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COURTS AND
TRIBUNALS JUDICIARY

The Remote Access Family Court

Mr Justice MacDonald

Version 4

16 April 2020

(This document will be subject to regular amendment and re-issue)

The aim of this document is to identify clearly the current problems which arise from the urgent need to move to a default position of remote hearings, to identify potential solutions to those problems and to set out operational protocols to govern the position whilst further solutions are being arrived at. As solutions are found to each problem, updated versions of this document will be circulated. In each version new additions will be highlighted in red (before being changed to black in any subsequent version) and redactions will be struck through (before being deleted in any subsequent version).

Accordingly, with each new edition only the text that is new to that edition will be shown in red.

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The Remote Access Family Court

Mr Justice MacDonald

“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.”

President of the Family Division

27 March 2020

1. INTRODUCTION AND EXECUTIVE SUMMARY

1.1 The COVID-19 crisis presents an unprecedented challenge to the provision of core public services that are traditionally delivered face to face, including healthcare, education and justice. At the same time, advances in communications and information technology made during the last 40 years allow us the opportunity to continue to provide these services effectively, through the use of hardware and software communication platforms that are now readily available. Within this context, it should be possible to continue substantially the full operation of the family justice system, albeit on a remote access basis, notwithstanding the COVID-19 pandemic.

1.1.2 It is important to note that the recommendations and guidance set out in this paper apply in the very particular circumstances of the current public health emergency. The steps that have been taken to date to establish a Remote Access Family Court would ordinarily have been taken over a very much longer period of time and only following extensive evaluation and consultation. Within this context, the contents of this document should not be taken as establishing a settled mode of operation for the family courts that will apply without more *after* the resolution of the COVID-19 crisis. The fact of the COVID-19 crisis, and the need to address that emergency in a manner that ensures the family justice system continues to function as it runs its course, does not diminish the already recognised difficulties presented by undertaking hearings in family cases remotely, which difficulties will in ordinary circumstances likely continue to place limitations on the wider use of remote hearings.

1.2 Information gathered since the Prime Minister’s announcement of the introduction of stringent social distancing measures on 16 March 2020 suggests that the key challenges in implementing a remote access Family Court for the duration of the COVID-19 outbreak centre on the extremely short timescale over which such a system must now be introduced and the need to mediate the very large choice of software and hardware platforms currently available to courts and court users. HMCTS have made telephone conference and Skype available, are introducing a centralised remote access system (the forthcoming ‘Cloud Video Platform’ or CVP) and are accelerating development of a bespoke IT solution for holding fully video hearings designed with the particular features of court hearings rather than meetings in mind. Beyond this, parties and advocates have also used platforms such as Zoom and Lifesize. In addition, it has become increasingly apparent as remote hearings have been undertaken that there are significant issues to be addressed regarding ensuring effective access to justice and fair hearings within the context of the remote hearing archetype and the negative impact on judges, lawyers and litigants of holding a hearing by remote means, leading to an increasing

recognition that some types of hearing *may* not be suitable for remote determination. This is dealt with further from paragraph 3.4.1 below.

1.2.1 Within this context, on 14 April 2020 the President of the Family Division announced a two week rapid consultation on the use of remote hearings in the family justice system to be undertaken by the Nuffield Family Justice Observatory. The Nuffield Family Justice Observatory will seek to gather evidence from families with children and all professionals working in the family justice system, including judges, barristers, solicitors, Cafcass workers, court staff and social workers. The consultation will run until 28th April, enabling the President to receive a summary of the responses by end April, with a view to issuing guidance in early May. The consultation can be accessed via the following link <https://www.nuffieldfjo.org.uk/news/rapid-consultation-remote-hearings> .

1.3 For the reasons set out below, whilst through a *Protocol For Remote Hearings in the Family Court and Family Division of the High Court* (see **Appendix 1**) it **has been** possible to stipulate now and nationally the detailed procedure for remote hearings, it is **not yet** possible, pending the introduction of CVP **and, in the future, a bespoke fully video hearings solution**, to arrive at a common agreement as to a single ‘off the shelf’ software platform to be used in the interim in all cases. In the circumstances, this paper proposes that in the interim (and in any event as a continuing contingency to ensure multiple redundancy following the introduction of CVP **and a bespoke fully video hearings solution**) the court and parties choose from a ‘Suite’ or ‘*Smörgåsbord*’ of IT platforms, subject always to the cardinal requirement that at the outset of each case the judge and parties consider and settle on the platform that is to be used in that case (see **Appendix 3**). **It should be noted however, that if parties ask to use other applications, updated guidance to the judiciary issued on 3 April 2020 requires judges to encourage the use of Skype for Business or CVP if at all possible (see paragraph 7.2.1).**

1.4 Within the foregoing context, this paper concludes that the Remote Access Family Court is best realised at the current point in time as a collection of ‘off the shelf’ remote communications platforms being used to achieve the single aim of keeping business going safely in the Family Court and Family Division of the High Court. In the present exceptional circumstances, the communications platforms that may be used include those for which HMCTS cannot provide technical support for judges and staff, where there is an urgent operational need to do so. It is suggested that it is plain that the need to deal with family law cases in the context of a global pandemic, using a platform that allows all parties in a given case to participate in a remote hearing, qualifies as an urgent operational need in this context. **However, and again within this context, if parties ask to use other applications, updated guidance to the judiciary issued on 3 April 2020 requires judges to encourage the use of Skype for Business or CVP if at all possible (see paragraph 7.2.1).**

1.5 The recommendations made in this paper are based on the inestimable expertise and experience in this area of Nicholas Mostyn J and comprehensive information that has been supplied in exceptionally short order by judges who have been required already to hold remote hearings, the MOJ and HMCTS staff members responsible for technology and the implementation of the technological aspects of the HMCTS reform programme, the Clerk of the Rules, the Press Association, the Family Law Bar Association, the Child Abduction Lawyers Association and the Association of Lawyers for Children. Particular credit must go to the FLBA and the ALC for providing reports on possible solutions to the difficulties summarised at para 8.3 below. Finally, the context in which the measures recommended by this paper will be implemented is highly likely to change as more is learnt about COVID-19, and the impact of Government responses and interventions is seen, requiring further review and amendment moving forward.

1.6 This paper should be read with guides that have, and continue to be developed for HMCTS staff in relation to remote hearings. These guides can be found at <https://intranet.justice.gov.uk/about-hmcts/operations-directorate/business-continuity/covid-19/guidance-on-using-telephony-and-video-technology-during-the-coronavirus-outbreak/>

1.7 An extremely useful introductory guide from Ishan Kolhatkar (to whom I am grateful for permission to use his material) the Director of Group Education Technology at BPP, setting out the basic aspects of video hearings that those new to video links will need to know is also required viewing and can be found at:

https://twitter.com/BPTC_Lecturer/status/1241771982850535424?ref_src=twsrc%5Etfw%7Ctwcamp%5Eembeddedtimeline%7Ctwterm%5Eprofile%3AFamilyLawBar&ref_url=http%3A%2F%2Fflba.co.uk%2Fjoin-us

And:

https://twitter.com/BPTC_Lecturer/status/1239828388212289537?s=20

1.8 The operational principles set out in this paper are now being implemented within the context of a recent change in status of some court buildings. On 27 March 2020 further information was issued by HMCTS categorising courts as being ‘open’ (or prioritised), ‘staffed’ or ‘suspended’ (see <https://www.gov.uk/government/news/priority-courts-to-make-sure-justice-is-served>).

1.9 Open courts will remain open for all purposes, where access can be achieved safely, including hearings in which the judge and at least some of the participants may be present, and to which the public and professions have physical access. Staffed courts are still attended by staff and judges but not open to the public. Judges at staffed courts can conduct remote hearings only. Finally, suspended courts have no staff or judges. These changes were implemented from Monday, 30 March 2020.

1.10 In addition, HMCTS has been working to expand capacity for remote hearings across the jurisdiction and has taken the following steps to promote remote hearings:

- (a) Supporting greater use of existing audio and video capabilities, including liaison the legal professional representative bodies.
- (b) Increasing the volume of teleconferences able to be held using the BT Meet Me system and increasing the number of accounts to ensure an account for each courtroom.
- (c) Removing the firewalls in the MOJ system which previously prevented HMCTS and judicial users from using Skype for Business to videoconference with those outside the MOJ network.
- (d) Increasing the number of OVIG licences which enable a ‘bridge’ out from JVS endpoints so that they can connect with users outside the JVS network to an increased capacity of 100 concurrent hearings with the aim to raise this to 500 concurrent hearings.
- (e) Bringing the CVP into wider use, to support videoconferencing in court and tribunal hearings (see paragraph 7.3 *et seq* below);

- (f) Accelerating work on the video hearings solution which has been used only at small scale to date, to ensure it will be able to support significantly greater volumes of hearings.
- (g) Providing staff with technical and operational guidance on using BT MeetMe and Skype for Business and developing guidance for the judiciary on Skype for Business.
- (h) Establishing an Audio-Video Taskforce, which sits underneath HMCTS' Gold Command structure.
- (i) Making two dedicated support staff immediately available for remote High Court and Court of Appeal hearings from the week commencing 30 March 2020 (this support cannot yet be made available more widely).

2. CONCEPT

2.1 In the five days following the Prime Minister's announcement of the introduction of social distancing measures, Mostyn J successfully conducted a contested hearing in the Court of Protection dealing with issues of the utmost gravity concerning a dispute as to whether the end of life arrangements should be made for an elderly stroke victim. Using Skype for Business, Mostyn J was able to complete, remotely, a final hearing involving five parties, taking evidence from eleven witnesses, including evidence from four expert witnesses (two of whom connected to the Windows based Skype for Business using their Macs), and to conduct the hearing in the presence of the press, who were able to attend remotely and report it to the public. The feedback from the legal representatives involved has been universally positive. On 20 March 2020 one of the Queen's Counsel involved tweeted that the approach was "highly effective".

The trial was reported on in the Law Gazette (<https://www.lawgazette.co.uk/practice/first-all-skype-trial-tests-crisis-working-at-cop-/5103541.article>). One of the journalists who had, again remotely, covered the hearing communicated the following to the Judicial Office on 19 March 2020:

"In light of our unique role covering hearings at the Royal Courts of Justice and the Rolls Building for the Press Association, I'd like to express our appreciation for the measures being taken and the arrangements being considered. I'd further like to express our gratitude for the clear and comprehensive guidance that has been issued by the Lord Chief Justice and the President of the Family Division earlier today.

On Wednesday, one of our reporters (Alison Kershaw) was able to cover a hearing before Mostyn J, sitting in Nottingham, which was conducted entirely over Skype...Alison informs me the hearing worked well and she was able to perform all of the tasks we would usually perform in person to ensure the fair, accurate and contemporaneous reporting of proceedings... I'd like to reiterate our gratitude for the steps that are being taken and the obvious care and hard work going on behind the scenes, in this highly complex and fast-moving landscape."

2.2 It is important to note however, that feedback provided by a lay party in the proceedings provides a significant counterweight to the foregoing positive assessments, and points up important matters to which those conducting remote hearings, and those participating in remote hearings should pay careful regard (see <http://www.transparencyproject.org.uk/remote-justice-a-family-perspective/> and see also <http://www.transparencyproject.org.uk/remote-hearings-a-gulf-between-lawyers-and-lay-parties/>). **Members of the judiciary conducting remote hearings have also raised issues deserving of**

careful consideration (see for example <http://www.transparencyproject.org.uk/remote-justice-a-judges-perspective/>). In addition, the ALC have highlighted issues of social and economic inequality which can prevent lay clients from properly participating in remote hearings concerning important decisions being made about their children.

2.2.1 In addition to the trial conducted and concluded by Mostyn J in the week commencing 16 March 2020, during that initial week there were multiple other examples of hearings being conducted successfully by remote means, including:

- (a) A remote hearing conducted by Skype for Business before Williams J in Leeds on 20 March 2020 involving the judge and three counsel. The process was described as “working perfectly”. Theis J also conducted a successful hearing by Skype for Business at the RCJ on 20 March 2020.
- (b) Sir Mark Hedley used Zoom to complete the remaining eleven days of a fifteen day fact-finding hearing that is an urgent *second* re-hearing. Judd J also successfully used Zoom for a hearing.
- (c) The Lord Chief Justice of England and Wales hosted a meeting of 151 leadership judges on 19 March 2020 using Skype for Business.
- (d) Since Monday 16 March 2020 there have been multiple successful short hearings across the jurisdiction using telephone conferencing.
- (e) The concept of remote hearings is also being used in other jurisdictions. The Hon. Justice Victoria Bennett AO commenced a remote hearing in Melbourne on 23 March 2020 involving 11 participants at any one time, including 5 counsel, 3 instructing solicitors and 2 parties. The trial was due to hear from 19 witnesses, linked in individually at various times for the purpose of giving evidence.
- (f) Dorset Council is already arranging remote facilities at Weymouth and Ferndown, and possibly other venues, where parents can go and use Skype for Business to attend hearings remotely. Enquiries are being made with DfE in an attempt to establish what steps are being taken in other local authority areas.

2.3 Within the foregoing, admittedly anecdotal, context, it would appear that all the steps that are proposed in this paper demonstrated themselves, to a greater or less extent **and subject to the matters set out at paragraph 2.2 above**, to be successful over the course of the first week after the Prime Minister’s announcement, at the very least as proof of concept.

2.4 On 27 March 2020, Resolution published a survey designed to take an early ‘snapshot’ of the use of remote hearings in family proceedings in this jurisdiction since that time. The snapshot indicates that remote hearings have taken place in courts on all circuits, that the majority of remote hearings (86.67%) have taken place by telephone, followed by Skype (28.89%) and Zoom (15.56%), that the majority of remote hearings have been set up either by the court (40.00%) or a represented applicant (35.56%) and that the majority of hearings concerned directions or case management hearings and other interim hearings. The majority of those responding to the survey (69.57%) had not felt under pressure to attend court physically.

2.4.1 Within the foregoing context, and during the currency of the current public health emergency, the family courts are now proceeding to deal with family work according to the President’s national guidance issued on 19 March 2020 entitled and *COVID 19: National Guidance for the Family Court* and, in consequence, remote hearings are being conducted under the umbrella of that national guidance

in accordance with the *Protocol For Remote Hearings in the Family Court and Family Division of the High Court* dated 23 March 2020 (see **Appendix 1**) and the *Protocol for Conducting Safe Live Court Based Family Hearings during the COVID-19 Pandemic* also 23 March 2020 (see **Appendix 2**). On 9 April 2020 the Lord Chief Justice, Master of the Rolls and the President of the Family Division issued a communication to the judiciary setting out some indicators that may assist the allocated judge in deciding whether, in his or her discretion, a particular hearing should be heard remotely, and if so what form of remote hearing should be adopted. That communication does **not** amount to official guidance and is **not** intended to be directive (see paragraph 3.4.1 below).

3. AIMS AND OBJECTIVES

Overall Aims and Objectives

3.1 As the President of the Family Division made clear in his guidance issued on 19 March 2020 entitled *COVID 19: National Guidance for the Family Court*, the cardinal operational principle of the Family Court and Family Division of the High Court is “Keep Business Going Safely”. This means ensuring the safety from infection of judges, court staff, lawyers and litigants whilst at the same time preserving the rule of law and access to justice that is the bedrock of a still functioning society. As the President observed at Paragraph 19 of the Guidance:

“These are exceptional and unprecedented times. The situation both nationally and in each locality is changing daily, if not hourly. I am well aware of the intensely difficult and highly stressful circumstances that all those working in the Family Justice System are currently experiencing and I am greatly appreciative of their commitment to the continued delivery of justice in circumstances which, only a week or so ago, would have been considered unimaginable. This Guidance is intended to deliver a very significant change of direction in the method of working within the Family Court, whilst at the same time enabling us to continue to operate and to meet the pressing needs of those who turn to the court for protection and justice.”

