

The Family Court and COVID 19

The Road Ahead 2021

1. As the Family Court moves from 2020 into 2021 and a new Lockdown it is timely to look, once again, at 'the road ahead'. Unfortunately the conditions for the next few weeks are such that it is all the more necessary to remind ourselves of lessons learned and to maximise our ability to work safely.
2. The message from the Lord Chief Justice issued on Tuesday 5 January¹ makes it clear that the courts will continue to function during Lockdown 3, but that footfall in court buildings must be kept to a minimum. The default position will be to facilitate the remote attendance of all or some of those involved in hearings. As the government have made clear, the current lockdown is likely to endure for some weeks. Whilst there is a most welcome 'light at the end of the tunnel', in the form of mass vaccination, this 'light' is only likely to lead to a return to anything like normal working in the Family Court once the bulk of the population have been vaccinated, which may not be achieved for some time. We are thus facing not only a period of enhanced provision of remote hearings during Lockdown 3, but also a further, albeit more relaxed, period with a significant proportion of remote/hybrid hearings over the next six months before, we hope, getting back to normality.
3. The need to maintain and enhance good practice with respect to the conduct of remote or hybrid hearings therefore remains a priority for all professionals, court staff and judiciary in the Family Court over the coming months.
4. At paragraphs 17 and 18 below, specific consideration is given to attendance at court during the present Lockdown.

'The Road Ahead'

5. The guidance given in 'The Road Ahead' in June 2020 continues to apply. May I draw particular attention to the 'key message' which concerns time management and which is set out in paragraphs 42 and 43:

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

¹ <https://www.judiciary.uk/announcements/message-from-the-lord-chief-justice-latest-covid-19-restrictions/>

- 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.**”
[emphasis added]

- 6. ‘The Road Ahead’ stressed the need for the parties and courts to identify the welfare issues involved in a children’s case and then to deal with the case proportionately in terms of allotting an appropriate share of the court’s resources and to ensure that all parties are on an equal footing in the proceedings.
- 7. I would invite all those working in the Family Court to remind themselves of the ‘Covid Case Management Checklist’ at paragraph 49 of ‘The Road Ahead’ which focussed on narrowing the issues, the hearing format and optimising fairness in remote hearings.

The Family Justice Observatory 2nd Report:

- 8. The second report by the Nuffield Family Justice Observatory on Remote Hearings² has, once again, provided a most valuable insight into how the system is working. Although most who read this guidance will have already seen the 2nd FJO Report, as we gear ourselves up for a further 4 months or more of remote working, can I ask you to look at it again as there are

² <https://www.nuffieldfjo.org.uk/resource/remote-hearings-september-2020>

clear lessons, both large and small, to be learned within its pages. In particular, it is clear that, for some parents at least, the experience of remote hearings may fall below what is acceptable in terms of fairness and justice.

9. I have already publicly endorsed the guidance put forward in Chapter 8 of the FJO Report. It is now annexed to this document with, once again, my express endorsement. All professionals, court staff and judiciary must maintain a keen eye upon the engagement of lay parties (even if they are represented) during a remote hearing to ensure that they are sufficiently connected with the court process in a technical sense, and are, more generally, following what is occurring.

Video hearings:

10. Access to adequate technology has improved throughout the past 9 months. Video platforms are now widely available and are supported at all levels of the Family Court. Where a remote hearing is to take place, the default format should be video. Audio-only hearings should only be used where there is some pressing reason for not using a video platform. Where video is used, but a lay party is joining only over an audio link, enhanced vigilance is required to ensure that the lay party is engaged with the court process. This approach applies both to children cases and to Financial Remedy cases, where all hearings are currently remote in any event.

Working Hours:

11. The degree to which work, including court hearings and the transmission of emails, now takes place without any regard to the confines of a normal working day has become a matter of very significant concern in the context of our individual and collective well-being. Prior to the advent of remote working, it was simply not possible to hold a court hearing before 9.00am because the court buildings were not open. Neither was it possible to appear in one court for a case management hearing, before starting a full hearing in another court many miles away 45 minutes later. Now it is possible to achieve these and many similar additions to the working day via a computer; but just because we can, does not mean that it is right to do so.
12. The pressure of work in the courts, and the backlog of cases, are matters that concern the system as a whole. They will not be resolved by individuals working beyond reasonable capacity, but by increased resources and strategic, system-wide changes in the way cases are dealt with. Since March, the resources available to Family Justice have consistently increased in terms of equipment, staff numbers and judge sitting days. In addition, system-wide changes will now be introduced in Public Law children cases (following the launch of the Public Law

Working Group report in February) to streamline the flow of work. These and other more detailed administrative strategies are being developed to help to address the caseload.

