. If the concern you have is that a lay party might not be able to access a hearing because of software, internet etc then we are encouraged to try to find another way of dealing with this issue rather than using a courtroom and consider the measures for optimising fairness set out in the President's Guidance.

48. Regarding support for lay parties, the President's Guidance states:

"The NFJO Report demonstrated the difficulty that some lay parties have understandably encountered when attempting to take part in a remote hearing.

Easing of the lockdown requirements, development of our common understanding of social distancing, and the gradual reopening of facilities, together with technical workarounds to maintain an open line between lawyer and client during a hearing, have opened up options for enhancing the support that can be given to lay parties. This progress will undoubtedly continue and will mean that some hearings that were adjourned in the early days on the grounds of fairness may now proceed remotely. 2

In all cases active thought should be given to arranging for a lay party to engage with the remote process from a location other than their home (for example a solicitor's office, barrister's chambers, room in a court building or a local authority facility) where they can be supported by at least one member of their legal team and, where appropriate, any interpreter or intermediary.

The ability for interpreters to undertake their role without unduly interrupting a hearing is plainly a cause of difficulty. Where the process is conducted over an audio or video link, and the interpreter (who is not in the same location as their client) must interpret over the same common link, there will need to be a pause for interpretation after every single sentence or phrase. Even at a hybrid or open hearing, the interpreter must sit at least 2 metres from the client and cannot whisper the interpretation as is usually the case. The need for this stop-start process adds considerably to the length of any hearing. Where possible attempts should be made to provide a workaround, such as interpretation over a separate open phone line with the interpreter and client using earpieces, or typed interpretation over linked computers or email.

More generally, in circumstances where the majority of cases must now proceed remotely or semi-remotely, every effort should be made to accommodate and enhance the ability of lay parties to engage fully in the court process.

I am very grateful to the Transparency Project who have this week published a simple, nationally available, 'Remote Court Hearings Guidance Note' to assist lay parties and litigants in person by explaining what a remote or hybrid hearing in the Family Court may involve. The attention of all lay participants should be drawn to this most useful document.

49. The President's recommendation is that the Transparency Project's guide note to assist lay parties and litigants in person by explaining what a remote or hybrid hearing in the Family Court may involve. The guide can be found [here](#). There is also a very helpful document that has been prepared by the FLBA Working Group in Sussex [here](#).

Hearing format - Is it necessary to conduct all or part of the hearing with some of the parties in attendance at court ['a hybrid hearing']?

50. Consideration needs to be given to who are you suggesting should attend in-person and whether 1) they can all actually attend and 2) they can fit in the courtroom and the court building line with the government / HMCTS guidance at the time. For example, in Swindon the advice from HMCTS is that a maximum of 6 participants can be safely accommodated in Court 3 and a maximum of 4 participants can be safely accommodated in Court 4 (in each case plus the judge and a clerk/usher). So, in a care case clearly not everyone will be able to be present in court. Further, the Swindon document sets out that "no more than 20 people are authorised to attend at any one time" (figure does not include staff, judiciary, jurors).
51. Professional witnesses like medical experts are likely to be able to give evidence remotely.
52. Cafcass have published a protocol on how and when Cafcass staff should attend court during the first phase of the COVID-19 recovery (1 June 2020 until 1 September 2020 – in line with the current government advice on social distancing). The full protocol can be read [here](#). In summary, the starting point is that Cafcass Officers will not attend hearings remotely unless there is a compelling reason to attend in person, even where others involved in the hearing are attending in person. Cafcass rely on the fact that the court does not

need to assess the demeanour of a professional witness when they are giving evidence. It is anticipated that most hearings will be done remotely but that there it is necessary for a Family Court Adviser to physically attend a court hearing, an assessment will be made about the vulnerabilities of the staff member and the safety measures in place at the court. Also consideration will need to be given to, for example, if the Cafcass Officer has family commitments as a result of the restrictions that means they cannot work outside of the home e.g. childcare or they are required to shield. The children's guardian would in most cases expect to be present throughout a final hearing but if circumstances do not allow this to be feasible, the court will be informed, and agreement reached as to which parts of the hearing the guardian can attend in addition to the giving of evidence.

