



*This guest post is written by an anonymous Circuit Judge working in the Family Court. / 07.04.20*

There is no question that remote hearings are a good means of ensuring the continued delivery of the decision-making element of the family justice system. It is amazing that we can do it at all and it is great that we can. But doing so in this way is at the cost of our ability properly to connect to one another, and judges like me are compromised in their ability to conduct hearings with the empathy, fairness, understanding and compassion that is rightly valued as an essential element of the Family Court. I appreciate that in order to deliver justice in the time of Covid-19 we must accept compromise. I wanted to share my experiences however, as there have been times that the extent to which I have felt constrained has been uncomfortable, and I worry about the impact on the parties, and the wider goal of delivering justice fairly. Even though huge progress has and will continue to be made in improving remote hearings, we will be working under the effects of Covid-19 for many months yet to come. I am concerned about the responsibility that will continue to fall on judges for deciding what cases are to be heard or not, and for setting the terms of reference for what constitutes a fair hearing in the time of Covid-19.

I am yet to tackle a contested trial, but over a couple of weeks I did about fifteen remote hearings (Skype for Business or phone), including two contested applications for secure accommodation orders, contested applications for interim care orders, a contested hearing about jurisdiction with reference to EU law, as well as more straightforward case management hearings in both private and public law. The hearings are relatively easy to set up but they are hard work, have generated a lot of difficult decisions around their process, and a lot of anxiety.

### ***Deciding whether a hearing should be a remote hearing***

Throughout the first weeks of the crisis, cases remained in our lists and staff and parties were pressing us to say what was going to happen with them.

For weeks the simple question of whether or not a hearing in our list could go ahead was very hard to make, and the sheer number of decisions was overwhelming. We were swamped by guidance and not of all it was consistent. There was no framework to help us decide. Was it business as usual, or urgent cases

only? Should we be working from home or coming into Court? If a remote hearing, by what means? If adjourned, on what terms? We are now comfortable with the idea that for the foreseeable future most shorter hearings will be remote, but questions about more complex contested hearings and trials listed over the next few weeks and months remain. If we consider a case is not suitable for a remote hearing but an attended hearing is not realistic, is it to be adjourned indefinitely? Or must we press on and do the best we can in the circumstances? What if one party does not accept a remote hearing and insists that nothing less than an attended hearing will be fair?

Guidance and yet more guidance emphasised that these decisions are for individual judges to make and our decisions will be respected, but it has been hard to get a sense of what was expected, even as a reasonable starting point. I had a creeping awareness of colleagues in other Courts approaching the same questions informed by a wide variety of different attitudes. For example, invited to follow the government advice that if we could work from home we should, we were also reminded by some leadership judges that (like them) we might feel our duty lay in showing solidarity to the staff by continuing to come into Court every day. Of course, I felt a strong desire to support the staff in my Court. Many were angry that judges could self-isolate in the luxury of their own chambers, yet still chose to stay home, whereas they were expected to come in every day, any hope of social distancing obliterated by the layout of their open plan office. But what was the best way to show them our support? By not going into Court was I letting the side down? Not showing the mettle of a proper judge? But if I went in, might I inadvertently be used as a stick with which to beat the staff? – *‘the judges are coming into Court, what are you complaining about?’* In my Court it appeared that it was only after the majority of judges stayed home that HMCTS put a rota system into place to drastically reduce the staff numbers coming into the building, and ordered laptops for other members of staff so they too could work from home.

### ***What sort of remote hearing is appropriate?***

The decision about what sort of remote hearing to have is not straightforward either. In practical terms the ‘smorgasbord’ of options for remote hearings is difficult to access from a judicial laptop, whether in Court or at home. From some directions came a message that we ought to embrace the opportunities of Zoom or Microsoft Teams or allow ourselves to be a bit freer with the licence we granted to others to take charge of recordings. It sounded appealing and modern and positive. But closer to home, there was real anxiety about the security and resource implications. Local HMCTS managers were clear that we should only use Skype or BT telephone conferencing. At the least I wanted to support the staff in my Court by listening to them, I was not prepared to cause them any additional stress by demanding otherwise. If you are working from home there is no reliable means of recording a Skype hearing, and the recording needs to be stopped and started again at least every 30 minutes. When working from home we don’t have a clerk or an IT support worker available to join in remotely and record. Even if these problems were overcome, more often than not one of the parties lacked access to Skype and so, for various reasons, phone hearings have become the default for now.

At the time, this felt like a defeat – and again, I felt I might be regarded as not fully with the programme, not sufficiently embracing of change and new ideas, not devoting myself whole-heartedly enough to the bigger effort. Every time I saw another celebratory tweet about another High Court judge who had chalked up a success with Zoom, or the reports of another trial with multiple experts lasting multiple days going without a hitch I felt a little more deflated.

