TO HAVE OR NOT TO HAVE: REMOTE HEARINGS, THAT IS THE QUESTION

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FOURTEEN

Introduction

We are all on a steep learning curve when it comes to remote court hearings. Within the space of little more than a month, the courts have gone through a process of trial and error that would, in ordinary circumstances, have been the subject of numerous consultations, localised pilots that would have been tested and re-tested over many months or years.

We have also seen an influx of guidance since the Covid-19 lockdown that has been mind spinning in terms of the frequency that it has come out. You could almost say that, if you don't like the current guidance, wait a moment and there will be something that may be more appealing such is the speed of the advent of new missives from various sources.

On that note, this is the second version of this briefing note as the first was outdated almost as soon as it had been sent out - with the decision of Lieven J in A Local Authority v Mother [2020] EWHC 1086 (fam) being delivered on 4th May 2020 and then, within a few days of that, the result of the rapid consultation by the Nuffield Family Justice Observatory, along with a View from the President's Chambers and the decision of the President in Re Q [2020] EWHC 1109 (Fam).

Within this document, I will summarise the current guidance that has been given as to the factors that the courts should take into consideration when deciding whether a hearing within care proceedings should be conducted remotely, what steps the court should take if it concludes that a hearing cannot be conducted remotely and I shall consider the concept of hybrid hearings.

I have also attached a copy of an article written by my colleague, Madeleine Whelan on the implications of the Adoption and Children (Coronavirus) (Amendment) Regulations 2020. https://www.familylawweek.co.uk/site.aspx?i=ed210698

Within this document, I shall also refer to the judiciary from The Lord Chief Justice, The Master of the Rolls and The President of the Family Division dated 9th April 2020; the fourth version of guidance issued by Mr Justice MacDonald; the decision of The President in Re P (A Child: Remote Hearing) [2020] EWFC 32; and the decision of the Court of Appeal (The President, Lord Justice Peter Jackson and Lady Justice Nicola Davies) in Re A (Children) (Remote Hearing: Care and Placement Orders) [2020] EWCA Civ 583.

Basic Principles

When looking at this question, the court will have to consider the judicial guidance that is set out below. However, the court will also, importantly, have to consider the following:

(a) The relevant aspects of Section 1 of The Children Act 1989, particularly the principle that any delay in determining a question relating to the upbringing of a child is likely to prejudice that child's welfare (Section 1(2)); and
(b) Article 6 of The European Convention on Human Rights which provides as follows:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent tribunal established by law…."

Fairness and the need to ensure fairness are amongst the key points. In Re A, the President said:

"The concept of fairness and the need for a lay party to engage in the process includes the ability of that person to follow and to understand what transpires at a court hearing at least to an adequate degree and then to be able to instruct their lawyers adequately and in a timely manner."

On 27th March 2020, the President also said:

"Can I stress, however, that we must not lose sight of our primary purpose as a family justice system, which is to enable courts to deal with cases justly, having regard to the welfare issues involved, part of which is to ensure that parties are on an equal footing. In pushing forward to achieve remote hearings, this must not be at the expense of a fair and just process."

The cardinal points stressed by the Court of Appeal in Re A are:

1. The decision whether to conduct a remote hearing is a matter for the Judge based on principles of fairness, justice and the need to promote the welfare of the child;
2. Guidance is just guidance and, given that all cases are different, is not proscriptive;
3. It should be remembered that the lockdown and closure of some courts is only temporary.

Hearings suitable for remote hearings

The following hearings are considered by the judicial guidance and the Nuffield report to be suitable for remote hearings:

1. Applications for Emergency Protection Orders;
2. Applications for Interim Care Orders (although the Nuffield Report adds that this should be where the decision cannot await the return to in person hearings);

3. Case Management Hearings;
4. Issues Resolution Hearings.

The Nuffield Report adds that final hearings where the is agreement or near agreement as between the parties would also be suitable for a remote hearing.

I would suggest that it would be fairly safe to assume that this list could be extended to include applications for Secure Accommodation Orders, applications under Section 34(4) of the 1989 Act or applications for Child Assessment Orders.

Live court hearings or hybrid hearings are, for the time being, confined only to exceptional circumstances where a remote hearing is not possible and yet the hearing is sufficiently urgent to mean that it must take place with those attending, albeit in accordance with social distancing requirements.

Final Hearings

When I make reference to final hearings in this document, it should be assumed that I am also referring to finding of fact hearings.

Again, it must be remembered that each case should be looked at on its own merits and that there is no blanket policy or guidance one way or the other. The Court of Appeal re-iterated that each case must be looked at on its own individual facts and that the decision whether to proceed was a case management decision entrusted to the judge. In Re A, the father was Dyslexic who found it difficult to process language and symbols; and would have found it difficult to follow the papers remotely, engage with his legal team and engage within the proceedings to a sufficient degree.