13. Prior to the arrival of Covid, each DFJ area had established its own Well-being Protocol. Many of these included expectations of when it was, and was not, acceptable to send/receive emails or to expect a response. I am asking each DFJ to reinforce the need to adhere to these parameters. In addition, I am very grateful to Darren Howe QC, Liz Isaacs QC and the FLBA team for sending out a short guide on how to programme your email software to delay sending messages between certain hours³. Judges should question professionals who are seen to have been sending messages at times outside acceptable hours. There should be no expectation that email traffic will be read and responded to in the evening, overnight or at weekends.
14. The courts' long-standing practice of not starting to hear cases before 10.00am and not sitting after 4.30pm, save to deal with urgent matters, arises from the need for the judges and staff to prepare for the listed hearings before they start and then to undertake the administrative tasks that have accumulated by the end of the day. In my experience most Family judges are at their desks well before 9.00am and continue working in the late afternoon and evening. For the professionals, the time before and after court is spent in preparation, drafting and discussion/negotiation.
15. Widespread reports suggest that this time, on the margins of the day, is now regularly being taken up by additional hearings – some starting as early as 8.00am or commencing at 4.30pm. Having discussed this issue with the FDLJ's and others, I am clear that this development, laudable though the reasons behind it plainly are, is not tenable in terms of the human resources and well-being of all concerned. What is achievable in a sprint, is not sustainable in a marathon.
16. It is, therefore, necessary for me to state that the normal sitting hours of the Family Court are between 10.00am and 4.30pm, with an adequate adjournment at lunchtime. Whilst a judge may decide that additional hearing time will be allocated outside these parameters, this should be seen as an exceptional occurrence, and not the norm, and should be limited to no more than a 30-minute extension to the court day. Cases which are genuinely urgent will, as they

³ https://mcusercontent.com/2750134472ba930f1bc0fddcd/files/514168da-4fb3-40ff-b0e9-0ec855b80917/Out_of_hours_Emails_FLBA_guide.pdf

have always been, be allocated any necessary hearing time. (Substantive hearings listed in the dual-listing pilot scheme at Stoke on Trent are an exception to this requirement).

Attendance at Court

17. Hearings that are currently listed to be attended, either hybrid or fully, now require urgent review in the light of the Lord Chief Justice's guidance on reverting to remote attendance unless some form of face-to-face attendance is necessary. For some of these hearings it may continue to be necessary for one or more participant to attend court. It is important for parties to be in communication with the court promptly on this issue. Ultimately the format of any hearing is a matter for the judge hearing the case and their approval will be required before any change to previously directed arrangements.

18. It is imperative that all those who do attend a court hearing should abide by the guidance concerning social distancing, hand washing/sanitising and wearing masks. During a hearing, all present will be expected to wear masks, save for the judge/presiding magistrate, an advocate addressing the court or a witness giving evidence. The new strain of Covid 19 is much more easily transmitted and extra vigilance in ensuring that all precautions are followed is required. Those attending court should expect that the court staff and the judiciary will insist upon strict compliance with these measures.

'We'll get there'

19. At the close of 'The Road Ahead', having observed that 'the road is long', I stretched the lyrical reference yet further with 'we'll get there'. At that time this was no more than an expression of imprecise hope. The arrival of vaccines that are already being deployed is plainly a game-changer. There is now a legitimate expectation that we will be able to move out of this restricted way of working by the summer. That is still some months off, hence the need to repeat and renew the basic guidance. I remain, however, profoundly confident that the 'can do' approach that has been the hallmark of the Family Court from Day One will continue and will see us through. As the Lord Chief Justice has said, our achievement to date has been 'remarkable'. The light is now at the end of the tunnel; let us travel towards it safely.