3.2 Within this context, it is necessary for a remote access Family Court to seek as far as possible to replicate, for all types of hearing up to and including final hearings, the ‘live’ court process (**but see paragraph 3.4.1 *et seq* below for the necessary limits to this approach**). In particular, a remote access Family Court must ensure the safety from infection of judges, court staff, lawyers and litigants whilst at the same time facilitating 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 and which maintains, where possible, the recent emphasis on transparency with respect to the operation of the Family Court. The objective should be to make the remote hearing as close as possible to the usual practice in court.

3.2.1 Guidance has now been issued by HMCTS with respect to the prioritisation of certain elements of work in the family jurisdiction. That HMCTS guidance identifies the following categories of work:

- (a) Work that must be done:**
 - (i) Emergency protection orders;
 - (ii) Interim care orders;
 - (iii) Secure accommodation orders;
 - (iv) Deprivation of liberty authorisations;

- (v) Urgent applications in private law children cases;
 - (vi) Child abduction orders (including Tipstaff orders);
 - (vii) Domestic abuse injunctions;
 - (viii) Female genital mutilation and forced marriage protection orders;
 - (ix) Urgent applications in financial remedy cases and decrees absolute.
- (b) Work that will be done:**
- (i) Gatekeeping and allocation of public law cases;
 - (ii) Gatekeeping and allocation of private law cases;
 - (iii) Processing of orders, documentation and correspondence in public law cases.
- (c) Work that the court will do its best to accommodate:**
- (i) Processing of orders, documentation and correspondence in private law cases.
 - (ii) Adoption orders.
 - (iii) Divorce matters.
 - (iv) Financial remedy matters.

Fairness and Solemnity

3.2.1 The primary purpose as a Family Justice system 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). Within this context, the use of remote hearings must not be at the expense of a fair and just process (see further paragraph 3.4.1 *et seq below*). Further, remote hearings remain court hearings and the solemnity of the occasion should be observed as closely as it is in a courtroom. Within this context, and insofar as is possible, the decorum of a court hearing should be maintained commensurate with the gravity and seriousness of the issues being decided in a formal legal arena. Steps should be taken to avoid matters that detract from the ordinary gravitas of a court hearing (see **Appendix 1**).

Live Hearings

3.3 Further with respect to aims and objectives, and importantly, a remote access Family Court must not, subject to the demands of the overriding need to protect the safety from infection of judges, court staff, lawyers and litigants, preclude the possibility of ‘live’ hearings in the Family Court where this can be achieved safely (see **Appendix 2**). Within this context, Paragraph 4 of the President’s Guidance of 19 March 2020 provides that “where the requirements of fairness and justice require a court-based hearing, and it is safe to conduct one, then a court-based hearing should take place.” The principles set out in the President’s Guidance dated 19 March 2020 are now supplemented by those set out in his email of 24 March 2020 at 10.16, namely that live court-based hearings should now be 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 involved attending court in a manner which meets the social distancing requirements. This reflects the Lord Chief Justice’s direction of 23 March 2020 which states at para 6:

“Civil and Family Courts

Guidance has already been given about the use of remote hearings. Hearings requiring the physical presence of parties and their representatives and others should only take place if a remote hearing is not possible and if suitable arrangements can be made to ensure safety.”

Adjourned Hearings

3.4 Finally, given the nature and risk presented by the COVID-19 outbreak, it must also be appreciated that there will be some cases that will need to be adjourned for longer periods of time because a remote hearing is not possible given, for example, the nature of the case *and* the length of the hearing combined with the number of parties, representatives and/or witnesses make it undesirable to go ahead with a hearing in court at the current time having regard to the current Government guidelines regarding social distancing as a means of attempting to delay the spread of the disease. **By way of further example, NAGALRO has made clear that it is becoming exceptionally challenging for ISWs to provide reliable evidence when working with families in the current circumstances, where it is not possible to observe and assess the interaction between the parents, parent and child relationship and dynamics between various family members in order to make a fair and reliable assessment of their parenting ability, not appropriate to speak to young children via Skype or video calling as there is no pre-existing relationship with those children and where the children have made serious allegations against their parents and not possible to speak to parents remotely who do not have sufficient credit on their mobile phones to facilitate video calling or Skype. Within this context, it is recognised that some cases will, inevitably and notwithstanding the unwelcome consequences, have to be adjourned.**

Judicial Discretion as to Remote Hearings

3.4.1 It must be remembered that the decision whether to proceed with a remote hearing or to adjourn remains at **all** times a judicial one. On 9 April 2020 the Lord Chief Justice, Master of the Rolls and the President of the Family Division issued a communication making clear that the decision of whether a particular hearing should be heard remotely, and if so what form of remote hearing should be adopted, is a matter for the allocated judge, in consultation with their leadership judges, to be decided on a case by case basis and with the overarching criterion being that whatever mechanism is used to conduct a hearing must be in the interests of justice. The communication of 9 April 2020 does **not** amount to official guidance and is not intended to be directive. Rather, it seeks to set out a number of indicators designed to assist judges in deciding which cases might, or might not, be undertaken remotely having regard the circumstances of the particular case, again with an emphasis on the judge exercising his or her discretion in each individual case.

Cases Concerning Children

3.4.2 Within the foregoing context, and having regard to the experience of holding remote hearings since 16 March 2020, the following *broad* indicators have been identified by the President of the Family Division as assisting the exercise of judicial discretion when deciding whether a given case concerning children is suitable for a remote hearing having regard to the particular circumstances of that case:

- (a) It is likely that case management hearings, or hearings that can be conducted by submissions only can properly be undertaken remotely.
- (b) Particular caution is required before a decision is taken to conduct a remote hearing in a case where the parties do not consent to that course of action. If all parties

oppose a remotely conducted final hearing, this is a very powerful factor in not proceeding with a remote hearing. If parties agree, or appear to agree, to a remotely conducted final hearing, this should not necessarily be treated as the 'green light' to conduct a hearing in this way.

- (c) Video/Skype hearings are likely to be more effective than telephone. Unless the case is an emergency, court staff should set up the remote hearing.
- (d) Where a final hearing is to be conducted on the basis of submissions only and no evidence, the final hearing could be conducted remotely.
- (e) In public law cases, where the parents oppose the local authority's care plan but the *only* witnesses to be called are the social worker and the Children's Guardian, the final hearing could be conducted remotely.
- (f) Where *only* the expert medical witnesses are to be called to give evidence, the final hearing could be conducted remotely.
- (g) In all other cases where the parents and/or other lay witnesses are to be called to give evidence the case is unlikely to be suitable for a remote hearing.

Financial Remedy Cases

3.4.3 On 15 April 2020 Mr Justice Mostyn and His Honour Judge Hess published a document clarifying the implication for financial remedies cases of the Lord Chief Justice, Master of the Rolls and the President of the Family Division's communication of 9 April 2020. That clarification makes clear that points (e) to (g) above do not apply to financial remedy cases. With respect to the general points (a) to (d), these fall to be applied in the context of financial remedy cases. Within this context the document makes the following points in the context of once again emphasising that decisions as to listing are in for the judge:

- (a) Financial remedy cases below High Court judge level are generally relatively short and straightforward. There will be no question of having to prove liability, as in a civil action. The majority will be needs cases which will not depend on a credibility assessment.
- (b) Even in cases that do require a credibility assessment, for example where non-disclosure is alleged, the case is likely to be relatively short and the relevant issues are likely to be able to be exposed and assessed by remote testimony.
- (c) Generally, the court should start from the position that a remote hearing is likely to be consistent with the interests of justice.
- (d) This will be especially so if the hearing will not involve live testimony; however even in the latter case the court can safely assume in many cases that a remote hearing will be consistent with the interests of justice.
- (e) The court should be alive to the possibility that opposition to a remote hearing is motivated by a desire to delay the resolution of the case.

Post Pandemic Recovery

3.5 The current crisis *will* pass. Planning for the post Covid-19 period will need to begin early and that period may in many ways be the most difficult logistically. In circumstances where there will be a

number of cases that it is not possible deal with remotely (for example because parties have particular vulnerabilities that make a remote hearing unfair or where a significant number of potential witnesses are engaged in frontline services in the context of the public health emergency) there are likely to be a number of long cases that have to be adjourned and will therefore be out of place in the list and increasingly urgent. Once the present crisis subsides it will be vital that a clear picture is available of the number and nature of the cases that have had to be adjourned. This will permit an informed review of the judicial resources available to deal with the backlog, including the extent of the funding required to secure for fee paid judges and the additional courtrooms and courtroom staff needed to accommodate the cases that must be dealt with. In the circumstances, where a hearing is not able to be dealt with remotely and is unsafe to deal with live, a record of each case adjourned should be kept by each court centre to inform the detailed planning that will inevitably have to follow the resolution of this crisis. The President of the Family Division has set up a Covid-19 Recovery Team, led by Baker LJ and Judd J.

4. LEGISLATIVE FRAMEWORK

Statutory Basis for Remote Access

4.1 The Coronavirus Act 2020 Part 1 deals, at ss 51 to 55, with the use of video and audio technology in courts and tribunals during the outbreak. At s 53 the Act provides for temporary modifications of s 85 of the Courts Act 2003, which will make it an offence to record a broadcast from the court that has been directed for the purpose of enabling members of the public to see and hear the proceedings and will make it an offence in any event to record or transmit material from participation through a live link on penalty of a fine at Level 3 on the Standard Scale. Those provisions will apply to the Family Court and the Family Division of the High Court. This is the power that was to be in the Prison and Courts Act 2017, as part of the online court and tribunal reforms. Section 75 of the Act provides that the Act will expire in 2 years. Section 76 provides that the government may, by regulation, provide for the expiry of any provision in the Act earlier than the two years and that the government by regulations may extend the life of a provision for six months beyond the 2 years. There is no power to extend a provision beyond that additional six months.

4.2 Within this context however, there is no specific provision made in the Act in respect of the use of remote hearings by the Family Court or the Family Division of the High Court. Further, the Act proceeds on the basis of an assumption that court buildings will remain open and it is at those buildings that any remote hearings will be conducted. It does not deal with the question of the power to hold remote hearings when the court building is closed and the judge and all the parties are located elsewhere. This gives rise to the question of what is the statutory or common law basis for an *entirely* remote access Family Court? Is there in fact any power for a Family Court to sit other than in a court building to deal with a remote hearing and, if so, what is the source of that power? These questions are not insignificant legally in circumstances where the COVID-19 pandemic is likely to shut parts, and potentially a significant part, of the court estate.

4.3 Section 71(1) of the Senior Courts Act 1981 provides that sittings of the High Court may be held, and any other business of the High Court may be conducted, at *any* place in England or Wales. Pursuant to s. 71(2) the places at which the High Court sits outside the Royal Courts of Justice shall be determined in accordance with directions given by the Lord Chancellor after consulting the Lord Chief Justice. Similar provisions apply in respect of the Court of Appeal pursuant to s. 57 of the 1981 Act. With respect to the Family Court, s. 31B(1) of the Matrimonial and Family Proceedings Act 1984, as amended by the Crime and Courts Act 2013, provides that sittings of the family court may be held, and any other business of the family court may be conducted, at *any* place in England and Wales.

Again, pursuant to s 31B(4) of the 1984 Act, places at which the family court sits, and the days and times at which it sits in any place, are to be determined in accordance with directions given by the Lord Chancellor after consulting the Lord Chief Justice. Within this context the Act, which defines remote hearings, recognises that participants in those hearings will be differently located and that all participants could be in separate locations. The Act does not require any of the participants to be in a specified location. Finally, para 2 of Annex 3 to FPR PD22A expressly contemplates the judge sitting at a site remote from the courtroom.

4.4 These provisions taken together suggest that there is no legal requirement for a judge of the Family Court or a judge of the Family Division of the High Court to be in the court building in order to conduct a remote hearing. They are consistent with the way 'Out of Hours' work is currently dealt with. In so far as there remains any doubt, this can be remedied by directions given by the Lord Chancellor after consulting the Lord Chief Justice, pursuant to s 71(2) of the Senior Courts Act and s31B(4) of the Matrimonial and Family Proceedings Act 1984.

Rules of Procedure

4.5 The Family Procedure Rules 2010 r 1.4(2) provides that the court must further the Overriding Objective to deal with the case justly by actively case managing proceedings, which active case management includes making use of technology (r1.4(2)(l)). Within this context, FPR r 4.1(3)(e) provides that the court may hold a hearing and receive evidence by telephone or by using any other method of direct oral communication. Pursuant to FPR r 4.3 the court can order that the matter be dealt with remotely of its own motion. FPR r 22.3 provides that the court may allow a witness to give evidence through a video link or by other means.

4.6 Whilst Annex 3 to FPR PD22A provides detailed guidance as to how video conferencing should be dealt with in court, that guidance is not ideally suited to the current extreme circumstances rendered by COVID-19 that have generated the need to increase radically the number of remote hearings. In the circumstances, further a Protocol For Remote Hearings in the Family Court and Family Division of the High Court is attached to this paper at **Appendix 1**.

5. IDENTIFYING AND ADDRESSING CHALLENGES

5.1 The right of access to a court must be practical and effective, rather than merely theoretical or illusory. In seeking to replicate the 'live' hearing process by way of remote hearings, the use of remote access communications platforms will create particular challenges and problems that will require to be solved. These may be particularly acute where the remote platform is being used to undertake a hearing extending across a number of days and at which evidence is being called, although as noted this has proved eminently possible. The following issues will fall to be resolved within that context.

Wellbeing

5.1.2 Conducting remote hearings is qualitatively and quantitatively very different from conducting a live hearing for judges, court staff, advocates and parties. Individual judges at all levels and the ADJ have provided powerful examples of the additional stress conducting hearings remotely places on judges. The ALC and the FLBA have likewise highlighted the additional strain that is placed on both lawyers and litigants in that context. Remote hearings are more complex to arrange, more difficult to run and, it is generally accepted at all levels, more tiring than face to face hearings. Litigants in person may feel less constrained on a telephone call than in the formal setting of a courtroom. It is also becoming apparent that the time required to set up the hearing, the need to hold all hearings with a fixed start time and the complexities that arise during the course of a remote hearing means that

courts cannot get through the same amount of work they can when doing face to face hearings. Particular challenges also arise from working at home and adapting working practices accordingly. Finally, it is recognised that by working remotely the demarcation between work and home is breached and matters that are ordinarily held at professional distance in the courtroom are brought into the home.

5.1.3 In these challenging circumstances it is even more important that judges, lawyers and court staff are enabled to apply the imperatives of the wellbeing initiatives that were reaching fruition on each circuit prior to the commencement of the COVID-19 emergency. In this regard, the following principles should be at the forefront of thinking on the conduct of remote hearings and working from home:

- (a) As made clear by the Lord Chief Justice, Master of the Rolls and President of the Family Division in their communication of 9 April 2020, judges are encouraged to recognise that doing as much as possible remotely does not mean, and cannot mean, trying to do everything remotely. It is important that listing takes account of the reality that long hours in front of a screen or on the phone concentrating hard are more tiring than sitting in a court room with all the participants present.
- (b) Within this context, it is unrealistic to expect that the lists can be conducted in the same manner as they are with face to face hearings. Once again, it must be remembered that the decision whether to proceed with a remote hearing or adjourn remains at **all** times a judicial one.
- (c) For the judiciary, it is important that the leadership judges know what effect remote working is having on their judges. It is vital that all judges keep their leadership judges informed of their experiences and raise with them any difficulties being created by remote working.
- (d) Working long hours at a desk in front of a screen can result in stress, headaches and fatigue, as can long hours spent on the telephone. Within this context, the North Eastern Circuit HR has provided the following tips with respect to mitigating the adverse impacts of conducting remote hearings:
 - (i) Ensure that you have a comfortable, well-lit workspace in your home and that you have the right equipment.
 - (ii) Take regular breaks from your screen and combine this with moving away from your workspace. This could include walking round the garden, going out onto a balcony or going into another room to sit quietly for a few minutes. It's important for both physical and mental wellbeing to take regular screen breaks and move around.
 - (iii) If you wear headphones for phone/Skype calls take the headphones out of your ears when not in use.
 - (iv) Take a break to do some quick exercises/stretches.
 - (v) Take time out for a proper lunch break.
 - (vi) Listen to calming background music when reading.
 - (vii) Create a clear demarcation between work time and rest and relaxation.

