



'Covid-19, remote working and protecting the rights of parents and children'

Allison Munroe QC, Garden Court Chambers (Chair)

Rebekah Wilson, Garden Court Chambers

James Holmes, Garden Court Chambers

Amanda Weston QC, Garden Court Chambers

8th April 2020



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ZOOM AND COURT HEARINGS TIPS AND PITFALLS

Rebekah Wilson, Garden Court Chambers

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ESSENTIAL DOCUMENTS

[FLBA UPDATED ZOOM INSTRUCTIONS :](#)

NOTE;

IT IS SECURE AND IT IS GDPR COMPLIANT

THERE IS ACCESS TO SKYPE BUSINESS USERS

RECORDING – DO NOT UPLOAD TO ZOOM. RECORD ON YOUR OWN DEVICE IF YOU ARE THE HOST. SEND TO THE COURT. DELETE FROM YOUR DEVICE.



ESSENTIAL DOCUMENTS CONTINUED

THE REMOTE ACCESS FAMILY COURT, MR JUSTICE MACDONALD VERSION 3

PARA 7.9 – DEALS WITH ZOOM



A TRIAL BY ZOOM

Sir Mark Hedley and the unprecedented 3rd fact finding in the case ***A (No. 2) (Children: Findings of Fact) [2019] EWCA Civ 1947 (14 November 2019)***.

<https://www.gardencourtchambers.co.uk/news/a-no-2-children-findings-of-fact-2019-ewca-civ-1947-14-november-2019>.

- 12 counsel
- 6 parties
- Experts and lay witnesses
- Lessons learnt



Guidance from on high, MacDonald J and FAS payments

James Holmes, Garden Court Chambers

8th April 2020



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Guidance from the President

- Since the 23rd March 2020, *‘the default position should be that all Family Court hearings should be undertaken by way of a remote hearing using telephone conferencing or an electronic communication platform.’*
- The above thought does not preclude the possibility of ‘live’ hearings, but are confined only to exceptional circumstances where a remote hearing is not possible and yet the hearing is sufficiently urgent to mean it must take place with people in attendance.
- Blanket approval of E-Bundles in all remote hearings



MacDonald J Guidance V3 – Key Points

- Are their restrictions on what IT platforms can be used?
 - In the interim the judge and parties are able to choose from a ‘*Suite*’ or ‘*Smorgasbord*’ of IT Platforms
 - Can include communication platforms which HMCTS cannot provide technical support for, where there is an urgent operational need to do so
 - Issue regarding access on Judicial and CAFCASS laptops.
 - Technical guides available
- Remote Issuing of Applications and Orders
 - ‘Wet’ signatures are not required



MacDonald J Guidance V3 – Key Points continued

- Recording of Hearings
 - Currently no central repository available
 - What Responsibility is on Legal Representative if they recorded the hearing?
- Interpreters
 - Still an urgent need for this to be addressed by HMCTS
 - What solution is there available?
- Intermediaries
 - On the 30th March 2020 Communicourt indicated postponed all assessments but are still accepting referrals
- Security and GDPR
 - Illicit Recording
 - Confidentiality



Other guidance which has been issued

- A lot of Local Guidance has been issued locally and nationally, set out below is the list of national guidance;
 - Guidance on Compliance with Family Court Child Arrangement Orders
 - Temporary Amendments to the Practice Guidance on Case Management and Mediation of International Child Abduction Proceedings
 - Message from the President: how to submit an appeal during the COVID-19 crisis



Issues

- How litigants in person and lay parties are going to access and participate in remote hearings
- Local Guidance not consistent with MacDonald J and Presidents Guidance
- Re-listing / address backlog after PHE guidance changes –
 - Covid-19 Recovery Team led by Baker LJ and Judd J has been set up



LAA Guidance during Covid19

- Advocates Meetings
 - There is no limit on number of claimable in care proceedings
 - There is no way to claim for advocates meetings in Private Law or Domestic Abuse Proceedings
 - What evidence is required by LAA
- AA/FAS Forms
 - Advocate's attendance form will not be required for remote hearings
 - What can be claimed for?
 - What evidence is required by the LAA
- Hearing times
 - Email Hearings
 - Conferences



LAA Guidance during Covid19 continued

- Cancelled Hearings

Where a self-employed advocate has been instructed to provide advocacy at a hearing and carries out at least 30 minutes of preparation work for the hearing, but the hearing does not take place (i.e. it is cancelled before the advocate travels to court) they will be able to claim a payment for a one hour hearing (Hearing Unit 1) if the cancelled hearing was an Interim Hearing, or half of the Final Hearing fee if the cancelled hearing was a Final Hearing. No bolt-on fees may be claimed with any claim for a cancelled hearing.

If an advocates hearing and a hearing are scheduled for the same day and the parties agree an order at the advocates meeting which then vacates the hearing, the advocate can claim both the advocates meeting fee and the cancelled hearing fee.



Suggested wording for orders

- Recitals

In respect of the parties attendance, they have attended, remotely, from XX until XX for the hearing and from XX until XX in respect of pre-hearing discussions by telephone and remained discussing the contents of the order from XX until XX

Due to the parties' remote attendance at court, the parties have referred the Court to The Civil Finance Electronic Handbook which, at paragraph 6.11, states as follows: "We do not require an advocates attendance form where a hearing is heard by telephone or video conference. In its place, the court order and attendance notes should be submitted to verify the hearing". For the avoidance of doubt, that is why the parties' attendance times are recorded in the attached schedule to the order as confirmation of the same.