### ***Remote hearings themselves***

I seem to have little input into who was attending a hearing. In one case after a productive advocates' meeting, the parties were reassured that the hearing could go ahead with only legal representatives on the line. This often happens at Court (although usually I am asked first if it is OK to release the parties). A part of me was grateful of fewer mobile phone numbers to dial on the very clunky BT Meet Me system. This is probably an acceptable trade-off in the bigger picture of getting through straightforward cases efficiently but, on any view, it moves the parties a step further away from the court process. By contrast, in other cases I have been given long lists of numbers to call, not all of them correctly transcribed. By the time everybody is connected, I have read my introductory script and started recording, we are fifteen minutes into the hearing. Even once started, things can go wrong : sometimes people drop out of the conference call and need to be called up again. Once I accidentally pressed the hash key twice and inadvertently brought the whole thing to an abrupt halt.

Where parties are represented, it is not easy for them to give instructions. At the end of submissions in one hearing I asked a party if she wanted the chance to speak to her counsel, at the same time slightly dreading the thought of her saying yes, as I would then have to stop the call and dial everybody in again ten minutes later. She didn't, but instead there were a few anxious seconds – I could sense the nervous anticipation of her counsel – might her client say something that would best have been kept between the two of them? In a private law case, there was no need for me to ask. The two and a half hour long hearing was punctuated by a relentless ping-pong, sometimes every few seconds, marking the sounds of emails dropping from the parties into their respective counsels' inboxes, as they fired off instructions. An irritating distraction for me, it must have been almost impossible for their lawyers to concentrate. In another case a litigant in person assisted by her McKenzie friend, also on the call, cheerily told me they were in touch online throughout the hearing. This seemed like a good idea at the time. But what if she were giving evidence, and her McKenzie friend was emailing her to tell her what to say all the way through? Or what if her ex-partner was bombarding her with threatening messages? Or threatened to record whatever she said in evidence and share it on Facebook with all her friends and family and the public at large? As far as I know none of this happened, but this concern is heightened in the context of a phone hearing – and it isn't removed by using a more sophisticated video platform. Is a warning from me that the hearing is to be taken seriously and it is a criminal offence to record it or publish it really going to be effective? Where this risk is identifiable plainly we should not be contemplating remote hearings – but it is not always easy to spot in advance. The risk of interference exists in every case.

It seems likely that we will opt for attended hearings where parties are not represented and need support, or where there is a risk of interference in a remote hearing. In due course we should be able to deal with more cases back in Courtrooms which will be regularly deep-cleaned and with social distancing rules strictly enforced. I have heard that in some areas there will also be half-way houses – witnesses attending at solicitors' or local authority offices to give evidence in a more controlled environment, but this is very much a postcode lottery and a work in progress. I do not know if it is something that will be available in my area. In any event, it is still not at all clear to me how I should identify and choose the best option. I am sure I have been sent all the guidance, all the protocols, all the links to all the webinars, and I have read as much as I can, but my enduring feeling at the moment is that I have missed the vital memo. I am an IT-literate judge, but feel dense or lacking in vision because I find it difficult to imagine doing the care cases or fact-finding hearings that I used to do week-in and week-out via a video platform. I can't really imagine doing them as attended hearings either. For many weeks and months, any trial where any participant has

to leave home will be at risk, because they may be taken ill, be self-isolating, or the demands of caring for others will take over. In a significant proportion of the cases I deal with, one of the litigants is supported by an intermediary. In our area Court intermediaries are not booking new cases nor offering either attended or remote service to existing ones. I don't know what – if any – options that leaves for those cases.

Remote hearings gain a momentum from which is difficult to row back. With no usher to marshal the parties, manage their expectations, or obtain helpful information about outstanding issues and time estimates, you have to take the cases in list order, sticking rigidly to the timetable. You have to try to get through the hearing in the time allocated, which in turn creates a pressure to make decisions quickly. Where parties are represented it is helpful to be in touch directly by e-mail. But position statements and draft agreed orders more often than not arrive at the last minute, by which time you are already focused on another hearing. Where all you can see is a head in a rectangle, or if you cannot see each other at all, it is hard to control the speed of submissions. A gentle interruption to try and catch up can lead to a verbal dance of *'I'm sorry ... no you go first ... no after you ...'*, as even a minimal time delay causes us to speak over each other. By then you have entirely lost the thread you were trying to keep up with in the first place. So you interrupt less, and try to keep track. You have to concentrate hard, think fast and marshal your thoughts as you go along. It is intense, exhausting, and to be honest, lonely work.