- (viii) Try to limit use of personal devices when relaxing at the end of the working day
- (e) There are free guided mindfulness exercises from Oxford University's Professor Mark Williams available at <http://franticworld.com/free-meditations-from-mindfulness/> (which derive from Oxford's University's eight week mindfulness course) and at <http://franticworld.com/coronavirus/> (with specific reference to the difficulties created by COVID-19).
- (f) The LawCare website which also contains advice on working from home at <https://www.lawcare.org.uk/information-and-support/working-from-home> .
- (g) For judges, following working from home guidelines have been published in the judicial intranet and provide comprehensive advice:
<https://intranet.judiciary.uk/wp-content/uploads/2020/03/Health-Management-Working-From-Home-Guidelines.pdf>
And
<https://intranet.judiciary.uk/wp-content/uploads/2020/04/Tech-advice-for-LCJ-1st-brief-17-March-2020.pdf>
- (h) For judges, the Judicial helpline 08000 217 821 is also available to provide confidential help and advice on range of health and wellbeing concerns.

Remote Issuing of Applications and Orders

5.2 As matters stand, the remote operation of the courts has centred on how to conduct hearings remotely in order to protect court users, court staff, lawyers and judges. This planning has proceeded on the assumption that court buildings, or at least some of them, would remain open and/or that lawyers and litigants would be able to attend to issue proceedings and that court staff will be available thereafter to draw, seal and send out orders. It is increasingly clear that this assumption is not a safe one. Indeed, on 27 March 2020 further information was issued by HMCTS categorising courts as being 'open' (or prioritised), 'staffed' or 'suspended' (see <https://www.gov.uk/government/news/priority-courts-to-make-sure-justice-is-served>). Within this context, there is an urgent need to consider now, in respect of each court centre, how proceedings will be issued remotely if all courts in a given area are shut down. Further, once the courts are shut, any assistance given to judges with respect to remote hearings will have itself to be remote. Thus, if a court clerk is to be involved in assisting the judge with regard to a remote hearing then that clerk will themselves have to be able to access the judge remotely.

5.2.1. However, with respect specifically to sealing orders, a solution is now available for Family Court orders which are sealed on FamilyMan automatically, kindly provided by HHJ Robin Bedford, which solution will be circulated to all judiciary by way of a separate, secure, email. The Family Division is not yet at this stage. The Clerk of the Rules advises that an electronic seal for the Family Division of the High Court is still some way off. The High Court seal is dated, and therefore changes every day. Whilst the President has given permission to change to an undated version, work is still being undertaken to create a version that can be utilised in the approach adopted for Family Court seals. Further urgent work is now required on this. I am grateful to HHJ Alison Raeside for raising, and solving the question of whether it is possible to prevent orders sent out in PDF format from being edited by those receiving them. The Adobe Acrobat programme allows a password protected restriction to be placed on further

editing PDF documents before distribution (see the instructions for restricting further editing at <https://www.adobe.com/content/dam/acom/en/products/acrobat/pdfs/adobe-acrobat-xi-protect-pdf-file-with-permissions-tutorial-ue.pdf>).

5.2.2 There has also been some question regarding whether a 'wet' signature is required on applications, consent orders, etc., with some court centres rejecting applications for decree *nisi*, draft finance consent orders and other documents because they did not have a 'wet' signature on them. On 27 March 2020 the President of the Family Division made clear that the rules do *not* indicate that a 'wet' signature is a procedural requirement and that, within this context, from now on 'wet' signatures are not a requirement for applications, consent orders, etc and such documents are not to be rejected by courts on that basis. Indeed, the authorities indicate that a printed name constitutes a valid electronic signature *Bassano v Toft* [2014] EWHC 377 [39]-[41] and *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2012] 2 All ER (Comm) 978 at [32]. There is no need for orders to bear a manual signature or even a facsimile of a manuscript one.

5.2.3 HMCTS have now put in place arrangements to ensure that applications for child arrangement orders continue to be processed during the COVID-19 pandemic. Wherever possible, parents and legal representatives should use the [online child arrangements service on GOV.UK to avoid delay](#). Further [guidance on child arrangements is available on GOV.UK](#). **If the matter is urgent (a hearing within the next 3 days or there are serious safety concerns) the online service should not be used and contact should be made with the local court.** Where a parent or legal representative is not eligible to use the online service and the matter is not urgent, paper C100 applications should be sent to C100 Applications, PO Box 4936, 69 Buckingham Avenue, Slough, SL1 0JR.

Judicial Access to Range of Communications Platforms

5.3 At the remote hearing stage, at present the judicial open build laptops come with Skype for Business and Microsoft Teams installed. The judge benefits from a licence to operate each of those platforms. However, there are multiple other platforms being used by lawyers and litigants which are not, at present, installed on judicial laptops and for which it is unlikely funding will be made available to the judiciary to purchase licences to use those alternative platforms. In the circumstances, there **has been** a critical need to identify which platforms, in addition to Skype for Business and Microsoft Teams, the judiciary can engage with. ~~The most pressing concerns the limitations presented by DOM1 machines.~~

5.4 For example, Mostyn J has ~~already~~ established that, whilst it is unlikely that funding will be made available to the judiciary to purchase operating licences for Zoom, Zoom can be downloaded by judges for free and will operate on a judicial laptop without restriction of features *provided always* that it is the lawyers who set up the Zoom meeting and invite the judge as a guest. ~~A further problem that remains to be resolved however, is that whilst this solution works for Open Build judicial laptops, it will not work for DOM1 judicial laptops, at least until Chrome is made available on them (see below). Whilst it has been possible to conduct hearings using Skype for Business on a DOM1 laptop by arranging for a represented party to set up the conference and to invite the judge in, and for judges to arrange meetings using Microsoft Teams on DOM1 machines (see below), the current experience of judges is that Zoom will only work on Open Build machines.~~ **Within this context, there remains an urgent need for a system of remote hearings that is compatible with DOM1 laptops or, more ideally, for DOM1 laptops to be urgently reconfigured to operate with the available suite of 'off the shelf' communications platforms.** Judges using DOM-1 computers can access a Zoom hearing set up by one of the parties via Skype for Business as long as it has been set up using either a Pro, Business or Enterprise licence (i.e. anything above the Basic, free licence) and the administrator of the account

has changed their settings to allow for attendees to join via Skype for Business (see paragraph 7.10.1 below). **Once again, it should be noted that updated guidance to the judiciary issued on 3 April 2020 requires judges to encourage the use of Skype for Business or CVP if at all possible (see paragraph 7.2.1).**

5.4.1 Further, some judges have found that using Skype for Business with the dual screens in court means that the sound does not work. This can be remedied by going to 'Control Panel', selecting 'Sound' and checking that the default audio device is set at Conexant SmartAudio HD. Any other device should be disabled. Conversely, seeking to undertake a hearing with just one screen makes it difficult to use an electronic bundle at the same time as seeing the advocate or witness. It is however, understood that whilst 1500 more laptops are to be made available to facilitate remote hearings, HMCTS currently unable to provide two screens for judges working from home within the near future. Judges have been told that no additional leads / connections are currently available. This requires urgent remedial action in circumstances where the optimum set up for a remote hearing is the use of two screens. As a workaround, when on circuit Mostyn J has used an HDMI cable to plug into the television to operate as a second screen. This solution worked well and, indeed, in some ways it was better than having a computer screen because the television's strong inboard loudspeaker could be utilised. Using this set up, the video hearing can be displayed on the television screen and the e-bundle can be open on the laptop. **Within the foregoing context, it must be emphasised that there is no expectation that judges will use their personal computers in order to work around these issues.**

5.4.2 In addition, in the week commencing 23 March 2020 further issues were identified regarding judicial access to the range of communications platforms. First, a difficulty with ensuring access by the fee paid judiciary to the necessary equipment. Fee paid DDJs, Recorders and Deputy High Court Judges will be a vital resource in circumstances where considerable numbers of the full time judiciary are or are likely to have to self-isolate at some point. There was an urgent need to work out how access to remote communications platforms was to be assured for the fee paid judiciary, including whether they were to be permitted to conduct remote hearings on their own computers and to do so from home, and how e-bundles were to be conveyed to part time judges who do not have access to a DOM1 or the electronic bundle filing system at each local court. **Within this context, the following steps have now been taken:**

- (a) The Senior Presiding Judge and the President of the Family Division have confirmed that (i) the fee paid judiciary can use their personal computers to undertake remote hearings (subject to the guidance set out at paragraph 5.20.3 below) and (ii) can conduct remote hearings from home.
- (b) It is understood that fee paid judges can download Skype for Business through their eJudiciary login which can then be installed on their work computers, signed into with their judicial email address and linked into their online judicial outlook.

5.4.3 Second, a particular difficulty has been identified in making provision for Family Panel Magistrates to be involved in remote hearings. The Family Panel justices are not at present properly equipped to undertake the transition to remote hearings because of the absence of fundamentals, including judicial laptops. Whilst many lay benches have been issued with iPads in order to receive e-bundles for their cases, they cannot work remotely other than by utilising personal computers and laptops, which is not appropriate, if they are to work from home. In addition, there are the issues of how they would be assisted remotely as a panel by their Legal Adviser if points of law arise and how written reasons for their decisions are produced in the context of a remote hearing. An option would be for Family Panel Magistrates to into the court building and sit 2 metres apart but to undertake all

cases in this manner is not consistent with current Government guidance. The possibility of the panel hearing the case over the phone using separate phone lines with a conference all call with each other and the Legal Adviser to discuss outcome could be considered. A further potential solution is ~~to use Zoom~~ ~~and to set up breakout rooms~~ **video-conference** for the magistrates to meet privately with their legal adviser.

5.5 In addition, it is not yet known what the impact will be of so many of the population self-isolating and the concomitant pressure on broadband bandwidth. Experience suggests that, as a minimum, recommended bandwidth for video hearings is 1.5 MBPS in both directions. It will be vital to monitor the situation to ensure that remote hearings are not being prejudiced by insufficient bandwidth being available to judges and parties connecting from diverse remote locations. To date, there have been few if any reported problems regarding the availability of bandwidth.

5.6 Finally, it has to be acknowledged that the judiciary contains a cohort of judges who are unfamiliar with the operation of the software and equipment needed to conduct a remote hearing. Within this context, there is an urgent need for clear, step by step instructions to enable *all* judges to use the software and equipment they require to successfully hear cases remotely (sometimes called in IT circles the “Press Here Stupid” guidance). At present there are a number of different initiatives to produce such guidance but it would be helpful to centralise that effort in order to quickly produce the necessary guides for all. The FLBA has now produced a series of concise technical guides for using Skype for Business, Zoom, Microsoft Teams and Lifesize following successful tests of the various platforms with the assistance of a number of judges both at court and at home. Step-by-step guidance for Skype for Business is now on both the eJudiciary and judicial intranet sites. HMCTS has also issued guidance on these technical topics that can be found at <https://intranet.justice.gov.uk/about-hmcts/operations-directorate/business-continuity/covid-19/guidance-on-using-telephony-and-video-technology-during-the-coronavirus-outbreak/>.

E-Bundles

5.7 The ability of the judge and the parties to access an electronic bundle for the hearing comprises an **essential** element of an effective remote hearing. Whilst there has been increasing use of electronic bundles, and whilst in some Family Courts, for example Manchester, the use of electronic bundles (accessed through Case Lines) is the default position, the wholesale move to remote hearings as a result of the COVID-19 pandemic means ensuring the availability of e-bundles and the software packages to use them effectively (see paragraph 5.9 below) is a matter of *extreme* urgency. Not least because the use of a paper bundle is not only incompatible with a remote hearing as a matter of logistics, but also presents a potential avenue of transmission of the virus.

5.8 FPR PD27A para 2.5 permits the use of e-bundles in a hearing before a High Court judge with that judge’s permission and in other cases or classes of case as have been approved by the Designated Family Judge for the relevant area with the agreement of the President of the Family Division and in accordance with the local arrangements. For financial remedies work, Mostyn J has issued *Financial Remedies Courts – e-bundles protocol* dated 3 March 2020 which provides for the use of e-bundles in financial remedies cases. This protocol is substantially repeated in the Protocol for Remote Hearings in the Family Court and Family Division of the High Court (see **Appendix 1**). By an email dated 23 March 2020 the President of the Family Division made clear that “I am today by this email giving a blanket approval DFJs to approve the use of e-bundles in all remote hearings held pursuant to my guidance of 19 March 2020”.

5.9 As e-bundles become almost mandatory, the need for judges to have access to a reliable *software* programme with which to navigate e-bundles has also become acute. The Acrobat Reader that comes pre-installed on judicial laptops is sufficient for this purpose. Experience, however, suggests that Acrobat Reader is limited in its functionality, particularly with respect to bookmarking. Other products, such as a PDF Exchange Editor have greater functionality, although to take full advantage they must be purchased. At present, PDF Exchange Editor is not available to judges free via HMCTS due to the constraints of testing and approval that apply. Urgent consideration needs to be given to lifting these constraints in the circumstances of the current national emergency. Again, there are further complications with respect to DOM1 machines. DOM1 users can seek authorisation to download Acrobat Standard although this is a complex process. These bottlenecks need rapid simplification.

5.9.1 The use of e-bundles can create difficulties for litigants in person and for parties who are remote from their lawyers being able to access the bundle during remote hearings. These difficulties may be mitigated by the following steps suggested by the FLBA and ALC:

- (a) For interim hearings at which that party is represented and is not giving evidence, it may be unnecessary for that party to have access to the bundle.
- (b) Some video-conferencing platforms enable a 'screen' or documents to be shared with one or more of the other participants, and this may be a method by which a party can access the bundle when required, particularly if the platform being used has a breakout room feature that enables instructions to be taken, and enables documents shown to clients, within those breakout rooms.
- (c) Specific documents (such as a party's statements where they are to give evidence) may, where appropriate, be posted to that party by their representatives or the local authority.
- (d) In exceptional circumstances, where no other option is available and the public health guidance permits it, it may be possible for a party to attend an 'open' court building or other facility in order to participate in the remote hearing while having access to the bundle.

Witnesses

5.10 Those attending court normally will have a broad idea of what is expected of them, not least, albeit inaccurately, from television court dramas. Save for expert witnesses however, who are well experienced in giving evidence by video-link, witnesses in family proceedings will have far less idea of what is involved in giving evidence at a remote hearing. Within this context, the protocol for the conduct of remote hearings at **Appendix 1** draws on guidance kindly provided to me by The Hon. Justice Victoria Bennett AO of the Australian Family Court, which guidance is sent out to witnesses in that jurisdiction who will be giving evidence at a remote hearing.

5.11 With respect to the oath, there may be an increased need for the judge to administer the oath or take the affirmation from parties and witnesses if a member of court staff is not also linked to the remote hearing. Mostyn J uses a short form by addressing the witness thus: "do you swear or affirm to tell the truth, the whole truth and nothing but the truth?" There should, for obvious reasons, be no requirement from the court at present to touch any Holy Book.

Recording

5.12 It is axiomatic that any hearing must be recorded in the same way that live hearings are recorded. A number of the remote communications platforms, including BT MeetMe and other teleconferencing facilities, Skype for Business and Zoom permit remote hearings to be recorded (although Mostyn J has

~~identified a problem with file corruption in Skype for Business that necessitates recording be re-started every 30 minutes to avoid data corruption).~~ Greater challenges lie in the storage of the recordings that result from remote hearings. First, given their size, they are apt to monopolise hard drive space if stored on the judge's computer. Whilst this is relatively easily addressed by transferring the files to the 'Cloud', there remains the challenge of ensuring that all recordings are eventually held centrally (see below). With judges conducting remote hearings on a variety of platforms, on occasion without the support of court staff due closure of the court, the risk of recordings being mislaid or corrupted is high. Care is also needed where a solicitor or other agency organises more than one remote hearing. There has been some anecdotal evidence of the same organiser organising two different hearings before different judges, resulting in the recording in the second Skype hearing cancelling the recording in the first.

