

Case Law Update: The Remote Family Court and Beyond

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Remote Hearings – When Do They Work?

1. ***A Clinical Commissioning Group v AF & Others*** [2020] EWCOP 16 – Court of Protection case, Mostyn J – *Decision whether to provide P with clinically assisted nutrition and hydration against his wishes – Used Skype for Business*
2. Mostyn J decided that this matter was suitable for determination remotely, but the Transparency Project has strongly criticised the process from the lay party's perspective. Key points:
 - Formality is important for people to feel that the decisions are being taken seriously;
 - Casual attire, distracting pets and wealthy-looking living rooms are unhelpful;
 - Avoid being self-congratulatory, and remember to real issues centre-stage;
 - Maximise empathy – be wary of anything likely to cause distress;
 - “It didn't feel like justice”
3. ***Re P (A Child: Remote Hearing)*** [2020] EWFC 32 – McFarlane P – *Consideration of whether composite fact-finding and welfare hearing involving allegations of fabricated or induced illness (FII) suitable for remote hearing*
4. The Local Authority was pushing for a remote hearing on the basis that most of the witnesses were professionals, and that delay would cause the child continuing emotional harm. The Mother was seeking for it to be adjourned, on the basis that she was unable to participate effectively (unstable internet connection, inability to receive advice and give instructions properly during the hearing). It was explored whether she could attend court for her evidence, but this was not possible as she had COVID-19 symptoms.

5. McFarlane P decided that this case was not suitable for a remote hearing and adjourned it until it was possible to hold a live hearing. Key points:
 - No ‘one size fits all’ approach;
 - Participants must be alive to issues of fairness and ensure that all parties are on an equal footing, particularly for the lay parties to participate;
 - It was a particular factor here that the allegations of PII involved a “very complex assessment”, and McFarlane P considered that he needed to be able to see the witness’ demeanour in court, as well as performance in the witness box.

6. ***Re A (Children) (Remote Hearing: Care and Placement Orders)*** [2020] EWCA Civ 583 – *Consideration of whether final hearing where adoption was being sought by the Local Authority in respect of two children is suitable for remote hearing*

7. The judge had decided that the matter should go ahead as a ‘hybrid hearing’, with the parents attending court to give evidence, and everyone else attending remotely, although he suggested that their physical attendance was an option. The parents sought for the hearing to be vacated due to recent guidance and because there was no real urgency. The Father, in particular, would struggle to participate, as he was dyslexic and struggled to process language, gets easily distracted, and loses confidence if he makes a mistake. He also could not access the technology except for sharing his wife’s iPad. The Local Authority had initially pressed to continue with the hearing, but later changed their position in favour of an adjournment. The Court of Appeal decided that in this case a remote hearing would be unfair.

8. Key points:
 - Each case must be assessed on its facts;
 - A decision about whether to hold a hearing remotely is a case management decision, so a wide discretion will be afforded to the court;
 - All issued guidance is just guidance, and its temporary nature should be remembered
 - If a remote hearing goes ahead, a ‘case plan’ produced in advance is useful;
 - This case was not sufficiently urgent (the judge had been mistaken about the age of the older of the children to be adopted);
 - Only requiring some witnesses to attend in person creates an imbalance of procedure, as they are more exposed to the judge’s assessment;

- If all parties oppose a remote hearing, this is a very powerful factor in not proceeding with it.
9. The Court of Appeal gave guidance on the factors which are likely to influence the decision:
- Importance and nature of the issue to be determined;
 - Whether special urgency or could wait;
 - Whether the parties are represented;
 - The ability of any lay party to engage with proceedings meaningfully (technology, funding, intelligence, language, ability to instruct, other matters);
 - Whether evidence will be heard or submissions only;
 - If there is evidence, whether it is professionals or lay parties, and to what extent it is contested;
 - Scope and scale of the hearing, including how long it is expected to last;
 - What technology is available – telephone is less effective than video;
 - The experience and confidence of the court and those appearing before it in the conduct of remote hearings using the proposed technology;
 - Any safe alternatives available for some or all participants to take part in the hearing by physical attendance in a courtroom.
10. ***Re B (Children) (Remote Hearing: Interim Care Order)*** [2020] EWCA Civ 584 – *Appeal against ICO removing child from grandmother at a short notice remote hearing*
11. The hearing was listed with less than 24 hours' notice to the grandmother. The Local Authority's initial plan was an ISO, as the main concerns related to the child's sister. The Guardian's position statement on the day of the hearing recommended removing the child to foster care in the interim, and the Local Authority changed their position on the day, without any care plans. The grandmother had no opportunity to put any evidence before the court, and her counsel felt "hopelessly unable to represent his client in the way he would normally be able to do". It was also relevant that English was not her first language. In addition, the child had a cough at the time, suspected to be COVID-19.

12. The Court of Appeal found that a remote hearing in these circumstances was unfair and allowed the appeal. Key points:

- The fundamental principles of substantive law and procedural fairness have not changed;
- A remote hearing can replicate some but not all features of a full hearing – it can be a fair hearing if good practice is followed;
- This was not an urgent case although it was treated as such (the concerns were about long-term emotional harm) – this made the difference between the shortcuts in procedure being unavoidable and unfair.