The following was said by the Lord Chief Justice, the Master of the Rolls and the President to apply:

1. If all parties oppose a remotely conducted final hearing, that is a very powerful factor in not proceeding;
2. The agreement of all parties to a final hearing proceeding remotely is not to be taken as a green light to do so;
3. Final hearings conducted on the basis of submissions only could be conducted remotely;
4. Where the parents oppose the local authority's plan, but that the only witnesses are professional or expert witnesses and the issues are limited, the hearing could be conducted remotely;
5. Video/Skype hearings are likely to be more effective than telephone hearings;
6. In all other cases where the parents and/or lay witnesses are to be called, the case is unlikely to be suitable for remote hearing. In Re A, the President made it clear that this paragraph applies to final hearings and not to interim hearings.

Like with some of what has come from the senior judiciary, the Nuffield's report expresses concern about final hearings where cross examination of lay witnesses is required taking place remotely, although, interestingly, it was said that these concerns may be ameliorated if the parent has met with their counsel or solicitor on a number of previous occasions or where the evidence began as a face to face hearing (although that would not ameliorate the difficulties identified above).

The factors which may influence the court in terms of determining whether a remote hearing may be held include:

1. The importance and nature of the issue to be determined;
2. Whether there is a special need for urgency; or whether the decision could await a later hearing without causing significant disadvantage to the child or other parties;
3. Whether the parties are legally represented;
4. The ability or otherwise of a lay party to engage with remote proceedings meaningfully;
5. Whether evidence is to be heard or the case will proceed on the basis of submissions only;
6. The source of that evidence;
7. The scope and length of the proposed hearing – I add here that it is the experience of many at the Bar who I speak with and that of a number of Judges who I have spoken to, that remote hearings take longer than in person hearings;
8. The available technology;
9. The experience and confidence of the court and those appearing before it with using the technology;
10. Any safe alternatives that might be available.

In *Re P (A Child: Remote Hearings) [2020] EWFC 32*, the President held at paragraph 24:

> *"The decision whether to hold a remote hearing in a contested case involving the welfare of a child is a particularly difficult one for a court to resolve. A range of factors are likely to be in play, each potentially compelling but also potentially at odds with each other. The need to maintain a hearing in order to avoid delay and resolve issues for a child in order for her life to move forward is likely to be a most powerful consideration in many cases, but it may be at odds with the need for the very resolution of that issue to be undertaken in a thorough, forensically sound, fair, just and proportionate manner. The decision to proceed or not may not turn on the category of case or seriousness of the decision, but open other factors that are idiosyncratic of the particular case itself, such as the local facilities, the available technology, the personalities and expectations of the key family members and, in these early days, the experience of the judge or magistrates in remote working. It is because no two cases may be the same that the decision on remote hearings has been left to the individual judge in each case, rather than making it the subject of national guidance."*

In Re Q, the President said that his comments at paragraph 24 of Re P were said obiter (i.e. were not central to the decision), but that they were relevant factors.

The Court of Appeal has long told us that trial judges have a huge advantage, particularly in determining disputed facts where the credibility of one or more witnesses is in issue as the trial judge sees those witnesses when they are giving their evidence (how they respond to questions, their body language etc) and how they respond when other witnesses give evidence on points that they disagree with or find uncomfortable. In Re P, the President noted that the advantage that the Judge has in those hearings is significantly limited when the hearing is conducted remotely. Therefore, there has to be a question as to how effectively a Judge can assess the credibility of a parent when the Judge can only see them as a relatively small square on a computer screen.

On 5th May 2020, Lieven J gave judgment in A Local Authority v Mother [2020] EWHC 1086 (Fam) which some may think throws new light on the importance of Judges seeing lay witnesses give evidence live.

This was a case where the court had heard the evidence of the professional and expert witnesses remotely and was due to go on to hear the evidence of lay witnesses, with the consent of the parents. However, over the course of the intervening weekend, the father e-mailed his legal team to say that he had been in Hospital and was of low mood, suffering from anxiety and had had suicidal thoughts. He did not want to proceed with the court hearing evidence remotely. The Judge directed the instruction of a Consultant Psychiatrist who concluded that the father had litigation capacity and that he could understand the evidence that he was given, consider it and communicate his views. Importantly, the psychiatrist concluded that it would help the father to give evidence via a video link.

The Judge considered the cases of Re P and Re A (above). She was also referred to (and considered) the decision if Leggatt LJ in R (on the application of SS (Sri Lanka) v Secretary of State for the Home Department [2018] EWCA Civ 1391 where he said:

"Generally speaking, it is no longer considered that inability to assess the demeanour of witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge. This is because it has increasingly been recognised that it is unusually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth."