5.12.1 Urgent consideration needs to be given to the manner in which recordings are to be stored centrally and a record kept of the recordings stored. This is now being considered by the Video Hearings Group chaired by the Chancellor of the High Court with a view to identifying the method by which a central repository of recordings held by HMCTS can be established. There is no difficulty with a host who is not the judge recording the hearing *provided* that host is a legal representative and provides to the judge a link to the recording immediately following the hearing. Pending the identification of the method by which a central repository of recordings held by HMCTS can be established the judge should direct either (a) that the legal representative who hosted the meeting should store the audio recording of the hearing in a secure GDPR compliant data storage facility, to be transferred to HMCTS when a storage facility becomes available or (b) that the legal representative is to send a copy for storage by the local court/judge and thereafter dispose of their own copy. Any system developed for storing the recordings by HMCTS will need to ensure:

- (a) Responsibility for conveying the recording to the court rests with the party hosting the hearing (where this is not the court).
- (b) Where the recording is an audio or video file, a standardised filename protocol for identifying such files is formulated.
- (c) Communication of the file, link to the recording is in a standardised format that includes the case number, the identity of the judge and the date of the hearing.
- (d) A dedicated HMTCS email address is established to which files of or links to recordings must be sent.
- (e) A clear mechanism for acknowledging safe receipt by HMCTS of files of or links to recordings is established.
- (f) The maintenance of an electronic register of daily hearings and recordings, showing the case number, the date of hearing, the judge, and marking the name of the host and date of receipt of recording.

Where the judge gives an *ex tempore* judgment, the relevant file or link to the recording can be made available to the transcribers, just as the digital file from a court recording is made available for transcription. **Where a judgment is handed down in writing remotely by email it should contain the following rubric on the front of the judgment:**

“Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be at [insert time] on [insert date].”

Use of Interpreters

5.13 Interpreters ordinarily sit next to a litigant and provide direct interpretation during the course of the hearing. This is at present both unrealistic where a remote hearing is taking place and, in any event, inconsistent with the Government guidance on social distancing. In the circumstances, there is an urgent need to identify a solution to the problem of ensuring simultaneous translation during the course of a remote hearing for those litigants who need an interpreter. The most likely solution is one based on a communications platform that not only allows multiple parties to attend the hearing remotely but that also permits multiple audio channels for a single user so that the interpretation does not interrupt the course of the hearing. It would appear that Zoom allows for this, but there remain issues in respect of recording, Zoom's website stating as follows:

“When the meeting or webinar starts, the host can start the interpretation feature, which will give the interpreters access to their own audio channels. Attendees can select an audio channel to hear their language of choice. Attendees will hear the translated audio and can choose if they want to hear the original audio at a lower volume. Cloud recordings of interpretation sessions will only record the original audio of the meeting or webinar, not the translations. Local recordings of interpretation sessions will record any audio that the person recording can hear, but not multiple audio channels.”

5.14 A further difficulty is that whilst the provider of interpreting services to HMCTS has its own Video Remote Interpreting platform that is available for use, HMCTS firewalls are currently preventing access. In addition, the platform appears to be a standalone platform geared more towards allowing an interpreter to be connected remotely to a court room, rather than allowing them to access a remote hearing being conducted by one of the available platforms such as Skype for Business or Zoom. In any event, the provider has indicated to the FLBA that there is no way for an individual interpreter's contact details to be provided, even to a nominated member of court staff or the judge, in order for them to be “dialled into” or invited to a remote hearing being conducted on an alternative platform. It remains unclear whether it is practical for arrangements to be made for the interpreter and client to speak via telephone while watching the hearing by video conference. Within this context, there is an urgent need for HMCTS to ensure that CVP **and the fully video hearings platform** is further developed to accommodate a separate channel feature to aid the use of interpreters during remote hearings by parties for whom English is a second **or more remote** language. **Discussions are currently taking place with HMCTS to seek to ensure that these platforms are able to accommodate this feature and to seek to identify solutions to this issue in the interim. Further information will be made available in due course.**

Use of Intermediaries

5.15 FPR Part 3A governing vulnerable adults will continue to apply to remote hearings. Intermediary companies have stated that they are prepared to work remotely, notwithstanding that on the face of it remote hearings present similar problems for intermediaries as for interpreters. Communicourt, for example has now however, indicated that, as at 30 March 2020, it has postponed all intermediary assessments (on the basis that an assessment carried out remotely could not be relied upon) although it continues to process referrals, that its intermediaries are no longer attending hearings physically as intermediaries are not listed as ‘keyworkers’ and only its more experienced intermediaries continue to attend some hearings remotely. If intermediaries are to attend a hearing remotely to support a vulnerable litigant who is themselves in a different location then, as with interpreters, there is an issue to be solved regarding the need for a discrete channel between party and intermediary so that the interpretation does not interrupt the course of the hearing. Again, these issues need resolution as a

matter of urgency. 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.

Transparency

5.16 FPR r 27.11(2)(f) provides that duly accredited representatives of news gathering and reporting organisations may attend a private hearing in the Family Court. It is likely that FPR 27.11(3), which permits the press to be excluded if justice would be impeded or prejudiced is wide enough to permit the court to exclude the press from a remote hearing if the remote hearing could not, practically, take place if this step were not taken. It remains however, highly desirable, particularly at a time of national crisis, that the operation of the Family Courts is as transparent as possible in the circumstance. Within this context, careful thought needs to be given to press access to remote hearings.

5.17 Experience shows that facilitating such access during the course of a remote hearing is eminently possible. The remote final hearing conducted by Mostyn J in the week commencing 16 March 2020 was attended remotely by journalists who, as noted above, were able to perform all of their core functions notwithstanding that they were not physically in court. In particular, the following elements are notable:

- (a) Where the hearing is being held on a multi-channel communications platform an invitation is sent to the press by the lead party and the email addresses of the parties' representatives are provided to the press, the latter enables reporters to raise questions outside of the hearing as they would in the normal course.
- (b) The reporter(s) can dial in at the commencement of the hearing. At this stage they are able to participate in any discussions regarding reporting restrictions in the normal way. There is an opportunity, as there would be at a live hearing, for the reporter to ask any questions necessary to clarify anonymity concerns with the judge.
- (c) The press can (where appropriate) be provided with electronic copies of documents ahead of the hearing.
- (d) On multi-channel communications platforms such as Skype for Business, the reporter is able to dial in and drop out (as they do in live court hearings) of the hearing without causing disruption.
- (e) Handed down judgments can easily be covered remotely, provided they are available online via Bailii or the Courts and Tribunals website, or via email at the point of hand down.

5.18 To ensure continued transparency of family hearings within the context of a move to remote hearings, it will be vital to ensure that the fact that a hearing is to be a remote hearing and, where possible, the technological method to be employed, be shown in the cause list of the Family Division or the lists in the Family Court. The court list plays a fundamental part in open justice, even where it is anonymised as it largely is in the family jurisdiction. It would be of assistance if the Family Division cause list and lists in the Family Courts (or an online equivalent where the court is no longer open) could list the case as "Being Heard Remotely". This will allow an enquiry to be made by the press (subject to a telephone number or email address being made available) as to the manner in which they might seek to observe proceedings. Where a judgment is reserved and listed for hand down, the list should state that the case is listed for "handing down judgement by email". It would also be of

assistance if a method of communicating this information to the press and legal bloggers could be arrived at, for example by using the CopyDirect service or routing the information via the Press Association using highcourt@pa.media in advance of a hearing, which would ensure all of PA's High Court team are notified of the arrangements. However, there is a need to consider all journalists including but not limited to the Press Association. This will also include legal bloggers.

5.18.1 In this regard, some court lists are published on Courtserve (see <https://www.courtserve.net/>) and, for some courts, on the HMCTS website (see <https://www.justice.gov.uk/courts/court-lists>). These can be accessed by journalists and legal bloggers. Within this context, further consideration is being given to a means of ensuring the required information is available in the Family Courts (this will likely require the list in each court to include the type of remote hearing that is taking place and a contact for press enquiries, subject always to their being staff able to prepare such a list given the pressure of resources caused by the COVID-19 outbreak) but the Daily Cause List in the Family Division of the High Court will now contain the following statement:

“For the time being, and save where indicated otherwise, hearings in the Family Division of the High Court are being conducted remotely.

Accredited Members of the press or legal bloggers who wish to attend a remote hearing should email the judge’s clerk.

Details of the judge’s clerk can be requested by email from
rcj.familyhighcourt@justice.gov.uk

The present arrangements will be kept under review.”

5.18.1 HMCTS staff should also be reminded of their obligations to provide information to journalists under the HMCTS guidance issued in 2018 in this context, and entitled *Jurisdictional Guidance to Support Media Access to Courts and Tribunals – Family Courts Guide* which can be found at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/869798/HMCTS_media_guidance_-_Family_Court_Guide_March_2020.pdf.

Access for Parties and Litigants in Person

5.19 Participation of the lay parties continues to be a fundamental element of a fair trial where a hearing is held remotely. Within this context, it is not appropriate for courts to stipulate ‘advocates only’ remote hearings as a means of dealing with the logistical and practical difficulties caused by the current public health crisis. The current massive increase in litigants in person in the Family Court consequent upon the impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 creates a particular challenge in respect of remote hearings. Within this context, the court will need to address the following potential difficulties for lay parties and/or litigants in person.

5.19.1 First, in any case in which neither party has a solicitor, if a remote hearing is to be held it will need to be set up by the court. If the court buildings are shut then either a member of staff working remotely or the judge will be required to arrange the remote hearing, the latter involving administrative contact between the judge and the parties if it is to be achieved. A judge should not send out a **video-conference** ~~Skype or Zoom~~ invitation to a litigant in person from his or her judicial email. It must come from his or her clerk or the court staff. If this is not possible, then the hearing will likely have to take place using the court teleconferencing facilities. Where both parties are litigants in person, and where staffing levels permit, the following principles should, ideally, be applied to the provision of a remote hearing:

- (a) A judge's clerk or a member of court staff should participate and be present throughout the hearing.
- (b) The clerk or member of court staff should be the person who initiates and monitors the remote hearing.
- (c) The clerk or member of court staff must ensure that the remote hearing is continuously recorded.

5.19.2 Second, and also potentially affecting lay parties, there is likely to be a not insignificant cohort of parties attending from a different location to their lawyers and litigants in person who lack access to sophisticated communication platforms. In these circumstances, if held, it is likely that significant numbers of private law hearings and an appreciable number of public law hearings will have to take place by means of telephone conferencing, limiting the types of hearing that can be accomplished remotely in the private law context. As noted above, HMCTS has issued guidance to its staff to help with the process of accessing a hearing in this context and it can be found here: <https://intranet.justice.gov.uk/about-hmcts/operations-directorate/business-continuity/covid-19/guidance-on-using-telephony-and-video-technology-during-the-coronavirus-outbreak/>

5.19.3 Third, and again also potentially affecting lay parties, it must further be remembered that some parties attending from a different location to their lawyers and litigants in person are likely to face difficulties in achieving *any* access to a remote hearing including where a party or litigant in person is homeless, does not have a mobile phone or landline, does not have a Wi-Fi connection, or does not have sufficient "credit" on their phone. Alternatively, such difficulties may arise where a party continues to live in the same household as another party, particularly where there are allegations of domestic abuse. The following solutions have been suggested by the FLBA and the ALC:

- (a) While a party who has a Pay as You Go mobile phone would incur a cost, and therefore require "credit", to telephone into any hearing, they would not incur a cost, and therefore not require "credit", if the hearing provider dials out to them.
- (b) Where video communication platforms enable an audio only connection in addition to video connection, a decision can be made on a case by case basis whether a party may join on an audio only basis if adequate for the needs of a party who is unable to join without a video connection.
- (c) Courts can produce plain English guides to assist the litigant in person with basic literacy to connect to a video conference by explaining that they will be sent an invitation with a link or login details, and that they need to follow the link and enter any code 10 minutes before the start of the hearing. Court DSOs could support litigants in person to connect. Litigants in person could also be offered an opportunity for a 'dry run' test connection by the hearing host, 24 hours prior to any hearing wherever possible.
- (d) There may be some hearings where technological challenges mean that the only way to involve a litigant in person in an otherwise remote hearing is to provide a safe space for them to do so. Subject to the strict social distancing requirements, arrangements could be made for a litigant to attend an 'open' court in order to participate in a remote hearing, enabling a party to access the remote hearing without the need to convene a fully face-to-face hearing.
- (e) Subject to the strict social distancing requirements, arrangements could be made by local authorities to provide a space where parents in care proceedings can access hearings remotely, whether by providing access at that location to the necessary equipment, or simply

by permitting access to Wi-Fi. As noted above, Dorset County Council has taken steps to adopt this approach.

- (f) There is no reason in principle why a litigant in person who would otherwise be permitted the support of a McKenzie friend should not be afforded the support of a McKenzie friend when the hearing is conducted remotely, even if the McKenzie friend can't be in the same location as the litigant in person. In the usual way, a McKenzie friend can be asked for a verbal confirmation they understand and will abide by the McKenzie Friend guidance, having been sent and read that guidance

5.19.4 Fourth, where a party or litigant in person is able to access a remote hearing it should be borne in mind that they are likely to be particularly anxious if having to take part in a hearing without proximity to their, or any legal representation *and* to simultaneously deal with unfamiliar technology. **The use of the technology automatically results in the removal of basic human contact with clients, the ability to read body language and a situation where not all parties may be visible.** As the FLBA notes, although some litigants in person will be 'tech savvy', many will not. Some will be illiterate, find text or screen-based communication difficult, or find audio only communication difficult (for various reasons such as a disability) and may have language or communication difficulties. Within this context:

- (a) It is important for clear ground rules to be set at the start of any hearing. For example, on turn-taking, muting, privacy, alerting the judge if any technical or sound difficulties and in particular making clear that there is a prohibition on recording or broadcasting, which may not be obvious to litigants and which carries a criminal sanction.
- (b) It is important for judges to 'check in' regularly with a litigant in person to ensure that they are hearing, understanding and following the proceedings.
- (c) Developing experience suggests that remote hearings are more tiring than face to face hearings. Regular breaks are essential for all participants and particularly litigants in person.

5.19.5 Fifth, it should also be remembered that the current public health emergency means that for solicitors and advocates, meeting with their lay clients represents a significant challenge, particularly those clients who, as a consequences of poverty and social disadvantage, may lack phone credit/data, tablets or computers and wireless access. Where contact prior to a hearing is possible, the particular needs of certain vulnerable clients may mean that there is insufficient time to explain fully complex evidence and to take instructions thereon. With respect to the representation of children, solicitors will also face challenges in assessing the competency of children in private and public law proceedings. These problems may be particularly acute where the proceedings concern an application for the urgent removal of a child from the home. Within this context, when listing cases the court should be sympathetic to requests for additional time to be built into a remote hearing to permit solicitors and counsel to speak with lay clients 'at court' and to requests for breaks during the hearing to take instructions. Courts should likewise give consideration to how case management timetables can be adapted in respect of filing of evidence and listing to ensure that solicitors have adequate time for case preparation.

5.19.6 Finally, in those cases where a child who is joined as a party to proceedings, is separately represented and will need to access a remote hearing, in public law cases the child may be facilitated to attend a remote hearing by the local authority to ensuring that the child has the means of accessing the hearing remotely from the place in which they are accommodated and in private (for example in a DOLS application). The situation in private law cases is much more difficult and this will need to be

addressed on a case-by-case basis, accepting that in some cases the attendance of the child will not be practicable.