Deciding a contested application for a change in interim care plan on the phone, I heard submissions from four counsel. If we were at Court, I would have taken a short break, to gather my thoughts, and make some notes ready to deliver judgment. The parties would have had the chance to speak to their representatives, reflect on the submissions made and their lawyers would have prepared them as best they could for the judgment to come. However, I was exhausted, having by then been engaged in remote hearings for nearly six hours with only two short 5-10 minute breaks in between. There were nine people on the call and it had taken over ten minutes to dial them all up in the first place. I was confident about the decision to be made and the reasons for it. I took a few minutes, pressed ahead and delivered a short judgment there and then. The judgment was sound, but I do not know whether the mother regarded it as insulting that I launched straight into it, or whether she was glad to have it over and done with. Normally I would have addressed my words to her directly, but I could not see her to know how it was received. I mind about this. I felt compromised and that my ability to do what I do best had been chipped away. Even when I make difficult decisions at an interim stage, the way I manage these hearings is an important part of building trust between me and the litigants. I think the parties know I have listened to them and understood their point of view. I would hope they leave with some confidence that their voices will continue to be heard throughout the process and that it will be fair. I didn't feel I achieved anything close to that at this hearing.

I heard an application for permission to oppose the making of an adoption order on the phone. Everything was in place to enable me to decide the application, but I remain anxious about my decision to deal with it remotely. Even when such hearings take place in a courtroom they are usually emotionally raw and distressing. I had previously met the birth mother and we had gone over the legal test, the evidence required, and she had put in a detailed witness statement which covered everything she needed it to. I consulted with the parties in advance and all wanted the hearing to go ahead, particularly the birth mother. The children concerned had suffered a series of catastrophic disruptions throughout their short lives and desperately needed stability. Delay in making this decision would certainly have harmed their

welfare. The birth mother did not have access to Wi-Fi and we were in the early stages of lockdown. If I adjourned, I did not know when or how the adjourned hearing could take place. And so, I had decided to press on with the hearing by telephone as the least worst option.

As a judge operating remotely – whether by phone, Skype or other digital platform – you are deprived of all the means you usually use to create an atmosphere of trust, fairness and compassion from the outset. You cannot smile reassuringly at a party, cannot make any realistic assessment of their level of anxiety and nerves, cannot put them at ease by showing them you are listening intently and carefully to what they say. You have had no insight into the dynamics of the case by hearing from the usher what has been happening before the hearing. Any attempt at a light remark while you read out the HMCTS script at the outset should not be tried in any circumstances – you cannot risk striking the wrong tone. I worked hard to compensate, with the tone of my voice, showing I was listening, and taking it in, by rephrasing what she said back to the mother. I slowed her down every now and again to make clear I was writing it all down, and asked questions, ensuring she had told me all she could that might support her case. I referred to details of the evidence in the bundle, reassuring her that I had read everything she wanted me to read. I decided it would be better to send a short written judgment after the hearing so that she was clear of my decision and the reasons for it.

Birth parents seeking permission to oppose are not entitled to legal aid, so often attend Court alone, but they are allowed a family member or friend into the Court room for moral support. In this case, the mother had nobody. This mother was alone in a small flat, her family isolating elsewhere. She did well in the circumstances, but at times, she was audibly distressed.

The hearing was technically fair but troubling, and I worry that despite my best intentions, I might not have done right by this vulnerable young woman.

I am left with questions that I find hard not to direct at myself in a critical way. Am I just not up to speed? Should I be more enthusiastic about embracing different forms of technology despite concerns around security and their availability to all? Should I demand more from others to make what I have more effective? Should I accept that some hearings are not now and never will be suitable for remote hearings, and that those hearings where attendance is required need to wait. Or does that lead to a system where those who are represented are more likely to get access to justice than those who are not? What if I think a case is unsuitable for a remote hearing, but an attended hearing is not possible? Given the nature of the public health crisis, should I accept compromise, do the remote hearing anyway and focus on delivering decisions where I can, push my concerns to one side, and focus on a bigger picture?

Technology will improve, we will gain from sharing our experiences and collectively develop a better understanding of what will work and what won't, and where to draw the line so that we do not compromise more than we should. I am not arguing against the idea of remote hearings at all – either while the crisis sustains or in the long-term. They present a valuable opportunity to connect people who would otherwise struggle to attend hearings, and innovation in this area is long overdue. However, I hope to contribute to a debate, and I ask for some recognition that for the people whose job it is to deliver justice to families, how we go about it as well as the bare fact of it being delivered, really really matters – to us and to the families at the end of the line.

***We have a small favour to ask!***

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