Leggatt LJ said that this was particularly so where the witness was giving evidence in a second language or through an interpreter. However, he went on to say that it was impossible and, perhaps, undesirable to ignore totally the impression given by the demeanour of a person giving evidence.

Lieven J had said that, whilst two of the barristers appearing before her had said that vulnerable witnesses often give evidence via a video link, she had to add a note of caution, namely that, if a vulnerable witness was to be subject to careful cross examination, perhaps with reference to a large volume of papers, they would usually have the benefit of an intermediary to assist them in managing the process. That a witness gives evidence remotely is often not, in itself, a sufficient protection.

Lieven J concluded that, in her view, it is not possible to say that a witness gives better evidence in a courtroom rather than remotely. She said that she had thought that a person might be more likely to give more honest evidence in a witness box with all the formality of a courtroom, but accepted that she was now persuaded that the opposite might be correct and so was of the view that, without empirical evidence, she could not concluded which forum was more likely to elicit the best evidence.

The Judge applied the Re A test and concluded that she would proceed with a remote final fact finding hearing.

This decision is of some interest: partly because this is one where the court concluded that it could go on to hear the case remotely (unlike the President's decisions in Re P and Re A) and partly because of the Judge's consideration of the strengths and weaknesses of hearing lay evidence remotely.

We have to be a little cautious in attaching too much weight to the decision of Lieven J, which came before the Nuffield's report was published. Lieven J is a relatively junior High Court Judge and did not come to a firm view one way or the other about the importance of seeing lay witnesses give evidence in the flesh. The President, albeit sitting as a first instance Judge, has authority resulting from his seniority, had considered that issue in Re P and concluded that there was a benefit to seeing witnesses live. The third note of caution is that Leggatt LJ's words were spoken in the context of judicial review rather than within family proceedings, whereas the President's words were.

The Nuffield's report followed a two week rapid consultation and was informed by feedback from all areas of professionals from within the family justice system and was looking at remote hearings of all natures in both public and private law cases. The report is peppered with quotes from those who responded. Much of what is set out below can be applicable to interim as well as final hearings, but I have included it in this section of the note for ease.

Many of those who responded expressed a concern about reading the body language of witnesses in remote hearings and that it was near impossible to judge the reaction of witnesses giving evidence and of those listening to the evidence of others. One barrister said that "the judge is less likely to give lay parties the benefit of the doubt, especially when they are trying to be conciliatory." A Magistrate said: "I find it very difficult to get a proper grip on the case without seeing the parties. Body language etc is so important, and we are relying totally on the local authority for interpretation of what has been said – one knows very well from court that two people can hear exactly the same evidence and understand different things from it."

The Nuffield report said that many had said that it was difficult to conduct hearings with the empathy and humanity that were important within care proceedings. Remote hearings have been described as "impersonal and transactional rather than humane."

Other problems with remote hearings identified within the Nuffield's report included those were connectivity was poor – a problem that I am sure we have all experienced with remote hearings; and that legal representatives are not as well briefed as they would be had they

met with the client at court before a hearing. Some parents have poor access to technology and others have had to call in from odd places, such as in a motorway service station.

All of those matters that have been identified within the Nuffield's report go to the question of fairness and are matters which need to be on the list of those that must be in mind when balancing fairness with the need to avoid delay.

The Nuffield's report is well worth a read and includes sections about a whole range of issues such as concerns that have been expressed about hearings relating to the potential removal of newborn babies.

Vulnerable parents/witnesses

Where the parents have a vulnerability that makes their fair engagement less likely via a remote hearing, the court will almost inevitably adjourn. I will give an example from my own experience: I am counsel for a father in a case where the mother has cognitive limitations. She requires the support of an intermediary. The subject child sustained bruising which led to the proceedings being commenced. The mother is in the pool of possible perpetrators. Two of the other people who are in the pool also require the support of intermediaries. The next 10 days of the fact finding hearing were due to be heard in May 2020. Due to the lockdown, none of those who require the support of intermediaries have been able to have the support from them (and in the case of two witnesses, have not been assessed by them). The High Court Judge conducting the matter recently adjourned the fact finding hearing as it would not have been fair to proceed. That is despite the fact that September 2020 will see the second anniversary of the precipitating events. No-one within the proceedings wanted to build in further delay, but had the Judge decided to plough on, it would not have been fair to this mother, the wrong decisions may have been made, decisions which would potentially impact on the mother and the child for the rest of their lives and, paradoxically, further delay could have been built in as the prospects of an appeal and re-trial would have been all the greater.

A number of those respondents to the Nuffield's consultation expressed concern about the ability of those with difficulties (hearing, language or learning) to properly participate in hearings, especially as they were not able to access their lawyers so easily.