Security and GDPR

Illicit Recording

5.20 The primary security concern in respect of remote hearings centres on the hearing unauthorised recordings being made by a litigant or as a result of malicious third party hacking. As a result, historically, there has been a reluctance to use 'off the shelf' communication platforms and HMCTS has had a policy which deprecates this. It must be recognised that **video Skype** hearings carry a significant risk of being recorded by LIPs or parties participating at a separate venue than their solicitors and the photo of the judge/social worker/advocates being posted on social media, however this is a risk that will, for the time being, have to be accepted. It is important to note however, that this primary security risk has been recognised in the Coronavirus Act 2020. Section 53 of the Act provides for temporary modifications of the Courts Act 2003 which make it an offence (a) to record a broadcast from the court that has been directed for the purpose of enabling members of the public to see and hear the proceedings and (b) in any event to record or transmit material gained through participation through a live link. Whilst security vulnerabilities remain, it is clear beyond peradventure that the need to keep the family justice system operational in some form outweighs, in the current unprecedented circumstances, the security issues of doing so with 'off the shelf' remote methodologies. The perfect cannot be permitted to be the enemy of the good.

GDPR and Data Protection

5.20.1 With respect to GDPR and data protection, information supplied by the FLBA clarifies that the Information Commissioners Office is content that Skype for Business, LifeSize and Zoom (provided in respect of Zoom that the host has indicated that they accept the terms and conditions specifically in relation to GDPR which, in reality, they will have to do as they are not able to set up a meeting unless they have ticked the requisite box) are GDPR compliant. The position with respect to Microsoft Teams will need to be clarified. The Information Commissioner's Office has indicated that reasonable allowances are going to be made during this period of national emergency (see <https://ico.org.uk/about-the-ico/news-and-events/icos-blog-on-its-information-rights-work/>).

5.20.2 Further, the Data Protection Act 2018 Sch 2 para 14(2) states that the listed GDPR provisions do not apply to personal data processed by (a) an individual acting in a judicial capacity, or (b) a court or tribunal acting in its judicial capacity. Paragraph 14(3) of Sch 2 provides that as regards personal data not falling within para 14(2), the listed GDPR provisions do not apply to the extent that the application of those provisions would be likely to prejudice judicial independence or judicial proceedings. Sch 2 para 1 provides that 'listed GDPR provisions' includes the Articles concerned with personal data collected from the data subject and personal data collected other than from the data subject.

5.20.3 On 8 April 2020 the Judicial Data Protection Panel issued further guidance for judges entitled **Covid-19 Guidance - Storing Bundles at Home**. That guidance makes the following key points:

- (a) Storing the bundles in a judge's house during the present pandemic period is inextricably linked to the judge carrying out the administration of justice. A judge could not currently carry out their judicial functions without storing bundles in their home. This is due to public health considerations for judges, court staff and couriers.

- (b) When judges store bundles in their homes they are thus doing so whilst acting in a judicial capacity.
- (c) Such storage is subject to guidance from the Judicial Data Protection Panel rather than the Information Commissioner's Office and subject to the guidance set out in *Data Protection – Responsibilities of the Judiciary (May 2019), Section 2* and the Guidance Note of 8 April 2020. The guidance sets out the steps judges should take to keep court bundles etc secure while working outside court buildings during the COVID-19 pandemic.
- (d) The Guidance makes clear that members of the judiciary should ensure that they take steps to keep personal data secure. Judges who follow the guidance will be indemnified by the Ministry of Justice i.e., in respect of fines or damages arising from any data breaches that occur due to, for example, the loss of court bundles from a judge's home. If the judge does not follow the guidance they risk personal liability without indemnity.
- (e) To minimise the risk of data breaches occurring, judges should, in so far as possible, take the following steps to keep court bundles secure in their own homes:
 - (i) ensure court bundles are not left open where they could be seen by other members of the household while they are being used;
 - (ii) ensure court bundles are not left unattended during the day or night in rooms which have open windows. If windows have locks, ensure the lock is used;
 - (iii) ensure that bundles, when not in use, are stored in a room that is not easily accessible at ground level;
 - (iv) ensure that bundles, when not in use, are stored in a room that, as far as possible, minimises access to other members of the household;
 - (v) if possible lock the door to the room in which the court bundles are stored; and
 - (vi) ensure that windows and doors are locked during any periods when your house is empty.
- (f) When the current situation begins to normalise, judges should arrange with HMCTS to return any court bundles back to court buildings for storage.
- (g) Guidance on the use of electronic documents, which will cover the use of e-bundles, is contained in guidance entitled *The Responsibilities of the Judiciary IT (Security)*. The IT Security Guidance provides that the use of eJudiciary is mandated for all official business. Judges should therefore ensure that any case-related materials should be stored in eJudiciary and not on their own devices or private cloud storage.

Confidentiality

5.20.3 Particular care must be taken where multi-party discussions take place using any breakout features to ensure the correct channel is selected. Within this context, greater care with the expression of personal thoughts is also wise when connected. At present there would appear to be no bar on a lawyer conducting a remote hearing from home using an e-bundle, although this remains to be clarified. It remains important when using CaseLines or other shared bundling software to ensure that lawyers own work remains private.

5.20.4 The ADJ, FLBA and ALC have each raised concerns regarding children being present in households from which remote hearings are being accessed, there being a concern that subject children (or other children) may be present at, or able to hear, the hearings. This would not be appropriate and steps must be taken to prevent such a situation arising. In some cases it *may* be that another family member in a parent's household is able to provide childcare for the duration of the hearing, with parent accessing the hearing remotely from a quiet location in the home. Where this is not possible, and where a party is represented, the court may need to take a more flexible approach to the need for a parent to attend interim or procedural hearings. In any event, the court must be astute to ensure that children are insulated from witnessing or hearing remote hearings. In many cases this will provide only limited protection in circumstances where parties have young children and no access to childcare within or outside the home in the current public health crisis. Where it is simply not possible to insulate children from hearing or witnessing inappropriate matters, consideration will have to be given to adjourning the hearing.

Legal Aid

5.21 Anticipating a move to hearings by telephone or video link in the current coronavirus situation, the Family Bar and solicitors are understandably concerned about the effect on advocacy fees under the FAS scheme. The Legal Aid Agency issued guidance dated 24 March 2020 and entitled Remote Family Hearings: updated ways of working, **which guidance was updated on 15 April 2020**. The following key points should be noted:

Advocates Meetings:

- (a) The definition of advocates' meeting includes meetings held by video conference, webcam or telephone where this appropriate in the circumstances.
- (b) With respect to the legal aid funding of remote advocates meetings or conferences, where possible advocates should use free services such as Skype or Zoom. Where this is not possible the cost of setting up a teleconference and dialling into the meeting are a claimable disbursement.
- (c) Although it would usually be expected that two advocates' meetings would take place in accordance with the Public Law Outline, provided that the advocates' meeting is held as directed by the Court and in accordance with the PLO, there is no limit to the number of these fees that may be claimed. In the current circumstances the Legal Aid Agency accepts that there may be an increase in the number of advocates meetings.
- (d) Advocates meetings may now be arranged through email rather than court order. The provision of email evidence from the court and/or the judge will be treated as the same as providing the order. The LAA will also accept retrospective recording of advocates meetings in orders which follow such a meeting.
- (e) An advocates meeting can take place on the same day as an interim hearing but it may be claimed only if the meeting takes place outside of any time period that is taken into account in calculating the fee for the interim hearing.
- (f) If the advocates meeting leads to an agreed order, with no need for a hearing and a self-employed advocate has undertaken at least 30 minutes of preparation for the hearing, they are entitled to claim a payment for a one-hour hearing if the cancelled hearing was an interim hearing, or half of the final hearing fee if the cancelled hearing was a final hearing.

Hearings:

- (g) If the court directs an alternative method of hearing then the advocate will receive the appropriate fee as if the hearing had taken place. The LAA accepts that telephone hearings may no longer take under an hour.
- (h) An advocate's attendance form (a FAS form) will not be available in hearings undertaken by video or telephone conference.
- (i) Where a court order sets out all the information that is required in the FAS form (i.e. the names of each of the advocates that participated in that hearing, the start and finish times for the hearing (including lunch breaks) and bolt-ons) this will be acceptable evidence to the LAA. Where the court order does not have all the required information the LAA will require an attendance note as well.
- (j) Bolt-ons may be claimed for telephone/video hearings if appropriate. As there will be no FAS Form, a note of the hearing will be needed and the claim justified on CCMS, the CLAIM 1A or the CLAIM 5.
- (k) In the ordinary course of events, hearings attended at court routinely include a requirement to attend an hour before for pre-hearing discussions. This is reflected in the advocacy fee payable for the hearing. For remote hearings, the hearing time will start from the time that the telephone call/videoconference was ordered by the judge. There may be initial discussions which can happen on a conferencing platform which is different to the hearing itself. This time will be counted towards the hearing time. If the judge attends to ensure everyone is present then absents themselves for pre- hearing discussions and then re-joins the telephone hearing that time will be counted.
- (l) Advocates may also need some time after the hearing is finished to finalise the terms of the order. Time spent on the phone/videoconference finalising the order can be included in the calculation of hearing time. These discussions may be on a conferencing platform different to the one used for the hearing.
- (m) Where the remote hearing is conducted by way of an email exchange, the LAA will accept as evidence a court order that's sets out the start and finish time of the hearing and the names of the advocates. If this information is not on the court order the LAA will require advocates to self-certify the amount of time spent reading and responding to emails and will expect to see copies of emails and a copy of the court order with the advocate's name recorded.

5.22 It has become apparent that there is concern that the stipulation in the legal aid guidance that the applicant must organise the remote hearing can result, particularly with respect to telephone hearings, in considerable expense. The **original** LAA guidance was based on HMCTS operational guidance sent to the LAA. Further discussions are taking place with respect to this issue. **The revised guidance of 15 April 2020 states as follows:**

"Arranging remote hearings, conferences and meetings

Who is responsible for arranging a remote hearing and how will the costs be covered?

1. HMCTS have produced guidance which can be found here:

<https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirusoutbreak>

2. The choice of the conferencing platform is a matter of judicial discretion. It is also a matter for the judiciary as to who will arrange the remote hearing. If an advocate incurs costs in setting up a remote hearing e.g. using a BT Meet Me number this can be claimed as a disbursement. These costs relate to individual cases. Where for an example a firm or chambers purchase a Zoom license this is an administrative cost for them and not an individual disbursement.

3. Where clients incur additional cost in participating in a remote hearing e.g. additional data charges, then this is claimable as an individual disbursement.

Who is responsible for arranging a remote advocates meeting or conference and how is this funded?

4. The advocates will decide who should arrange the meeting and set up the telephone or video conference facilities.

5. Where possible advocates should use free services such as Skype or Zoom. Where this is not possible the cost of setting up a teleconference and dialling into the meeting are a claimable disbursement.”

Publicity

5.23 The move to a default position of remote hearings will likely come as a shock to most litigants already dealing with the general anxiety and pressures caused by the COVID-19 pandemic. Within this context, it is to be anticipated that there will be improved participation in, and co-operation with remote hearings if the fact of the new default position is, when appropriate, more widely publicised by the Judicial Office communications team (by way of a clear notice placed on the judiciary.uk website). HMCTS should produce online plain English digital ‘leaflets’ or information pages and FAQs explaining to litigants (whether represented or in person) how they can join and participate in a remote hearing, what they will need in order to do so, what support is available and how they can ask for adjustments or a face-to-face hearing. The FLBA has formulated a document entitled ‘Public Information about Remote Court Hearings’ which explains remote hearings and the rationale for their use. The Transparency Project has suggested that information could be displayed on the Gov.uk website and that clear, concise Plain English notices should be posted on all official sites which the public are likely to be directed to or consult on family justice matters.

Alternative Dispute Resolution

5.24 At a time when there is a pressing need to reduce the pressure on a reduced judicial resource and to provide priority to the most urgent cases, it is important to explore with parties whether one of the forms of alternative dispute resolution is merited. With respect to child abduction matters each party will be expected, prior to the first on notice hearing, to make contact with Reunite by email on reunite@dircon.co.uk or by telephone on 0116 2555 345. Parties to private proceedings should give consideration to the use of arbitration. The Children Arbitration Scheme will shortly also begin dealing with applications for permission to remove from the jurisdiction where the country involved is a party to the 1980 or 1996 Hague Conventions or BIIA. Within this context, where a hearing has to be adjourned by reason of the current public health emergency, the provisions of r 3.4 of the FPR should be borne in mind, which provisions provide as follows:

“When the court will adjourn proceedings or a hearing in proceedings

3.4

(1) If the court considers that non-court dispute resolution is appropriate, it may direct that the proceedings, or a hearing in the proceedings, be adjourned for such specified period as it considers appropriate –

(a) to enable the parties to obtain information and advice about, and consider using, non-court dispute resolution; and

(b) where the parties agree, to enable non-court dispute resolution to take place.

(2) The court may give directions under this rule on an application or of its own initiative.

(3) Where the court directs an adjournment under this rule, it will give directions about the timing and method by which the parties must tell the court if any of the issues in the proceedings have been resolved.

(4) If the parties do not tell the court if any of the issues have been resolved as directed under paragraph (3), the court will give such directions as to the management of the case as it considers appropriate.

(5) The court or court officer will –

(a) record the making of an order under this rule; and

(b) arrange for a copy of the order to be served as soon as practicable on the parties.

(6) Where the court proposes to exercise its powers of its own initiative, the procedure set out in rule 4.3(2) to (6) applies.”

6. TIMESCALES

6.1 It is self-evident that a remote access Family Court must be available now **and for the duration of the COVID-19 pandemic**. This is, happily, largely the case, at least in relation to telephone hearings, in most areas with remote hearings being able to be conducted via ordinary judicial telephony as well as BT MeetMe at 1022 court and tribunal locations. Less common to date, has been the use of video hearings. Whilst many courts are equipped with older video links, experience has shown that these are extremely cumbersome to use and often break down or do not work correctly. Even less common, for reasons that it is not productive to dwell on at this point, has been the use of far more effective ‘off the shelf’ communications platforms for video hearings.

6.2 Within this context, it is clear that we need to cover two key periods to ensure that remote hearings, and in particular remote hearings by video can be the default position during the course of the COVID-19 pandemic. First, the period prior to the introduction by MOJ / HMCTS of CVP and **subsequently the bespoke fully video hearings solution** and other remote hearing elements of the reform programme. Second, the period from the introduction by the MOJ/ HMCTS of CVP **and the bespoke solution** to the end of the COVID-19 crisis **and beyond**. The key point is that these two periods are *not* mutually exclusive for the following reasons.

6.3 As noted, experience with official IT programmes (and sometimes with ‘off the shelf’ programmes) is that there can be ongoing reliability problems. Within this context, and given the unprecedented nature of the emergency and the need for a highly robust system of remote hearings, even after the introduction of CVP and the bespoke solution it will be necessary to maintain effective access to the remote platforms used during the first period to ensure the system has available to it multiple redundancies as a contingency, in order to ensure in turn that remote hearings can be maintained as CVP and the bespoke solution beds down or if they encounters technical issues, in circumstances where its level of immediate and sustained utilisation will be *much* higher than that envisaged when they were in the planning stages.

7. PRIMARY REMOTE COMMUNICATION PLATFORMS

Summary of Current Position

7.1 One of the saving graces that has become apparent in the first week after the Prime Minister’s announcement has been the extent to which family advocates are equipped for remote access. A survey conducted by the FLBA has revealed that both in London and the Regions the Bar is well equipped with remote access options in chambers (see ~~Appendix 3~~ **has now been removed as many more chambers and law firms have acquired the remote technology and continue to do so, rendering keeping that Appendix properly up to date an impossible task. Chambers and law firms can be contacted directly for more information**). Many chambers have systems with a number of licenses, some of which are capable of being be ‘donated’ to host users in the court, in particular, judges, on a case by case basis. At the same time, it must be remembered that some solicitors firms, particularly those who rely on legal aid, have been forced to furlough paralegals, assistants and support staff, which has increased the workload for solicitors, and may not be in a position to invest in technology at this time.