Suggested wording for orders

- Schedule to be attached to order
 - a) Court type – High Court / Circuit or District Judge / Lay Bench
 - b) Case type – Domestic Abuse / Care / Public Other / Private Children / Ancillary Relief
 - c) Type of Hearing – Interim / FDR / Final / IRH / Finding of Fact
 - d) hearing date – XXX
 - e) Attendance times – XX – XX
 - f) bolt on payments –



Useful Links

Mr Justice MacDonald Guidance (03/04/2020)– <https://www.judiciary.uk/wp-content/uploads/2020/04/The-Remote-Access-Family-Court-Version-3-Final-03.04.20.pdf>

Legal Aid Agency - <https://www.gardencourtchambers.co.uk/resources/download/128/fbla-update-fees.pdf>

Judiciary Guidance - <https://www.judiciary.uk/coronavirus-covid-19-advice-and-guidance/#familyguidance>

Family Law Bar Association – Twitter <https://twitter.com/FamilyLawBar>



Fair access to the court

Article 6 and 8 procedural safeguards in a time of crisis

Amanda Weston QC, Garden Court Chambers

8th April 2020



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Vulnerable client groups

Lawyers might feel upbeat about the relative success of remote hearings? How might clients be experiencing the process. Obstacles to participation may include:

- Practical access to broadband, hardware, technical support and privacy
- Literacy support, access to documents
- Cognitive impairments
- Disabilities, learning disability/learning difficulties
- Autism, communication needs, other special needs, stress and anxiety
- Poverty, phone credit, lack of access to finances, coercive control
- Sickness, childcare needs



The President of the Family Division 27 March 2020

“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 [FPR 2010, r 1.1 ‘the overriding objective’], part of which is to ensure that parties are ‘on an equal footing’ [FPR 2010, r 1.2]. In pushing forward to achieve Remote Hearings, this must not be at the expense of a fair and just process.”



Remote hearings – what is lost?

The alchemy of bringing people together in a room

- Personal contact, negotiation opportunities
- Empathy and reassurance, support in time and place
- Gravity, seriousness of the environment



Judicial Guidance on remote hearings

The latest guidance from MacDonald J – version 3

- a hearing that permits the parties to fully participate, that ensures both procedural and substantive fairness in accordance with the imperatives of Art 6 and the common law principles of fairness and natural justice (3.2)
- The right of access to a court must be practical and effective, rather than merely theoretical or illusory. (5.1 – see UNISON judgment of Lord Reed)
- Practical problems of assessing need for intermediaries remotely and making effective provision remotely ‘need resolution as a matter of urgency’ (5.15)

“In any event, there will be a particular need for the judge to set out from the outset the clear ground rules (in the broadest sense) for the conduct of the hearing. Further, it is likely that other common special measures or participation directions are, in large part, capable of being replicated at some remote hearings using the features of video communications platforms.” (para 5.15)



Where do we find the fundamental principles of a fair hearing?

The following sources of law inform the detail of the procedural changes we might need to seek to ensure a fair remote hearing:

- Common law ‘access to justice’ and human rights principles “march hand in hand”
- Article 6 the right to a fair hearing of civil rights and obligations
- Article 8 Procedural safeguards
- Article 14 – the right to equal treatment in the protection and vindication of fundamental right
- Equality Act 2010 – the prohibition of discrimination against those with a ‘protected characteristic’
- UN Convention on the Rights of Persons with Disabilities
- UN Convention on the Rights of the Child



What are the principles governing fair proceedings?

- The principle of 'open justice'
- Equality of arms
- The right to be heard
- The right to know the case against you
- Unimpeded access to the court as a common law imperative - UNISON



Procedural Fairness is a flexible concept - Doody

(1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. re that he is informed of the gist of the case which he has to answer.'

[R v SSHD ex p Doody & others [1994] 1 AC 531, [1993] UKHL 8, [1993] 3 WLR 154]



Doody - 2nd principle

(2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type.



Doody 3rd principle

(3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.



Doody 4th principle

(4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.



Doody 5th principle

(5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.



Doody 6th principle

(6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.



Article 6 ECHR

“In the determination of his civil rights and obligation ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”



Article 6 principles in family proceedings - McMichael

Where parents were not given disclosure of reports concerning adoption of their child prior to the hearing “ *this practice revealed a basic inequality and placed the parent at a substantial disadvantage both in respect of bringing an appeal and in the subsequent presentation of any appeal*” which “*did not afford the requisite protection of the applicants’ interests as safeguarded by Article 8*”

McMichael v UK (1995) 20 EHRR 205, [1995] 20 EHRR 205, [1995] ECHR 8



Article 8 procedural safeguards in action

"the protection afforded ... by Article 8 ... is not confined to unfairness in the trial process... Article 8 guarantees fairness in the decision-making process at all stages of child protection"

(Re L (Care: Assessment: Fair Trial) [2002] EWHC 1379 (Fam), per Munby J at para 88



Discrimination – the equal access to justice toolbox

Equality Act 2010 s 4 – protected characteristics (age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; sexual orientation.)

Equality Act 2010 s 6 – (1)A person (P) has a disability if—

(a)P has a physical or mental impairment, and

(b)the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.



Discrimination – the equal access to justice toolbox

- The ‘Reasonable adjustments’ duty on public authorities – ss 20, 21 and 29(7) EqA
- The Public sector equality duty ‘PSED – s 149 EqA
- Mental Capacity Act 2005 – Code of Practice -“support” to participate and engage
- The UN Convention on the Rights of Persons with Disabilities – articles 12 – 14

(unincorporated instrument relevant to inform content of more general human rights –
Burnip)



Thank you

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