53. Regarding lawyers and other professionals, it has been said that the reality of our current situation is that some people would find it very difficult or impossible to attend in person at the moment for reasons including health or childcare commitments (this may also be the case for lay clients!). If someone does not want to attend for health reasons it might be because of an undisclosed health condition or early pregnancy. It is understood from information received from the Western Circuit that on Circuit, courts are urged not to require information about why an advocate requests a remote hearing and also that advocates should not feel pressured to attend.
54. Whether the lawyers need to attend will depend on the facts of the case. See: [A \(Children\) \(Remote Hearing: Care And Placement Orders\) \[2020\] EWCA Civ 583](#) and the Court of Appeal decision released yesterday in which the court did not overturn a decision not to grant an adjournment until the autumn for the possibility of leading counsel for the mother being able to attend the attended part of a hybrid hearing ([C \(Children: Covid-19 Representation\) \[2020\] EWCA Civ 734](#)).
55. The President has given the following guidance on when lawyers and other professionals are unable to come to court:

"HMCTS has worked closely with professional bodies representing solicitors and barristers to explain and develop the extensive measures that have been, and will continue to be, undertaken in court buildings to comply with advice from Public Health England/Wales. Professionals who are not in recognised vulnerable groups will be expected to attend at court where required."

Those professionals who, unfortunately, are required to shield or in some other vulnerable group, are entitled to expect that the judiciary will be sympathetic to their situation and, will take all reasonable steps to make arrangements for the hearing to proceed which take account of their difficulties. Where, however, it is not possible, despite all best endeavours, to accommodate the absence of a professional who must avoid coming to a court building then, unless the interests of the child, fairness and justice can be met in another way, the court hearing should proceed in their absence, with any necessary arrangements being made to cover for the absent professional". [emphasis added]

56. Consideration also needs to be given to the Judge and whether they are able to appear in-person. One of the considerations that may weigh heavily in the balance when deciding whether to have a hybrid hearing is whether there is felt to be a need for a party/parties to attend court and be in front of the Judge as it forms an essential part of the assessment of that witnesses evidence.

57. In a message to the Judiciary, the Lord Chief Justice has said:

"We must continue to look after our own and our families' health. Some judges will need to continue to shield themselves or a family member. Others will need to isolate if they have coronavirus or have been in close contact with someone who has. In general, though, it is proving to be more efficient for judges to work from a court building, even when hearing cases remotely, where they can be better supported by staff, have space, access to the papers and none of the intrusions of working from home. Judges should aim to work from a court building where it is safe and efficient to do so."

58. Your case might have been allocated to a particular Judge who has been involved to date or might have determined the previous proceedings. If the Judge is unable, for their own personal reasons, to attend court at this time, a decision will need to be made as to whether the matter can be satisfactorily dealt with remotely before them, and if not, whether it should be reallocated or adjourned because it must be heard by that Judge and all/part of the hearing must be done in-person. For example, in the Swindon area, two District Judges are not able to attend court at this time and the guidance from Swindon is that *"if necessary and appropriate, their cases may have to be reassigned, but wherever possible judicial continuity will be respected"*.

Concluding suggestions and comments

59. Some additional considerations that occur to the author are:

- in hybrid hearings people might need breaks at different times – handwashing breaks for those in court, more regular breaks for those staring at a screen?
- get contact details for everyone involved in the hearing – things are bound to go wrong with the technology, or you might need to have negotiations with / take instructions from someone in a different location to you. It will be good practice to get client's emails early on as now the guidance suggests more of a focus on video hearings rather than telephone hearings – providing both an email address and telephone number to the court is advisable;
- what can you do (in so far as you are professionally able) to help a litigant in person to make the process fair?

60. As is made clear in the President's Guidance, much of what is happening at the moment is aspirational, untried and likely to depend upon the ability of a range of agencies and professionals to deliver resources or to work in ways which will be new:

"As has been the case during the past three months, much will depend upon continued communication and cooperation between each agency involved in the delivery of family justice; the 4 importance of collaborative working, both locally and nationally, cannot be overstated." [emphasis added]

61. Hopefully, the St. John's Family Forum will continue to help facilitate **communication, cooperation and collaborative working** between family law professionals.

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