7.2 Within this context, and before considering each of the options, and the lessons that have been learnt to date in using each of them, a number of consistent messages have become apparent following the Prime Minister’s announcement on 16 March 2020:

- (a) The number of communication and information technology platforms that are available is sizeable, with at least four (Skype for Business, Microsoft Teams, Zoom and Lifesize) being in regular use by various agencies, barrister’s chambers and solicitors firms;
- (b) There is a very wide range of views as to the ease of use and efficacy of each of the main ‘off the shelf’ each platforms, some views being evidence based, some based on personal preference and experience. In this context, it will be difficult to identify and promote the use of a *single* ‘off the shelf’ platform and achieve buy-in from all of the agencies and lawyers involved with respect to the choice.
- (c) Objectively, there are a number of advantages and a number of disadvantages that can be identified in respect of each of the ‘off the shelf’ communication platform solutions.
- (d) Importantly, it is apparent that many ‘off the shelf’ communication platforms allow a user with a licence to ‘invite in’ the judiciary to a video link based on that platform at no charge to the MOJ, subject to equipment compatibility issues that appear commonly to arise in respect of DOM1 machines.

- (e) It is apparent that different court areas have already started to reach their own local solutions with different communications platforms according to local circumstances and local tastes. For example, a meeting of the Bar and bench in Manchester has resulted in Skype for Business being identified as the preferable platform for use in that court area.

7.2.1 Within this context, on 2 April 2020 HMCTS issued further guidance to court staff and the judiciary. **That guidance was further updated on 3 April 2020 to include the requirement that, if parties ask to use other remote communication applications, judges are to encourage the use of Skype for Business or CVP if at all possible. The revised guidance** is here produced verbatim:

“REMOTE HEARINGS - IT SOLUTIONS

FURTHER GUIDANCE

1. Many judges, court staff, lawyers and others have asked for further guidance on which apps can be used for remote video and audio hearings.

Recommended: Skype for Business and Kinly Cloud

2. We recognise that there are a variety of on-line apps which are theoretically available for use to conduct remote video hearings (and some are perceived to have advantages over others). However, at present, we only recommend Skype for Business (“**Skype**”), and HMCTS’ Cloud Video Platform (“**Kinly Cloud**”) are used and these are the only apps for which HMCTS can provide technical support.
3. **Skype** remains the default video app at the moment because (i) it is loaded on most judicial laptops, (ii) there is detailed and user-friendly guidance about it, (iii) staff are trained to support its use and (iv) it is tried and tested.
4. **Kinly Cloud** is already used within the criminal courts for remote video links and is now being rolled out more widely for remote video hearings. To make use of this platform in Civil, Family and Tribunals please contact your local listing team who will be given guidance on how to access licenses and training.

Recommended: BT MeetMe

5. **BT MeetMe** is the recommended default audio app at the moment. There are user guides for conference calling and for the role and responsibilities of the Digital Support Officer.

Other on-line apps

6. **Microsoft Teams (“MS Teams”)**: We know that some eJudiciary users have been able to use MS Teams for some time. Currently, it does not function effectively across all judicial computer systems. However, it will soon be made available on DOM1. HMCTS will then be able to carry out cross-domain and functionality testing, and produce guidance for its use across all judicial/ staff device types and arrange the right support. It is hoped that detailed guidance on MS Teams will be available generally in a few weeks’ time.
7. There are other on-line video apps but only those mentioned in this guidance are supported by HMCTS, namely **Skype for Business** and **Kinly Cloud**. They are the ones that should, therefore, be used. **If parties ask to use other apps, you should encourage the use of Skype for Business or Kinly Cloud if at all possible.**

8. We are continuing to work to make sure that the best available apps are brought forward for general use as quickly as possible.

Lord Justice Haddon-Cave

Deputy Senior Presiding Judge of England and Wales

Mr Justice Mann

Judge in Charge of Live Services

Andrew Wright

HMCTS Digital and Technology Services – Head of Judicial and RCJG”

7.2.2 It will be seen that this guidance states that the HMCTS recommended applications “should” be used rather than “must” be used. Whilst it will further be seen that the guidance acknowledges the existence of, and does not expressly prohibit the use of other applications, the guidance was further updated on 3 April 2020 to include the requirement that, if parties ask to use other applications, judges should encourage the use of Skype for Business or CVP if at all possible. In the circumstances, whilst judges retain their discretion with respect to which platform to use in a given case including, where there is an urgent operational need to do so, those applications for which HMCTS cannot provide technical support, parties can expect judges to encourage the use of Skype for Business or CVP if at all possible. Again, it is suggested that it is plain that the need to deal with family law cases in the context of a global pandemic using a platform that allows all parties in a given case to participate in a remote hearing qualifies as an urgent operational need in this context.

7.2.3 Finally, and within this context, it is important also to note that at present the court system is operating in exceptional circumstances. Within this context, the situation set out above is plainly required to keep the family justice system operating and to ensure access to justice and the maintenance of the rule of law. This forms the justification of the ‘smörgåsbord’ approach. However, ~~when this crisis passes there will need to be a~~ the process of rationalisation with respect to the technology by which remote hearings are conducted will be one that is continuing. A considerable amount of work and investment has been undertaken by HMCTS to develop solutions to enable remote hearings to be undertaken. Within this context, in due course, and post COVID-19, any remote hearings that continue to take place will move to being facilitated primarily through the communication platform invested in by the MOJ / HMCTS as part of the reform programme (with the alternative methodologies currently in use meaning that the system has available to it multiple redundancies as a contingency).

Court Reform: Fully Video Hearings

7.2.4 Prior to the COVID-19 emergency, the Reform Programme had already been planning to introduce new video conferencing software to the courts and tribunals that reduced then eliminated the need to rely on the older, unreliable hardware and which contains software features which are particular to court and tribunal hearings, as opposed to video conference meetings. This new video conference software has been subject to small scale testing in the civil and family jurisdictions and a process evaluation is being completed with respect to this system by the London School of Economics (<https://www.gov.uk/government/news/video-hearings-tested-in-domestic-abuse-cases>). Additional testing and evaluation with respect to this system had previously been undertaken in the tax tribunal (<https://www.gov.uk/government/news/results-of-fully-video-hearings-pilot-published>). With the outbreak of COVID-19, work is being accelerated with a view to ensuring that this platform has the functionality and resilience to enable it to be brought into much wider use. Further information will

follow as regards when the family courts can expect to be able to make greater use of this bespoke video hearings solution where appropriate.

MOJ/HMCTS Cloud Video Platform (CVP/Kinly Cloud)

~~7.3 The Court Reform Programme had already planned to introduce new video conferencing software to the courts that reduced then eliminated the need to rely on the older, unreliable hardware. Part of that programme is the 'Cloud Video Platform (CVP). The 'Cloud Video Platform' (CVP) contract is a MOJ-wide contract with a video conferencing provider (Kinly) which provides the courts, prisons, and MOJ with a large number of 'virtual meeting rooms'. Using the 'CVP rooms' allocated to HMCTS gives HMCTS and the judiciary a secure digital network and the ability to manage and conduct cases digitally with other trial and hearing participants. It can be accessed from any video and audio capable computer, laptop, phone and tablet that has an internet connection. The cost of using the system is borne by HMCTS and is free to the users. However, it does require an internet connection to work, so if using a portable device, litigants might have to use their mobile data allowance. It will allow remote hearings to be accessed without the need for video link hardware and will likely fit well with the current need urgently to ramp up the number of remote hearings. At present, information from Rosie Rand suggests that CVP will be available in days rather than weeks. An important point is that insofar as CVP remains configurable at this point, a number of lessons are already being learnt in respect of the challenges examined above that could usefully be incorporated into CVP if they have not been already. In particular, the availability of multiple channels to enable simultaneous interpretation.~~

7.3.1 There remain a number of issues in respect of CVP that require to be resolved before it can constitute a replacement platform for remote hearings conducted from outside a court building. The key issue is the current absence of a dedicated recording facility built into the platform (CVP being considered for use in the courtroom alongside the standard digital recording equipment available in each such courtroom). At present, hearings taking place through CVP outside a courtroom must be recorded by remotely accessing a BT MeetMe line via an HMCTS mobile telephone. This is unlikely to be possible for the majority of judges conducting hearings from home. Further, as noted above, discussions continue with HMCTS regarding the provision of a facility to allow the effective participation of interpreters.

7.3.2 It is recognised that judges, lawyers and litigants have had a huge amount of change to deal with since the Prime Minister's statement on 16 March 2020. Within this context, the move towards greater use of CVP will be a gradual one with no sudden shift to exclusive use of that platform. Further, alongside the allocation of virtual CVP courtrooms will be the provision of regional training sessions for judges and court staff, supplemented by daily national awareness sessions and the issuing of staff guidance (see below). Support for judges and court staff will be provided by local Digital Support Officers (DSOs).

7.3.3 Every circuit has now been allocated an initial supply of CVP courtrooms. More CVP rooms will be allocated when demand arises. The following are the key features of CVP:

- (a) The court is assigned a virtual CVP courtroom which the judge can configure and from which the court can send meeting invitations via email. Parties will receive a joining invitation that makes clear the invitation is to a CVP court hearing.
- (b) CVP is a browser based application (compatible with Google Chrome, Mozilla Firefox, Opera, Microsoft Internet Explorer, Microsoft Edge and Apple Safari although note that only Google Chrome and Mozilla Firefox allow multi-media file sharing, the other platforms being limited to PDF file sharing). Lawyers and litigants have the option of

joining the hearing via (a) their web browser, (b) telephone (audio only), (c) Skype for Business or (d) another video meeting room.

- (c) Where the court is using CVP and the CVP courtroom is accessed using BT MeetMe there is provision to use BT MeetMe to record the CVP hearing (which *may* also enable the hearing to be recorded where CVP is not being accessed from a courtroom setting if remotely access to a BT MeetMe line via an HMCTS mobile telephone is possible).
- (d) Both the judge and those attending the hearing can be assigned access PINS. The hearing can be 'locked' to all others once the judge and those attending have arrived. The judge can mute all participants or individual participants.
- (e) The judge can promote participants to host the session and leave the session, facilitating discussion between the parties in the absence of the judge.
- (f) CVP allows screen sharing and PDF file sharing.

7.3.4 As noted, with respect to training the judiciary and court staff on the use of CVP, there will be the provision of regional training sessions for judges and court staff, supplemented by daily national awareness sessions and the issuing of staff guidance. The Operational Transformation Team will hold three training sessions per day for three weeks commencing 20 April 2020. Those daily training and awareness sessions will be provided remotely.

Judicial Telephony

7.4 It is important to highlight that there is already a facility on the ordinary judicial telephones in a judge's chambers that enables the judge to dial out and connect up to four people to the call. Judges have had some success, in addition, of achieving recordings on the court recording equipment of hearings conducted in this way. This option is obviously subject to a court remaining open and to the judge being able to access the court safely. However, this facility allows the judge to (a) dial the first person in the normal way and wait until they answer (b) press the right arrow key then press down to highlight 'start conference' Press 'OK' (c) dial the new participant they wish to add in conference (d) press the right arrow key, use the down arrow key to highlight the 'Conference' option and 'OK' to confirm and thereafter to conduct the hearing one up four participants have been added.

Telephone Conferencing / BT MeetMe

7.5 BT Telephone Conferencing and BT MeetMe is available at one thousand and twenty two court and tribunal locations nationally. In addition, there are three other approved telecommunications providers, namely Legal Connect, Kidatu and Arkadin. The following contacts are for the other preferred tele-conferencing provides: LegalConnect 0800 953 0405; Email: support@legalconnect.co.uk, Kidatu 0800 279 4595; Email: info@kidatu.co.uk, Arkadin 0800 279 5596; Email: legalevents@arkadin.co.uk. In its HMCTS guidance for civil work, HMCTS excludes telephone hearings where all parties are represented but this seems unrealistic in the context of the current crisis. There has been no suggestion to date that a telephone conference involving only litigants in person is impermissible. Under telephone conference accounts the court will arrange the call and dial out to all parties on the numbers provided and then the judge will conduct the hearing.

7.5.1 There is a facility to record. HMCTS pay the costs of the call and the telecommunications provider will send the court an audio file via email of the hearing and it is stored on the court system in much the same way as in court recordings. Transcripts are available in same way as they are for normal court hearings in that they are sent to the panel of contracted transcribers with the fee being the

same. A request for a transcript of a telephone hearing should be made to the court where the hearing has taken place. Form EX107 (tape transcription request) must be used in all instances. Please see EX107 Info for more information which provides help on completing the EX107 and a full list of court approved transcription companies and prices. The cost of transcripts remain the same whether they are recorded in the standard fashion or as part of a telephone hearing.

7.5.2 There is anecdotal evidence of difficulties with BT connections. If a court or court user wishes to make a complaint about the service provider or their conduct, they must in the first instance contact the relevant court manager and raise this complaint with them in accordance with the procedure set out in the Complaints Leaflet EX343. Work is being done to establish the precise extent of the telephone conferencing resource within the court system. Telephone conferencing is the service that should be used where telephone hearings are chosen as the appropriate methodology for a remote hearing. Requests for additional BT MeetMe accounts have been made, to enable one account per court room for every site. Local site DSOs will start to see these requests being fulfilled. The Digital Support Officers (DSOs) can all access these accounts on their work iPhones, so even DSOs who are self-isolating (and not unwell) should be able to provide support from home. Sites that do not have a BT MeetMe account should email DSOenquiries@justice.gov.uk.

Skype for Business

7.6 Skype for Business is a communication platform developed by Microsoft as part of the Microsoft Office suite. It is designed for use with the on-premises Skype for Business Server software, and the software is offered as part of Office 365 on judicial laptops. Where a participant does not have Office 365 account, Skype will work via a browser (the main issue in this context is the parties internal security settings preventing them clicking on links in emails which cause a browser to open; this can be addressed by cutting and pasting the link into a browser manually). Whilst the judicial laptops were previously configured to prevent connections external to ejudiciary.net and justice.gov.uk email addresses, that restriction on external calls have now been removed. **Further, HMCTS have now made Skype for Business interoperable with ordinary Skype. It is now possible to have both programmes on the judicial computer.** The basic version of Skype for Business is a free app and is compatible with the paid for version used by the Court. The platform allows document sharing during a remote hearing. The platform allows the hearing to be recorded and once recording is completed it can be placed in a common cloud storage place such as OneDrive, Dropbox or iCloud. As set out above, this platform has been used successfully in the past week for hearings up to and including a multiday, multiparty final hearing with lay and expert evidence. Experience suggests that the most efficacious way to use the platform is for the lead legal representative to set up the Skype meeting and invite the judge into the meeting. For multiday hearings it is useful to keep the 'meeting' set up in Outlook 365 open for the duration so that parties can use the same link to join each day. Additional documents can be circulated by email as it is possible to keep Outlook open and running. Counsel have reported also that 'gowns can be tugged' and 'notes' can be passed virtually by using mobile phone texting during the course of the hearing.

7.7 Problems have been identified with using Skype for Business that will require further consideration. First, in September 2017, Microsoft announced the phasing out Skype for Business in favour of the cloud based Microsoft Teams. In these circumstances, support for Skype for Business Online will end in July 2021, although the Skype for Business Server will receive extended support until October 2025. There has also been some concern about the sustainability of recording the hearing, with one incident of a recording becoming corrupted after 30 mins. Hence the suggestion of Mostyn J, as a safety measure, that recordings are restarted ("the tape is changed" in old money) every 30

minutes. However, recording on DOM1 laptops should last for an hour without the need to stop (HMCTS are in discussions to see if this can be extended) and on open build devices the Skype recording limit is 24 hours. Skype for Business also lacks a side meeting or breakout function, which is useful during the course of a remote hearing.

7.7.1 The FLBA has expressed concerns regarding the inability of barristers to activate Skype for Business using their work email addresses if their chambers does not have a group subscription. This appears to be unfounded as anyone can join a Skype for Business meeting as a guest provided that he or she is provided with the meeting URL. Some judges have expressed a concern that if the meeting is organised by the Judge then the judge's email address is displayed. This is another reason why it may be better in each case for the meeting to be organised by one of the lawyers where at least one party is represented, **although HMCTS have now established a workaround to deal with this problem**. There is also a difficulty in getting DOM1 machines to interface with the judicial laptops via Skype for Business. This latter issue is being investigated by the Judicial Office. Where there are issues either with microphones or speakers, these can often be solved by ensuring that Skype is using the right speakers and microphone on the user's computer. This can be established by entering settings via the small 'cog' symbol at the top right of the screen. This allows access to the audio settings. Connection problems can be resolved by clicking on the "Trouble joining? – try Skype Web App" which takes the user through steps which seek to address connection problems.