Rt Hon Sir Andrew McFarlane
President of the Family Division

8th January 2021

8. Suggestions and examples of good practice

Many of the challenges highlighted in previous chapters indicate the kind of changes that are needed to ensure that remote and hybrid hearings work well and are fair and just. We do not revisit all these themes here but note, for example, the need for:

- technological improvements (such as access to big screens and headphones) to enable hybrid hearings to work well
- support in person (such as a legal representative, interpreter, intermediary or advocate) for all vulnerable parties to be able to fully participate in hearings
- additional support to enable litigants in person to participate in hearings effectively
- national guidelines regarding the safety of face-to-face contact for parents who have infants removed due to care proceedings
- measures to improve the ‘gravitas’ of hearings—such as having a standard court crest video background and better court administration
- continued work to improve technology across the family court estate
- better IT support for district judges and magistrates
- clarity about who is responsible for supporting parties to have access hardware and have good connectivity, and to be able to navigate software to participate in hearings
- more administrative staff to ensure the smooth and efficient running of hearings.

In addition, many respondents gave examples of what did work well and made recommendations for the future. While some of the problems identified will require additional resources if they are to be addressed, much of the good practice described would not be particularly costly to implement.

If everybody stuck to their roles and responsibilities, and we understood what each other did, and didn't overlap, and if cases were prepared properly, I do think things would be much more efficient...I think a high percentage of cases are ill prepared (Local authority solicitor).

Ironically, the court service doesn't actually need cutting edge technology. Cameras, screens and microphones are, in essence, established technology. I appreciate that the task is slightly more complex than that, but it focuses one's mind to remember that what is required is not actually the height of modern technology (Barrister).

8.1 More face-to-face or hybrid hearings

Many respondents highlighted the need to increase the number of face-to-face hearings.

Primarily, the physical court estate needs to be opening up more. I don't accept that more courtrooms couldn't be opened up safely. It is imperative to access to justice.

Giving evidence from home was hard due to technical issues. Things were easier when I went to court to give evidence there and the parties were in other venues (Barrister).

We need to get back to Court as soon as possible using other buildings as 'Nightingale Courts' if Courts are inadequate (Magistrate).

From the point of view of a Magistrate it is worrying how many colleagues are feeling dispirited, low and considering their options. If it were possible to bring the Bench together I think it would make a real difference to morale (Magistrate).

Some respondents focused on the need to ensure some face-to-face contact for parties, either in or outside the courtroom. They emphasised that, where vulnerable lay parties have representation and/or an advocate, intermediary or supporter, then every effort should be made to ensure that they are with those people while the hearing is taking place and in whatever form the hearing is taking place.

Our local authority has provided rooms to be used as witness suites and solicitors' firms and local sets of chambers have also successfully been providing this. However, in my view it should be available not randomly but in every case - the Court service should be providing a witness suite, whereby (subject to COVID restrictions) a person attending a remote hearing can be assured of:

- (i) working equipment to connect to a hearing, see other participants and have access to a bundle without stress;*
- (ii) the ability to be accompanied in the room by their lawyer, intermediary and/or a person specifically there to give them support;*
- (iii) the ability to monitor participation in the sense of – nobody there who shouldn't be, no devices switched on that shouldn't be, flags raised to the Court if feeling physically or emotionally not safe to continue;*
- (iv) access to holy books, witness cards etc;*
- (v) the ability to create an atmosphere that is emotionally containing i.e. comfortable and not like a police interview suite, but has some formality – e.g. when they see themselves on screen there is a Court crest or HMCTS logo behind them and they are on a comfortable chair that they can sit up straight and be seen;*
- (vi) the ability to have a conference pre-, post- and during hearings (Judge).*

Other respondents suggested similar ideas—such a room within a local authority, Cafcass property, solicitors' or barristers' buildings where a CVP link and technical support could be made available for parents to use.

[Make] remotely accessed venues in solicitors offices and county council offices more suitable for lay parties, interpreters and intermediaries to sit closer together and Perspex screen facilities available in courtrooms (Judge).

Open hubs when ready and safe; [with] parties having access to better hardware and internet at their legal reps' offices (Magistrate).

Parents should be given the option of going to a law office to participate, and have legal help (Magistrate).

Provision of fully equipped 'clean rooms' or pods which lay parties could use to participate in remote hearings (Third sector organisation).

Perhaps secure desktops in small private cubicles in corridors in the court building or even in shopping centres/ malls where lay clients can go to sit in a quiet place to join the hearings via video link if they do not have the technology at home to join a hearing via video (Barrister).

Alternatively, respondents suggested that there were other ways that lay parties could be supported to access proceedings remotely.

HMCTS to fund devices for lay parties to be used to enable access to the hearing both for remote connections and also accessing the bundle (Barrister).