13. The Court of Appeal made a number of critical ‘observations’ while stating that they appreciated the highly pressured circumstances everyone was under:

- The Judge’s workload was a contributing factor (10.5 hours almost non-stop on three separate cases, ending with an ex tempore judgment at 17.57);
- The child’s voice was not heard through the Guardian at the critical moment – her recommendation was surprisingly bold given she did not have much time to give a view, and her statement made no reference to the child’s wishes, the impact of the sudden change, or an explanation of why this is urgent;
- The Local Authority’s process was arbitrary – the change was not based on evidence and was not supported by a care plan;
- It cannot plausibly be argued that a case is urgent where the central concern is emotional harm that goes back years;
- This was a classic case for an adjournment, at least to consider setting up a video link (the Court noted the qualitative difference between video and telephone).

14. ***Maughan v Wilmot*** [2020] EWHC 885 (Fam) – Mostyn J – Review of a financial remedies matter on the basis that the husband had misled the court about the liquidity of his assets, conducted by Zoom.

15. ***EK (A Child)*** [2020] EWFC 25 – Mostyn J – Welfare hearing concerning child under 1yo, conducted by Skype for Business and resulting in adoption. The Judge commented that delays with the adoption process were “not a reason for adopting a futile experimental adjournment”. He also commented, “In my judgment as it is inconceivable that either of these parents could ever be trusted safely to bring up EK.”

16. **A Local Authority v M, F, SX** [2020] EWHC 1086 (Fam) – Lieven J – *Decision partway through a trial of allegations of serious injuries resulting in baby’s death, after medical evidence heard via Zoom, as to the suitability of the hearing continuing as a remote hearing*

17. All parties in this case wanted to continue with the hearing remotely. The Father preferred to give evidence remotely due to the suicidal feelings he was experiencing as a result of the matter. The Mother had asthma and therefore could not attend live. The Judge considered that this case was suitable to proceed as a remote hearing.

18. Key points:

- The issues were such that the parties would find it very stressful in any event;
- The likely expected backlog post-COVID-19 made this matter more urgent;
- In contrast to technical problems, court hearings also have their problems, for example exigencies of public transport, the challenges of poor heating systems and uncomfortable courts;
- Crucially, she disagreed about the need to see the parties’ demeanour in court – it is more obvious but not more illuminating, and without empirical evidence she could not conclude that it is a good guide to truthfulness.
- It was relevant that video links are already commonly used in criminal and family proceedings for vulnerable witnesses.

19. **Padero-Mernagh v Mernagh (Divorce- Nullity- Remote Hearing)** [2020] EWFC 27 – Williams J – *Decree of nullity granted for Philippine marriage after hearing via Skype for Business*

20. Key points:

- Judge’s clerk was also online and taking care of the recording.
- The judge put together a remote hearing commencement protocol.
- The Judge referred to the Transparency Project’s article and said he was satisfied a fair hearing had been achieved.

Transgender Parents

21. *McConnell & Anor, R (On the Application Of) v The Registrar General for England and Wales* [2020] EWCA Civ 559 – Court of Appeal decision on appeal from McFarlane P’s judgment interpreting section 12 of the Gender Recognition Act 2004. The Court upheld the decision, concluding that:

- The word “mother” legally means “the person who gave birth to the child”;
- Section 12 is both prospective and retrospective;
- Although there is an interference with the parent’s human rights, it was justified by the legitimate aim that the child has a right to know its origin;
- Heavily influenced by what was perceived to be far-reaching consequences of a different decision;
- Ultimately said that parliament was better placed to achieve any changes.

Financial Remedies

22. *W v H (divorce financial remedies)* [2020] EWFC B10 – HHJ Hess – Needs pensions case. Key points:

- The Pensions Advisory Group report is persuasive;
- Equality of income is likely to be more fair than equality of capital, although no one size fits all;
- In a needs case, pre-matrimonial pension assets may well need to be shared, particular with defined benefit pensions;
- Offsetting against other assets should be avoided where possible;
- The case is also a good summary of other relevant principles.

23. *Kliers v Kliers* [2020] EWHC 1026 (Fam) – Mr Nicholas Cusworth QC – Financial remedies case heard before the COVID-19 restrictions, with judgment given after. No effect on judgment.

Parental Alienation

24. *Re S (A Child)* [2020] EWCA Civ 568 – An appeal concerning parental alienation as a result of the Mother’s involvement in a cult (Universal Medicine). The Court of Appeal remitted the matter for transfer of residence to be considered. Key points:

- The court's treatment of sects, cults and minority groups should be 'cautious and neutral' – it should be concerned with welfare on evidence only, so the mother's beliefs are to be respected in a democratic society, but the child's welfare is the paramount consideration;
- Reiterates law on parental alienation (does not need to be malicious, requirement for fact-finding, change of residence not last resort);
- Took into account practical difficulties of moving at the moment.

Court of Protection

25. ***BP v Surrey County Council & Another*** [2020] EWCOP 17 – Interim decision upholding moratorium on visits in care homes.
26. ***VE v AO*** [2020] EWCOP 23 – Decision that P, who had terminal cancer, should move to live with her family, despite COVID-19 restrictions.
27. ***Re Z*** [2020] EWCOP 20 – Decision about contraceptive treatment for 22yo woman with mild learning disability. There were some difficulties as a result of the hearing being remote.
28. ***University Hospitals Bristol NHS Foundation Trust v ED*** [2020] EWCOP 18 – Authorisation for patient who had suffered from pneumonia several times in the last few years not to be given another round of CPR and ICU. Not clear whether the latest instance was related to COVID-19.

Legislation

29. ***The Adoption and Children (Coronavirus) (Amendment) Regulations 2020*** – Significant relaxations on safeguards and assessment procedures.
30. ***Civil Legal Aid (Procedure) (Amendment) Regulations 2020*** – Expands the types of evidence which can be submitted to support an application for legal aid.
31. ***Domestic Abuse Bill*** – second reading on 28 April 2020.

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