Microsoft Teams

7.8 Microsoft Teams is what is known as "a unified communication and collaboration platform". It provides a facility for video meetings and file storage and, as with Skype for Business, integrates with Microsoft Office 365. It also features extensions that can integrate with non-Microsoft products. Microsoft Teams is built into the judicial laptops. Its video conferencing facility seems to have added value compared to that offered by Skype For Business. There has been little, if any attempt to use Microsoft Teams in the past week as a means of conducting a remote hearing. It is likely that the Bar will again have a concerns as to the extent to which it is possible to activate Microsoft Teams using their work email addresses if their chambers does not have a group subscription.

7.8.1 Lucy Reed and HHJ Martin Dancey have now undertaken some testing of Microsoft Teams as an option for remote hearings in an endeavour to work out what is and what is not possible from a DOM1 judicial laptop. I am very grateful to them for sending me the results, which I replicate as follows.

7.8.2 A connection was possible on Microsoft Teams between respective eJudiciary accounts. As DOM1 won't let judges download software using the Microsoft teams app is not an option. However, working step by step it is possible for a judge to log into the web based Microsoft Teams using their eJudiciary credentials via the Firefox browser from a DOM1 machine. From within the web browser it was further possible for the judge on a DOM1 machine to navigate to the 'Calendar' feature and set up a new meeting and invite users not in the judicial address book. With respect to recording, whilst an incoming invitation in Microsoft Teams sent by a lawyer setting up a remote hearing can be accepted by a judge using a Dom1 machine, where the lawyer sets up the meeting and invites the judge the lawyer is able to record the meeting but the judge is not. However, when the judge invites external participants the judge is the participant who has control of the recording with the lawyer having no option to record. In the circumstances, it would appear to have been established that, if the court or an individual judge wishes to do so, they can set up a hearing using Microsoft Teams, ensure the hearing is recorded and retain control of the recording. To do so they the judge (or court staff) will need the correct email addresses to send the invitation. In the circumstances, whilst Microsoft Teams lacks certain features, for example it does not have the separate 'meeting rooms'

that Zoom does, it is workable for use by all judges with both open build and DOM1 machines. Links to between eight to ten people have been achieved.

Zoom

7.9 Zoom is a platform that allows users to host a video conference with meetings of up to one thousand participants, with the host controlling secure access. It allows for the sharing of documents. It is considered by some to provide the highest quality video and sound of the platforms available. Break-out rooms as part of the meeting are possible, away from the main hearing. Accordingly, advocates' discussions in the absence of the judge can be held under the umbrella of the same meeting with specific participants. Advocates can 'leave' the hearing room, take instructions in the 'meeting room' and then re-join the hearing. Zoom is a cross-platform software which works across both Windows PCs and Apple Mac products. Online tutorials are available at https://support.zoom.us/hc/en-us/articles/206618765-Zoom-Video-Tutorials?_ga=2.60121641.546688394.1585071332-1582296056.1584693973.

7.10 The cheapest version of Zoom that allows up to 100 participants per video conference is £11.99 per month if paid for monthly and the equivalent of £9.99 a month if paid as an annual fee. The free version, the 'Basic' version limits the duration of any video conference established by the basic licence holder to 40 minutes, so is not suitable for most video court hearings. However, any invitee to a video conference organised on Zoom does not need to pay any fee. This means that were the judge to be invited by one of the parties (the judge having installed on the computer the Zoom software) there would be no cost to the MoJ as in such circumstances it would not be necessary to issue additional licences for the judiciary. The host will send the judge an invitation which includes a URL which the judge clicks on to join the hearing. Lawyers are anxious as to whether they are authorised to run hearings where they are invited by the court, or required for technical reasons to set up the link and how they should handle the resulting recordings (see now however, **Appendix 1**). These anxieties appear to be unfounded.

7.10.1 Some chambers, particularly those dealing with so called 'big money' financial remedy cases have offered to make available a 'clean' iPad loaded with Zoom for use by the court. However, this runs the risk of becoming a route of transmission for the virus. ~~Once again, there remain issues with the installation of this platform on DOM1 machines. Zoom says that: "The Zoom web client allows joining a Zoom meeting without downloading any plugins or software. However, the web client has limited features and functions best on Google Chrome." Unfortunately, DOM1 machines are not loaded with Chrome. They have Edge and Firefox but an experiment by Mostyn J and HHJ O'Dwyer using both browsers was unsuccessful. Judges with DOM1 machines will likely have to use Skype for Business until Chrome is made available. Both Judd J and Francis J held successful hearings using Zoom on 24 March 2020. Judges using DOM-1 computers can access a Zoom hearing set up by one of the parties via Skype for Business where the party hosting the Zoom hearing has configured Zoom to enable access via Skype for Business. The instructions for the setting this configuration, and for joining an appropriately configured Zoom meeting via Skype for Business are set out at <https://support.zoom.us/hc/en-us/articles/208219346-Skype-for-Business-Lync-Integration>. Once again it should be noted that updated guidance to the judiciary issued on 3 April 2020 requires judges to encourage the use of Skype for Business or CVP if at all possible (see paragraph 7.2.1).~~

Lifesize

7.11 Lifesize is a communications platform that allows high definition videoconferencing and a cloud-based video collaboration. It is understood to be secure and can be set to record proceedings. It is in

use by a number of sets of barristers' chambers. As with Zoom, if a judge is invited to participate in a 'Lifesize' meeting there is no charge to the MOJ. It is understood that there have been issues with connecting chambers' Lifesize systems to the video link systems used in the RCJ.

FaceTime

7.12 FaceTime is built into all Apple products and is available on supported iOS mobile devices and Macintosh computers that run Mac OS X 10.6.6 and later. However, it is limited to Apple products and thus not universally available to the wider judiciary or to all members of the legal profession.

8. CONCLUSIONS – REFINING THE 'SMORGASBOARD'

8.1 The reality is that for foreseeable future remote hearings will become the norm and they must become the norm immediately. Within this context, and having regard to the matters covered in this paper, whilst through an urgent Protocol it is possible to stipulate now and nationally the *procedure* for remote hearings (see **Appendix 1**), it **has** simply not **been** possible pending the arrival of the MOJ/HMCTS Cloud Video Platform, **and subsequent bespoke solution** to reach common agreement as to the single communications platform that should be used in all cases. Further, even after the introduction of the CVP **and subsequent bespoke solution**, the need for a high number of remote hearings will **continue to** be so pressing that the multiple redundancies provided by maintaining multiple 'off the shelf' options through which to conduct remote hearings will be so valuable as to require maintaining for the duration of the COVID-19 pandemic.

8.2 In the circumstances, pending the arrival of CVP, **it has been important that** judges, lawyers and litigants should be able to choose from a suite or 'Smörgåsbord' of platforms (most likely BT MeetMe, Skype for Business, Zoom, Microsoft Teams or Lifesize) depending on the circumstances of the court, the parties and of the particular case. **However, as made clear above, the revised guidance to the judiciary means that , if parties ask to use other applications, they can now expect judges to encourage the use of Skype for Business or CVP if at all possible. Within this context, increasing numbers of CVP courtroom will be made available to facilitate remote hearings using that platform. Again subject to the requirements of the revised guidance requiring the judiciary to encourage the use of Skype for Business and CVP,** subsequent to the arrival of CVP, judges, lawyers and litigants should continue to be able to choose from the 'Smörgåsbord' of platforms as a contingency and a means of maintaining multiple failsafe redundancies in what will be a vital public service.

8.2.1 Within this context, the Remote Family Court **is remains** best realised at the current time as a collection of platforms being used to achieve the single aim of safe access to justice and the maintenance of the rule of law **but with an increasing emphasis moving forward on CVP as that platform is gradually made available, with training, across the jurisdiction, subject to the resolution of the issues identified above.** Flexibility, the use of local resources and expertise and not getting hung up on a single option **will, however, continue to** be the key operational principles. **Once again, it must be remembered that the decision whether to proceed with a remote hearing or to adjourn remains at all times in the discretion of the allocated judge.**

8.3 A number of extremely pressing problems remain that will need continued attention and monitoring if the Remote Access Family Court is to be able to replicate most types of hearing that are currently undertaken live. In particular, and by no means exhaustively:

- (a) In so far as there remains any doubt about the power of a judge to hold a remote hearing from home or other non-court location this should be resolved and, if necessary directions given by

the Lord Chancellor after consulting the Lord Chief Justice, pursuant to s 71(2) of the Senior Courts Act and s31B(4) of the Matrimonial and Family Proceedings Act 1984.

- (b) .../
- (c) There is an urgent need to consider whether, and if so how, court staff are going to be able to support judges undertaking remote hearings if staff are not able to access court buildings.
- (d) There is a critical need to confirm which of the 'off the shelf' platforms can be accessed by the judiciary on DOM1 machines and to provide the correct facilitating software (including Chrome) and advice to those judges with DOM1 machines accordingly.
- (e) There will be a need to monitor the use of remote hearings to ensure that they are not being disrupted by insufficient bandwidth in circumstances where, as a minimum, the recommended bandwidth for video hearings is 1.5 MBPS in both directions.
- (f) .../
- (g) .../
- (h) There is an urgent need for the MoJ to authorise the installation on all open build laptops of PDF Exchange Editor and, in the current emergency circumstances, to do so without the constraints of an extended period of testing and approval. Equally, there is an urgent need to streamline for DOM1 users the acquisition process for Adobe Acrobat Standard on DOM1 machines.
- (i) As pointed out by the ALC, urgent consideration needs to be given within the context of the current social distancing guidance as to how parties located at home can join remote hearings (including how children who are also present at home are to be insulated from the remote hearing), how parties with literacy problems can be assisted to deal remotely with documents and how solicitors are to be provided with time to take instructions from clients prior to and during remote hearings.
- (j) As also highlighted by the ALC, urgent consideration needs to be given to how capacity is to be assessed remotely in respect of adult parties and children and how children with party status are to be facilitated to participate, with appropriate privacy, in remote hearings.
- (k) Urgent consideration needs to be given to the manner in which the recordings of remote hearings are to be downloaded to, and stored in a central location and how a record is to be kept of such recordings to allow future access.
- (l) Urgent clarification is required on how best, when using a remote platform, to establish, if possible, a discrete channel between party and interpreter and/or intermediary during the hearing.
- (m) Careful thought needs to be given to how the press are going to continue to be able to observe proceedings pursuant to the rules. In particular, there is a need to consider how cases are going to be listed in the Family Court so as to ensure the press are aware of the existence of a remote hearing and how to request access to the same.
- (n) Further thought needs to be given to the particular difficulties faced by litigants in person with respect to remote hearings, which problems have not yet been, and may not yet be capable of being fully articulated.

- (o) .../
- (p) Urgent consideration is needed of how the new default position of remote hearings during the currency of the COVID-19 pandemic is to be communicated to the public at large.
- (q) There is an urgent need to address ... how the Family Panel Magistrates can be facilitated to carry out effectively remote hearings. The question of whether the use of personal equipment should be permitted in the particular circumstances of the fee paid judiciary requires resolution.

8.4 Whilst there is no time to delay issuing the Protocol at **Appendix 1** whilst these problems are solved, it will be apparent that there remain very substantial problems to solve. Within this context, **the Video Hearings Judicial Working Group is meeting regularly and co-ordinating and monitoring the development of the resources being used to operate** ~~consideration will need to be given to establishing a body which will continue to work to solve these problems and which will then monitor the operation of the remote access Family Court, with a view to making changes and additions where necessary.~~ Further versions of this paper will be issued over the coming days as each of the problems set out above is resolved.

8.5 Finally, whilst the types of hearing dealt with, and the methodologies used to hold those hearings will be continue to be determined on case by case basis **subject to the principles set out above**, it is important that judges, lawyers, litigants and court staff are able to orientate themselves in the new reality by means of a consistent *procedural* approach. In this context, set out below at **Appendix 1** is a procedural protocol. It is modelled, to a certain extent, on the Civil Protocol published by the Master of the Rolls. Further, where some live hearings remain contemplated, there is a need for a comprehensive protocol to ensure that such hearings are safe. A Protocol appears at **Appendix 2**.

8.6 Overall, it is important to note the following three principles set out in the President's email of 24 March 2020 at 1016hrs:

- In terms of remote working, different Family Courts will be at different stages of modernisation and will be able, or less than able, to move to remote working;
- One size, in terms of remote working, will not fit all.
- You will need to develop your own way forward, supported by the guidance that has been issued. What is best for Court A may not be best for Court Z.

Further, it is not realistic to expect this all to happen everywhere straight away. As Nageena Khaliq QC and Sophia Roper have said in their recent blog on Mostyn J's remotely conducted COP case (<http://ukmedicaldecisionlawblog.co.uk/rss-feed/115-skype-in-the-court-of-protection-the-courts-in-the-time-of-coronavirus>) "We will all learn as we go along. A degree of tolerance will be necessary."

MacDonald J

16 April 2020

Appendix 1

Protocol For Remote Hearings in the Family Court and Family Division of the High Court

23 March 2020

INTRODUCTION

1. The COVID-19 pandemic necessitates that, for the time being, 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 communications platform.
2. This Protocol sets out the process for arranging, preparing for and holding a remote hearing. It applies to all types of proceedings to which the Family Procedure Rules (FPR) applies and applies to all types of hearing in the Family Court and in the Family Division of the High Court. Hearings conducted in accordance with this Protocol should be treated for all other purposes as hearings in accordance with the FPR. Any reference in this Protocol to a judge is to be taken as including any judge of the Family Court.
3. The Protocol applies both to a remote hearing conducted by the judge from a courtroom and to a remote hearing conducted by a judge from any other place in the jurisdiction of England and Wales.
4. This Protocol should be applied flexibly. In particular, it should be remembered that whilst the default position is that all hearings in the Family Court should be undertaken remotely, where the requirements of fairness and justice necessitate a court-based hearing, and it is safe to conduct one, then a court-based hearing should take place with appropriate safeguards against infection in accordance with current Government guidance. In these circumstances, regard should also be had to the *Protocol for Conducting Safe Court Based Family Hearings during the COVID-19 Pandemic*.
5. Equally, given the nature and risk presented by the COVID-19 outbreak, it must also be appreciated that there may be some cases that will need to be adjourned for longer periods of time because a remote hearing is not possible because the nature of the case and/or the length of the hearing and/or the number of parties, representatives and/or witnesses make it undesirable to go ahead with a hearing in court at the current time, having regard to the current Government guidelines regarding social distancing as a means of attempting to delay the spread of the disease.
6. Whether, and the precise method by which a hearing is conducted remotely is *always* in the discretion of the judge in the individual case, operating in accordance with the applicable law, Rules and Practice Directions. Nothing in the Protocol should be taken as derogating from the duty of the judge to decide the issues in the case judicially and in accordance with normal principles.

REMOTE HEARINGS GENERALLY

Need for Focus on Timely Preparation

7. Holding a hearing remotely makes it even more essential that proper preparation and planning happens in good time for the hearing. During the currency of the current public health emergency, it will be incumbent on all parties to proceedings to be even more proactive and co-operative with respect to preparation for forthcoming hearings.

8. Consideration of whether a remote hearing or a series of remote hearings is appropriate for a remote hearing should begin early. Further, and in particular:

- (a) Having regard to Paragraph 12 of the President's Guidance entitled COVID 19: National Guidance for the Family Court issued on 19 March 2020, parties must redouble their focus on identifying the issues that require to be dealt with at the hearing and their efforts to agree and narrow the issues whenever possible and must identify clearly for the judge in advance of the hearing those issues that remain to be determined.
- (b) Within this context, there is a need for a renewed focus on ensuring that, when directed, advocates' meetings are effective and, in particular are always attended by the advocate who will be conducting the remote hearing.
- (c) Instructions should be taken from clients at soon as practicable to enable proper preparation and always *prior* to any advocates meeting. If necessary, solicitors and advocates should stress to clients the difficult circumstances in which the courts are at present operating and the need to co-operate with timely instructions. Save where a client has *no* means of remote communication, not being able to meet clients face to face with clients is not an excuse for failing to take full or any instructions for hearings.
- (d) Evidence and other documents *must* be filed and served in accordance with the relevant case management order or Practice Direction.