[In relation to infant removals] With the major maternity units, the relevant local authorities should provide (laptop or computer) with good WiFi in a suitable private room (Judge).

8.2 Improving the way hearings are run

When asked about what was working well, or suggestions for good practice, many respondents identified ways in which remote/hybrid hearings could be better run.

Some of these suggestions related to specific challenges of conducting a hearing that was fully or partially remote. But some relate to good practice regardless of whether the hearing is held remotely.

Before the hearing:

- ensure all parties are given details about the hearing and the technology being used well in advance
- ensure hearings are listed with sufficient notice to allow parties to have an advocates' meeting before the hearing
- avoid late changes of date that will affect advocates'/intermediaries' ability to attend
- inform parties about the ground rules for attending a hearing (such as not recording and being alone)
- try out the technology first and check that all involved can hear/see well and test the mics
- ensure that there is a navigable PDF bundle for all participants
- ensure lay parties can communicate with their solicitor, advocate or intermediary during the hearing
- set up means for professionals (the bench) to communicate with each other during the hearing.

At the start of the hearing:

- start hearings at the appointed time
- introduce all those on the call
- start with a clear explanation about how the hearing will run so parties can engage effectively and can be heard
- explain that it is an official court hearing and normal courtesies and protocols apply
- check there are means for a solicitor and client to communicate during the hearing
- make it clear that all parties (especially those unrepresented) will be heard, and provide reassurances that views will be sought frequently throughout, and that there is consequently no need to worry or interrupt.

During the hearing:

- make sure everyone has been afforded the opportunity to speak
- on telephone hearings make sure speakers identify themselves
- on video hearings, make sure parties can be seen at all times
- take regular breaks
- allow time for lay parties to communicate with their representative and/or intermediary or advocate
- mute those not speaking
- check understanding of terms (e.g. s7, Welfare check list) with litigants in person
- ensure that the outcome has been understood by the parties.

Although these suggestions appear obvious, both professionals and parents raised concerns about the way that parties were currently experiencing remote and hybrid hearings, suggesting that such practice was not always evident.

The judge should explain how the phone process works. No-one explained to us how we could metaphorically raise our hand in proceedings. To a layman, a Judge is a scary person and I feared interrupting her. I fear for anyone on the autistic spectrum in this process and believe that their needs should be taken account of if they are not already (Parent).

A concerning proportion of litigants, even those who were represented reported not having access to the papers during a hearing, including final hearings (The Transparency Project).

When the video link is sent to parties, they should be asked to confirm receipt so that the court knows it has been received, or can resend if no response received (Magistrate).

If I could have talked to the judge, I felt ignored throughout (Parent).

[I would have liked] more guidance when court papers were sent (Parent).

[It would have helped if the] Judge had listed what was happening and going to happen (Parent).

Information is not in user friendly format (Legal adviser).

It was also clear from the responses that some courts have developed good practices.

We provide detailed orders which set out exactly what they need to do – e.g.; how to download app in advance, make sure they can charge their device during the hearing as drains power; the email address of the court to provide their own email address and to correspond with the court; how they will access the hearing via an email sent to them by the court; when that email will be sent etc (Legal adviser).

We put in our instructions for connecting to remote hearing that go out with the link that you need to enter in your name and your role in the case (J Smith, counsel for mother) so everybody knows who you are (Judge).

Court clerks do run CVP test hearing for parties and witnesses prior to hearings to try and iron out any connection/hardware issues (Barrister).

We have continually updated our working guidelines and offered a number of 'bite sized' video-based training sessions to develop our skills and confidence managing remote hearings. As we have become more experienced and confident we have been able to reintroduce appraisals, mentored sittings (for recently trained justices) and supported sittings (to train new presiding justices) (GLFP).

I check at the beginning of the hearing as to how [communication between lay party and their legal representatives] will be managed during the hearing and for contested cases with evidence ask that the lay parties and their legal representatives are at the same venue (which won't necessarily be the court) (Judge).

As a winger, I set up an email link with the Chair. This enables us to communicate while still on telephone & can help speed up decision making (Magistrate).

8.3 Other ideas for improving the administration of hearings

Respondents also made suggestions about how preparation for and smooth running of hearings could be made more efficient.

[Have] compulsory bundles even if only consisting of a case summary and position statement (Judge).

[We need a] centralised directory of all judicial email addresses or a specific email address to send documents for remote hearings and which is constantly checked and where documents are sent to the judge immediately (Barrister).

