

## **Remote hearings: just because a matter can be heard remotely does not mean it must be**

Due to the Covid-19 pandemic and the social distancing measures, the Family Courts have had to adapt quickly to this unexpected landscape to keep hearings going when possible. While hearings are still proceeding, these are at large conducted via telephone or video hearings through platforms such as Skype or Zoom. However, there have been concerns in relation to the balance that needs be struck between proceeding with cases to promote the welfare of children and protecting the interests of the parties and witnesses and their right to a fair trial.

### Case law on remote hearings

Recent caselaw has provided useful principles in terms of what judges should consider when deciding whether a hearing should go ahead remotely.

The three key cases which consider the implications of remote hearings are:

Re P: (A Child Remote Hearings) (2020) EWFC 32, Re A (Children) (Remote Hearing: Care and Placement Orders) [2020] EWCA Civ 583 and Re B (Children) (Remote Hearing: Interim Care Order) [2020] EWCA Civ 583. The latter two cases were decided on back to back days by the same Court composition consisting of: The President of the Family Division, Sir Andrew McFarlane, and Lady Justice Nicola Davies and Lord Justice Peter Jackson.

On 5<sup>th</sup> May, another judgement was published, A Local Authority v Mother [2020] EWHC 1086 (Fam), which applied the key principles established in the three cases above.

### ***Re P: (A Child Remote Hearings) (2020) EWFC 32***

This was a public children law case concerning allegations brought by the Local Authority against the Mother for falsely fabricating or inducing illness of a 7-year-old child. These allegations were entirely disputed by the Mother.

The matter was listed for a 15-day contested fact-finding hearing at the Guildford Law Courts; however, due to Covid-19, the Judge decided the hearing would proceed via Skype video. While the Local Authority, the Father and the Children's Guardian all stated that the matter could and should proceed via remote hearing as suggested, at least until hearing from the expert evidence, Mother's counsel argued that the Mother could not have a fair trial with effective participation at a remote hearing. Notably, the Mother had fallen ill with Covid-19 prior to the hearing and had also struggled with her internet connection and was unable to give instructions and/or receive advice during the hearing.

The President of the Family Division ruled that the case should be adjourned and could not proceed remotely, stating in his judgment that while a judge could deal with electronic bundles and the mechanisms of Skype that was only one element of the judicial function. The President highlighted that it was important for the judge to see everyone in the courtroom, especially the Mother in this case. While modern technology such as Skype allowed a judge to see a number of attendees on their screen at any of time, it would be a poor substitute for actually seeing that person live at court. Moreover, it would not allow effective participation and engagement by the parties and could be deemed unfair.

The President stated at paragraph [8]:

*“Establishing that a hearing can be conducted remotely, does not in any way mean that the hearing must be conducted in that way.”*

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

This case concerned care proceedings in respect of five children with long term foster placement being proposed for the elder children and adoption for the youngest two children. A hearing took place on 3 April 2020 where a judge directed the final hearing to take place over seven days commencing on 27th April in hybrid form. The Father has dyslexia and also unsuitable equipment at home to attend the hearing remotely, as such it was deemed, he could attend the court in person throughout the hearing with his counsel. The Father appealed this decision and all parties, except the Guardian, supported the appeal and did not find the matter to be so urgent that it required it to immediate determination.

This case was much anticipated, as it was the first appeal in a case relating to the welfare of children to reach the Court of Appeal on the issue of remote hearings during the Covid-19 pandemic. It provides a useful overview of the cardinal principles to be considered when deciding whether to proceed with a remote hearing.

The following fundamental principles were set out by the CoA in paragraph [3]:

- i. *“The decision whether to conduct a remote hearing, and the means by which each individual case may be heard, are a matter for the judge or magistrate who is to conduct the hearing. It is a case management decision over which the first instance court will have a wide discretion, based on the ordinary principles of fairness, justice and the need to promote the welfare of the subject child or children. An appeal is only likely to succeed where a particular decision falls outside the range of reasonable ways of proceeding that were open to the court and is, therefore, held to be wrong.*
- ii. *Guidance or indications issued by the senior judiciary as to those cases which might, or might not, be suitable for a remote hearing are no more than that, namely guidance or illustrations aimed at supporting the judge or magistrates in deciding whether or not to conduct a remote hearing in a particular case.*
- iii. *The temporary nature of any guidance, indications or even court decisions on the issue of remote hearings should always be remembered. This will become all the more apparent once the present restrictions on movement start to be gradually relaxed. From week to week the experience of the courts and the profession is developing, so that what might, or might not, have been considered appropriate at one time may come to be seen as inappropriate at a later date, or vice versa. For example, it is the common experience of many judges that remote hearings take longer to set up and undertake than normal face-to-face hearings; consequently, courts are now listing fewer cases each day than was the case some weeks ago. On the other hand, some court buildings remain fully open and have been set up for safe, socially isolated, hearings and it may now be possible to consider that a case may be heard safely in those courts when that was not the case in the early days of 'lockdown'.”*

At paragraph [9] the CoA stated:

*“The factors that are likely to influence the decision on whether to proceed with a remote hearing will vary from case to case, court to court and judge to judge. We consider that they will include:*