In the Nuffield's report, it was said that intermediaries are often unhappy with remote hearings taking place where they are asked to support a parties or witness.

As an interesting aside, as of this week, Communicourt has begun to assess parents once more. However, it is not a full return to its usual service. In a limited number of cases, they are offering to undertake assessment meetings via Zoom. The meetings last for three hours and are not offered if the parent's solicitor does not consider that the parent will be able to engage.

If the parent is only able to engage in the Zoom meeting to a limited degree, it is likely that Communicourt will advise that they are unable to complete the assessment. Even if the

assessment can be completed, there must be concern about how effective an intermediary would be able to assist a vulnerable party or witness if they are not able to sit with them, observe that person's body language (such as considering whether that person is getting tired or struggling to understand the line of questioning) or communicate with that witness or party.

Delay

One of the factors that must be weighed into the balance is the impact on the child of the final hearing being delayed. As I hope to show later, an adjournment of the final hearing, will not necessarily lead to more delay than proceeding.

The question of delay must not be looked at in isolation. All relevant factors (including fairness and the impact of delay for example) must be considered holistically.

Sometimes the impact on the child of delay will be greater: such as where the child needs to move placement and the delay will lead to prolonged uncertainty for a child who is aware of the proceedings; or further harm in cases where the child has remained at home, or another interim placement; or where the child is coming to the higher end of the window within which they would be adoptable; or where a placement is available that might not remain so in several months' time when the adjourned final hearing finally takes place.

On the other hand, there will be cases where the impact of delay will be minimal: for instance where a child is in a placement that may well be his long term placement; or where the children are not aware of the proceedings; or where family finding is not likely to begin for several months anyway.

Anecdotally, one thing that is common to many of the cases where adjournments have been applied for is that it was the Guardian who was most opposed to the adjournment. In many cases, this has been the understandable desire to avoid delay in final decisions being made. However, the old adage of "less haste more speed" may well apply to many cases. I'll give you an example and, as I do, I ask that you imagine that you are representing the mother and, in doing so, ask yourself what you would do:

The local authority is seeking Care and Placement Orders in respect of a four year old child. The mother is of average IQ. She opposes the applications. The main concern of the local authority relate to the mother's relationship with the father. The mother's case is that she and the father separated months ago. The local authority, however, has evidence (which the mother will challenge) that the parents have been seen together and that the relationship may be continuing.

In their final report, the Guardian says that the credibility of the mother is the key issue and that, if the mother is telling the truth, the child should be placed with her; if not, the child should be placed for adoption.

As counsel for the mother, are you content that your client gives evidence via a remote link with the Judge not having such a good view of her as if she was in the well of the court?

Are you content that your client gives evidence at court whilst you are appearing remotely and not able to take instructions in the usual way?

Do you think that to plough on would be fair?

If the Judge proceeds, what will you do? The answer to this is that you would, in all likelihood seek permission to appeal. It may be that the delay caused by the appeal coming before the Court of Appeal exceeds the delay caused by the adjournment being granted in the first place. Therefore, proceeding may not be the fairest or the most expedient way forward.

What to do if the hearing is adjourned

Where a final hearing or fact finding hearing has to be adjourned until it can be conducted on a face-to-face basis, the Court of Appeal tells us that the proceedings should be listed for a case management hearing (perhaps in a month's time) so that consideration can be given to re-listing given the circumstances as they pertain at that time.

Of course, it will also be necessary to look at other matters too at that time, including but not limited to:

(a) Whether the delay or any other factors alter the balance in terms of the question of interim placement;
(b) Contact;
(c) Support and monitoring in the circumstances of the lockdown;
(d) Whether updating evidence is required – such as further drug or alcohol testing with the tests before the court at this stage becoming dated before the re-listed final hearing.

Hybrid Hearings

Hybrid hearings (where the parents and their representatives sit in the well of the court, but the local authority, Guardian and experts appear remotely) can get around the problems identified above, but they are not a panacea. For example:

1. Such hearings require the attendance of parents and advocates at court. There is a question over whether such travel could be considered essential, but, perhaps more importantly, increases the risk of infection for those attending court and their families. The President is a key driver behind the wellbeing at the Bar initiative. It is difficult to see that increasing risks to Barristers and those unfortunate enough to have to put up with us is consistent with that aim.

2. In Re A, the Court of Appeal noted that a hybrid hearing where the father was in court, but his legal team were appearing remotely, would not have addressed some of the factors that would have inhibited the father's ability to engage with a remote procedure, such as the ability of a parent to give their lawyers instructions on points of importance to them or on the evidence as it develops.
3. It is daunting for a lay person to attend court and to give best of themselves. This is even more difficult if their legal representatives are not present, especially just before and when they are giving evidence.

DAS
9th May 2020