That parties are called or sent text reminders before hearings so they attend (Cafcass).

That there is guidance is issued to parties who are litigants in person before the FHDRA so they understand the limitations of the process and what can be achieved. A joint Cafcass/ HMCTS team could draft such a paper (Cafcass).

A legal adviser or gatekeeping judge to triage a case at application with a 10 minute phone call to establish the areas of conflict and set the parties on a course for self-resolution (or third-party supported) ahead of the FHDRA (Third sector organisation).

A family support officer post to be created whereby a staff member of the family court helps both parties to structure their time in front of the bench to be more efficient. This could be especially useful with litigants in person (Third sector organisation).

A virtual usher who can speak to parties in the virtual lobby before they join the remote hearing might reassure some litigants in person who are unsure what to expect (Legal adviser).

We believe that it should be an expectation for extracts from the bundle to be read aloud during remote and hybrid hearing – especially but not exclusively when the parent is giving their evidence....We would respectfully suggest that reading aloud the relevant passage/extract the parent is given the fairest possible chance of responding (Your Say).

8.4 Technological innovations

In addition for the need for continued improvement in access to (and the functionality of) technology across the family court estate, some respondents recommended further changes.

Phone hearings could be by a free-to-call service which people dial in to, rather than the judge or clerk having to call each person in turn (Barrister).

Helping justices set up a second screen for papers with HDMI leads (most could then use a TV monitor) (Magistrate).

Financial resource to ensure technology can support video hearings in all cases (the CVP does provide for connection by telephone so there really is no need for BT MeetMe anymore) and that hybrid hearings take place with proper link to large screens, webcams, microphones etc. in all courtrooms (Judge).

A break-out room in the virtual hearing room would be very useful, but I'm not aware of this on CVP or BT MeetMe - the platforms I use most often (Judge).

A court waiting room (Solicitor).

Separate platforms for intermediaries, interpreters and solicitors to be able to interact with their clients (Judge).

A parallel video retiring room to enable private discussions between justices without asking parties to leave the virtual court, email and WhatsApp groups (GLFP).

8.5 The need for more administrative staff

Many respondents pointed to the need for more administrative staff.

Although 71% of respondents reported that there had been sufficient HMCTS staff to support hearings, a significant number of respondents noted that there were insufficient staff to support the administration process:

[We need] more trained HMCTS support staff in court (Judge).

[We need] more staff to assist in placing the calls and dealing with the admin that remote Hearings generates (Judge).

The loss of DJ usher/Court clerk role is huge - now all their job seems to be is to make sure everyone connected and let me in to the call (Judge).

[We need] more HMCTS staff. Remote hearings require twice the amount of staffing work than attended. Documents that would be handed to ushers are now emailed to the central inboxes which are over 800 hours behind in processing correspondence. In addition, [we need] more judges to hear routine private law matters. Capacity is down from five cases a day to four cases in many cases and three a day in some. That creates a necessary increase in the number of judges required (Judge).

[We need] more HMCTS support for Judges to ensure that they are not required to act as administrative assistants! In order to make our remote hearings effective at the start of the pandemic, we took the decision for the Judge to send out the invite to the Teams meeting. This means that at least 30 minutes out of every working day is taken up with this take. Whilst it has meant that we have been effective in having Teams hearings on most matters, which are very productive, it is an enormous burden for the judiciary, especially in FDAC (Judge).

Hybrid hearing require HMCTS support simply not provided in my 'small' court (which in fact sits four district judges plus deputies, and which deals with some of the most deprived people in England) (Judge).

8.6 Suggestions for future guidance

Although most of the suggestions provided by respondents would not require changes in guidance, some respondents noted the need for clarifying guidance. In particular, one respondent recommended reviewing the Family Procedure Rules to set out:

- *who is responsible for arranging and recording the hearing to the court*
- *the steps parties should take in making representations about the format of the hearing. This could include an amendment to application forms and respondents' notices*
- *timescales for the arrangements to be made by the court and communicated to the parties*
- *mandate that consideration is given, when a party is a 'vulnerable person' within the meaning of FPR 3A, to the hearing being in person and specific reasons being given to justify why it is suitable for remote hearing.*

In addition a new procedure rule could be supplemented by a practice direction which consolidates the guidance which has been given by the senior judiciary of the non-exhaustive list of matters which are to be taken into account when deciding whether a hearing should be remote or not (Barrister).