- i. *The importance and nature of the issue to be determined; is the outcome that is sought an interim or final order?*
- ii. *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 the other parties;*
- iii. *Whether the parties are legally represented;*
- iv. *The ability, or otherwise, of any lay party (particularly a parent or person with parental responsibility) to engage with and follow remote proceedings meaningfully. This factor will include access to and familiarity with the necessary technology, funding, intelligence/personality, language, ability to instruct their lawyers (both before and during the hearing), and other matters;*
- v. *Whether evidence is to be heard or whether the case will proceed on the basis of submissions only;*
- vi. *The source of any evidence that is to be adduced and assimilated by the court. For example, whether the evidence is written or oral, given by a professional or lay witness, contested or uncontested, or factual or expert evidence;*
- vii. *The scope and scale of the proposed hearing. How long is the hearing expected to last?*
- viii. *The available technology; telephone or video, and if video, which platform is to be used. A telephone hearing is likely to be a less effective medium than using video;*
- ix. *The experience and confidence of the court and those appearing before the court in the conduct of remote hearings using the proposed technology;*
- x. *Any safe (in terms of potential COVID 19 infection) alternatives that may be available for some or all of the participants to take part in the court hearing by physical attendance in a courtroom before the judge or magistrates.”*

The CoA decided that the case was not suitable for a remote hearing due to the Father’s inability to engage with remote evidence at home or at court, the imbalance in requiring just the parents to attend court and there was not sufficiently pressing need for urgency in this case.

***Re B (Children) (Remote Hearing: Interim Care Order) [2020] EWCA Civ 583***

This case concerned two children, a girl aged 11 and a boy aged 12, who were cared for by their maternal grandmother under a Special Guardianship Order. Ongoing issues led to the girl being taken into police protection and placed in foster care; while the grandmother initially signed a section 20 agreement, she revoked her consent a few days later. The Local Authority then issued proceedings for an Interim Care Order in respect of the girl and an Interim Supervision Order in respect of the boy. On the morning of the hearing the Children’s Guardian stated that they supported Interim Care Orders in respect of both of the children, leading to the Local Authority changing their position to align with the Children’s Guardian in respect of both of the children being removed from the grandmother’s care.

The hearing was dealt with on telephone and despite the grandmother’s counsel seeking for an adjournment due to the Local Authority’s change in position this was denied, and the Interim Care Orders were made to remove both of the children from the grandmother’s care and place them in foster care. The grandmother appealed.

The appeal was allowed. The CoA stated that there was an inadequacy of evidence in the case at hand to justify the removal of the boy from his home and the fact that the grandmother did not have an opportunity to consider or put forward any evidence herself. The CoA found that the remote hearing that was conducted via telephone contributed in losing perspective in relation to the need for an immediate decision about the boy. The judgment highlighted

qualitative difference between a telephone hearing and a video hearing and the preference to video hearings in such urgent cases [35] and the fact that such a high pressure circumstances, including the judge's workload, in the current climate led to the fundamental legal and procedural principles to be compromised despite best intentions [39].

### ***A Local Authority v Mother [2020] EWHC 1086 (Fam)***

Interestingly, while writing this article another judgement came out in relation to whether to proceed with hearing lay evidence remotely, having done so with expert medical evidence. The case concerned a Local Authority's application for a Care Order in respect of a 4-year-old child and the matter was listed for a three-week fact-finding hearing commencing on 15<sup>th</sup> April 2020.

Mrs Justice Lieven adjourned the hearing having heard the medical evidence on Zoom to hear submissions on whether the parents and other lay witnesses should also give evidence via Zoom. Father's counsel sought an adjournment, though this was based on Father's mental health rather giving evidence remotely – which he actually preferred to do.

The Judge considered Re P and stated in paragraph [23] that a key consideration particularly in a fact-finding hearing was “...*the question of whether the judge will be in a less good position to judge whether or not the witnesses are telling the truth if the case is conducted remotely.*” The Judge then went on to consider the debate around the weight to be given to a witnesses' demeanour in court and case law regarding the same, coming to the conclusion that there was no empirical evidence to suggest that the court room would elicit the most truthful evidence in comparison to evidence given remotely.

The Judge then applied the paragraph [9] factors of Re A in turn to the case at hand through paragraphs [31] to [52] and came to the conclusion that it was appropriate to continue with the proceedings remotely due to the facts of this specific case. Notably, in this case the Mother had asthma and was isolating with her elderly father and as such was unwilling to attend Court to give evidence. The Judge had initially considered safe alternatives by which the parents could attend Court in June to give their evidence. However, due to the Mother's health, combined with the fact that she nor anyone in her household had a car to limit the use of public transport created uncertainty as to when the Mother would be able to attend Court and/or when it would be reasonable for the Judge to order the Mother's attendance – causing an unquantifiable delay in the matter. The Judge also had the benefit of having ‘tested’ hearing evidence on the Zoom video platform when she heard the medical evidence.

The Judge summarised her position at paragraph [53]:

*“...the technology has been proven to work in this case and I am confident that the Mother can use it effectively. The Father has the technology available to him, and on the day that he was in the hearing he seemed to cope with it fine. I will keep this matter under very careful review. In terms of managing documents, it has already been agreed that all references will be read to the Father.”*

### **Conclusion**

The above cases and guidance provide a useful tool in determining whether a case is suitable for a remote hearing. Each of the cases had unique factors: in Re P, the Mother had Covid-19 and an unstable internet connection hindering her ability to give instructions, in Re A the Father was dyslexic, in Re B the hearing was conducted on telephone and there was a loss of

perspective due to the remote process and in *A Local Authority v Mother* the Mother was reluctant to attend Court due to her health conditions and had demonstrated her ability to follow the hearing remotely. These cases demonstrate that the appropriateness of proceeding with a particular form of hearing must be individually assessed, applying the principles and guidance indicated above to the unique circumstances of each individual case.

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