9. The listing office, clerks and judges will consider as far ahead as possible how future hearings should best be undertaken. The listing office will also seek to ensure that the judge(s) and the parties are informed, with as much notice as possible, of the identity of the judge(s) hearing the case.

Types of Remote Hearing

10. There is no intention to prescribe which types of hearing will be suitable for being dealt with remotely. This will depend on the circumstances of the particular case and will be a matter for the judge having heard representations from the parties.

11. It is anticipated that all case management hearings will be capable of being dealt with remotely, as well as longer hearings limited to the determination of points of law and longer hearings that do not involve witness evidence, for example final hearings in summary proceedings under the Child Abduction and Custody Act 1985. However, experience suggests that contested multi-day final hearings involving both lay and expert evidence may well, depending on the circumstances of the case, be capable of being dealt with by way of a remote hearing. Committal proceedings (including Judgment Summonses) will always need to be heard physically in court.

Method of Remote Hearing

12. Likewise, there is no intention to prescribe the method by which a remote hearing is to be conducted or the communication platform to be used. There is an extensive 'suite' of communication platforms available by which to facilitate a remote hearing (including, non-exhaustively, a standard telephone conference call, BT MeetMe, Skype for Business, Zoom, Microsoft Teams and Lifesize). In addition, court itself will likely add remote hearing technology to its own services in due course as part of the reform programme. **However, if parties request to use other applications, the judge is required to encourage the use of Skype for Business or CVP if at all possible.**

13. Within this context, the cardinal rule is that at the outset of proceedings the court and the parties *must* consider and settle on the identity of the communication platform that is to be used in that particular case.

14. The minimum recommended bandwidth for a successful remote video hearing is 1.5 MBPS in both directions.

PRELIMINARY ARRANGEMENTS

15. Notwithstanding the default position, the court's permission is still required for all or any part of the proceedings to be dealt with by way of remote hearing.

16. Where the court, of its own motion or by acceding to an application by one or more of the parties, considers that all or any part of the proceedings should be dealt with by way one or more remote hearings, it is vital that there a *preliminary* hearing is held in order to consider and settle on the identity of the communication platform to be used and resolve the directions required in consequence thereof, including the identity of the lead party. It may be necessary for this initial hearing to take place by way of a telephone conference pending resolution of which electronic communications platform is to be used.

17. Where one or more of the parties is represented, responsibility for making the arrangements for the remote hearing(s) in the case will fall on either the applicant or the first represented party. If no party is legally represented, the court office will contact the parties to explain that the hearing will be held remotely and will send them instructions on how this is to be achieved.

18. Where one party is unable to attend a remote hearing by way of an electronic communication platform (for example, where they do not have access to the relevant technology or have a very poor Internet connection) but can attend by telephone, the remote hearing will be held by telephone conference call, to be arranged by the applicant (or first represented party) or by the court where no party is represented.

PREPARATIONS FOR THE REMOTE HEARING

Role of Lead Party

19. The identified lead party must liaise with the court in advance of the remote hearing to deal with any technical issues. The lead party must provide to all of the other parties the details required to attend the remote hearing as soon as they are available and in any event not later than 24 hours before the hearing is scheduled to begin. In many cases, it may be necessary for the lead party to set up the remote hearing with a view to inviting the judge to join that hearing rather than the court undertaking that task. Where the court directs that one of the parties hosts the hearing, whether for technical reasons or otherwise, that party shall be treated as being authorised to, and entitled to host the relevant hearing.

Electronic Bundles

20. The parties must agree, and the lead party must prepare and send to the court an electronic bundle of documents (and if appropriate an agreed electronic bundle of authorities) for each remote hearing complying with paragraph 18 of the President's Guidance entitled *COVID 19: National Guidance for the Family Court*. The electronic bundle must be prepared with care by somebody with adequate knowledge of the case and the following requirements must be followed:

- (a) PDF format is to be used;

- (b) All documents are to be contained, if possible, within one single PDF file;
- (c) The PDF file must be searchable;
- (d) Pagination must be computer generated within the PDF, not hand-written:
 - (i) Original pagination must be by section and page number i.e. A1, A2, A3.... B1, B2, B3 etc;
 - (ii) Insertions, after compilation of the original bundles, should be using 'legal' numbering (e.g. B13.1, B13.2, B 13.3 to be inserted between B13 and B14);
- (e) Each section of the bundle, and each individual document referenced in the index, should be separately bookmarked;
- (f) Electronic bundles should contain only documents and authorities that are essential to the remote hearing.

21. The electronic bundle must be filed with the court on CE-file (if available) or sent to the court via a cloud-based link (e.g. ShareFile, iCloud, OneDrive, Dropbox or Google Drive) rather than in a series of emails. Delivery by USB stick should be avoided due to the risk of creating a pathway of infection and to protect the integrity of the court IT systems. The electronic bundle should be provided to all other representatives and parties within the timescales provided by the relevant Practice Direction.

22. Nothing in this Protocol limits the parties from agreeing, with the consent of the court, to use an e-bundle service from a commercial provider.

Listing

23. Rather than all cases being listed to commence at 10.30am, where there is more than one remote hearing in the court list, the court will be required to list hearings at a specified time and there will be little or no option to extend the time estimate for the hearing once it has commenced. This means that time estimates provided to the court are critical and must be met. Advocates and parties must be ready to commence the remote hearing at the listed time.

Arrangements for Witnesses

24. Where the remote hearing will involve oral witness evidence, consideration must be given in advance to the documents to which the witness is likely to be referred. The parties should endeavour to agree the list of such documents. It will usually be most convenient for an electronic bundle of the copy documents to be prepared in advance, which the lead party should send to the witness. This means that a person seeking to cross-examine the witness must know in advance what documents will need to be shown to the witness during cross-examination.

25. When administering the oath or taking the affirmation, the court is likely to find it most convenient to ask the witness to repeat the oath at the prompting of the judge. By reason of the risk of creating a pathway of the transmission of infection, there is no expectation that the witness should touch the relevant Holy Book.

Interpreters and Intermediaries

26. Where the case is one that involves the use of an interpreter and / or an intermediary, early and careful consideration will need to be given as to how best to facilitate this involvement in the context of a remote hearing. In doing so, it will be vital that this is done in close consultation with the relevant

interpreter and/or intermediary. FPR Part 3A governing vulnerable adults will continue to apply to remote hearings.

Arrangements for Recording

27. Responsibility for recording the hearing will fall on the party or court that has organised the remote hearing. At the conclusion of the hearing (or at such points during the hearing as is necessary) the recording of the hearing will be uploaded to cloud based storage provision and the judge will settle arrangements for how the recording files are to be transmitted and stored centrally by the court.

Security of Hearings

28. Section 53 of the Coronavirus Act 2020 provides for temporary modifications of s 85 of the Courts Act 2003 which make it an offence to record a broadcast from the court that has been directed for the purpose of enabling members of the public to see and hear the proceedings and make it an offence in any event to record or transmit material from participation through a live link on penalty of a fine at Level 3 on the Standard Scale. Those provisions apply to the Family Court and the Family Division of the High Court. The recording by a party or other person of a remote hearing without the permission of the court is strictly forbidden.

Transparency

29. FPR r 27.11(2)(f) provides that duly accredited representatives of news gathering and reporting organisations may attend a private hearing in the Family Court. Whilst FPR 27.11(3) permits the press to be excluded if justice would be impeded or prejudiced, including where the remote hearing could not, practically, take place if this step were not taken, it remains highly desirable that the operation of the Family Courts is as transparent as possible in the circumstances. Within this context, the court and the parties must give consideration to how press access to the remote hearing is to be achieved. The court must indicate on the cause list that the hearing is a remote hearing and, if possible, the particular methodology that is being used.

THE REMOTE HEARING

30. All parties must ensure that they are ready to linked in promptly at the listed time. It is inevitable, particularly in the early stages of remote hearings, that there will be technical issues. Parties must be sympathetic and flexible regarding any technical difficulties that may be experienced by another party to proceedings. Professional decorum should be maintained at all times and in particular:

- (a) Advocates should dress as if they were attending court but advocates are not required to robe for any remote hearings.
- (b) Participants should ensure that the background visible on the screen is appropriate for a court hearing and that they are adequately lit in order to allow their face to be seen.
- (c) Participants must ensure that they will not be interrupted or distracted during the course of the hearing.
- (d) Participants should not move away from the screen without permission of the judge during the course of a remote hearing.
- (e) The usual restrictions on eating and drinking in a Court room apply.

- (f) All reasonable steps must be taken to preserve the confidentiality of the proceedings. This will include ensuring that participants are indoors in a room with the door closed and alone, unless they are a party to the proceedings sitting with another party to the same proceedings.
- (g) The use of earphones is permitted and encouraged if their use will assist in preserving the confidentiality of proceedings.
- (h) The judiciary and other advocates should be addressed as if they were in a physical courtroom. It is not however, necessary to stand when the Judge joins the hearing or when addressing the Judge.

31. Anybody attending the remote hearing should ensure they have good connection/signal to avoid a breakdown in connection during hearing. As noted above, the minimum recommended bandwidth for a successful remote video hearing is 1.5 MBPS in both directions. With respect to the hearing itself:

- (a) All participants to the remote hearing should join the remote hearing prior to the Judge.
- (b) The Judge's camera and microphone should remain on at all times during the hearing.
- (c) Unless addressing the Judge, or otherwise requested to do so, all other participants should have their microphones muted at all times.
- (d) Unless directed otherwise, all participants should leave their cameras turned on at all times.
- (e) At the start of a hearing, the Court identify the name and number of the case and will remind all parties that they are in a court of law, that notwithstanding that the hearing is being conducted remotely this does not change the seriousness and importance of the hearing and that the parties should behave as they would be expected to when physically in a court of law.
- (f) The Court will identify all participants to the remote hearing and give any additional directions the Court wishes to make about the use of cameras and microphones, including the need to mute the microphone when not speaking.
- (g) The Court will give any necessary warnings including warnings to all parties regarding recording and confidentiality. The parties will be asked to turn on their microphones whilst warnings are given, and will be invited to confirm their understanding of the warnings given.
- (h) When a witness gives evidence the Court will warn the witness that they must be in a room on their own and that they must not be prompted by anyone when giving their evidence. When a witness is giving evidence, that witness must keep their camera and microphone on at all times.
- (i) Advocates may need to take instructions during the course of a hearing and time should be provided to do so.

32. Where a witness attends the remote hearing the witness will be sworn or affirmed by the judge prior to commencement of their evidence. The witness is to be alone, in a secure room with the doors closed. The witness is to ensure that there will be no interruptions or distractions for the duration of their appearance at the remote hearing. The witness should have recently re-read all affidavits or statements made by him or her in the proceedings and have a copy of those documents with them.

33. The clerk, court official or the judge(s) must complete the order that is made at the end of the remote hearing. The wording of the order should be discussed and agreed with the parties before the link is terminated.

Appendix 2

Protocol for Conducting Safe Live Court Based Family Hearings during the COVID-19 Pandemic

23 March 2020

INTRODUCTION

1. The default position set out in the President's guidance of 19 March 2020 entitled *COVID 19: National Guidance for the Family Court* that all hearings will be heard remotely does not preclude the possibility of 'live' hearings where this can be achieved safely. Within this context, paragraph 4 of that guidance provides that "where the requirements of fairness and justice require a court-based hearing, and it is safe to conduct one, then a court-based hearing should take place." The principles set out in the President's Guidance dated 19 March 2020 are now supplemented by those set out in his email of 24 March 2020 at 1016hrs, reflecting para 6 of the Lord Chief Justice's direction of 23 March 2020, namely that live court-based hearings should now be 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 involved attending court in a manner which meets the social distancing requirements.

2. Safe live hearings, if they can be achieved, can only be so by careful and diligent adherence to the Government guidance on measures to combat COVID-19 that are in force at the time of such hearings. That Government guidance advises on social distancing measures that must be taken to reduce social interaction between people in order to reduce the transmission of COVID-19. Within this context, the primary mediator of a safe live hearing is the Government guidance on the PHE website. Nothing in this Protocol alters that guidance and that guidance takes precedence at all times.

3. The steps outlined below, if followed, are designed to ensure that if a court user is unknowingly infectious, others in the room will continue to be able to comply with the Government guidance on social distancing.

LIVE HEARINGS GENERALLY

4. Once again, the default position is that all hearings should take remotely, subject to the need to hear committal proceedings (including Judgment Summonses) physically in court. Further, and in any event, it would be inappropriate for a live hearing to take place involving a person who is symptomatic or which involved any person who is subject to mandatory social distancing by reason of them being at increased risk of severe illness from COVID-19 according to the Government guidance. In particular:

- (a) Anyone aged 70 or older (regardless of medical conditions);
- (b) Anyone under 70 with an underlying health condition listed below (i.e. anyone instructed to get a flu jab as an adult each year on medical grounds):
- (c) Anyone with a chronic (long-term) respiratory diseases, such as asthma, chronic obstructive pulmonary disease (COPD), emphysema or bronchitis;
- (d) Anyone with chronic heart disease, such as heart failure;
- (e) Anyone with chronic kidney disease;

- (f) Anyone with chronic liver disease, such as hepatitis;
- (g) Anyone with chronic neurological conditions, such as Parkinson's disease, motor neurone disease, multiple sclerosis (MS), a learning disability or cerebral palsy;
- (h) Anyone with diabetes;
- (i) Anyone with problems with their spleen or who have had their spleen removed;
- (j) Anyone who has a weakened immune system as the result of conditions such as HIV and AIDS, or medicines such as steroid tablets or chemotherapy;
- (k) Anyone who is seriously overweight (with a body mass index (BMI) of 40 or above);
- (l) Anyone who is pregnant;
- (m) Those who have received an organ transplant and remain on ongoing immunosuppression medication;
- (n) Those with cancer who are undergoing active chemotherapy or radiotherapy;
- (o) Those with cancers of the blood or bone marrow such as leukaemia who are at any stage of treatment;
- (p) Those with severe chest conditions such as cystic fibrosis or severe asthma (requiring hospital admissions or courses of steroid tablets);
- (q) Those with severe diseases of body systems, such as severe kidney disease (dialysis).

LISTING A LIVE HEARING

5. Any live hearings from Monday, 23 March 2020 will need to be approved by the judge hearing the matter, if necessary in consultation with their leadership judge.

6. Where, exceptionally, more than one live hearing is held, the court should stagger listings to reduce the number of people waiting in the foyer and to allow for cleaning between hearings. Courtrooms on separate floors should be used for face-to-face hearings if possible, to reduce the number of people waiting in the same area in the foyer.

7. To reduce the length of any face-to-face hearing, where possible, submissions should be reduced to writing and the parties should expect to deal only with those issues that are not capable of prior agreement.

CONDUCT OF A LIVE HEARING

8. COVID-19 is mainly passed on by person-to-person spread between people who are in close contact with one another and by droplets produced when an infected person coughs or sneezes. It can also spread through contact with a surface or object that has the virus on it.

9. Where a live hearing is held, the court should ensure that the following measures are implemented:

- (a) Separation (2m) of people in queue to get into the court building.
- (b) Security screening at the entrance to the court should be staggered appropriately
Separation (2m) in the queue for security must be maintained. Security to wear gloves

and regularly to clean trays for visitor's belongings. Security will be instructed to ensure social distancing is observed whilst court attendees are queuing for security.

- (c) Separation (2m) between security guards and people coming into court.
- (d) Separation (2m) of at all times in the court building (including in the assembly areas and when filing to and from court). The court should stagger listings to reduce the number of people waiting in the foyer and to allow for cleaning between hearings. Courtrooms on separate floors should be used for face-to-face hearings if possible, to reduce the number of people waiting in the same area in the foyer.
- (e) A sufficient supply of hand wash and paper towels (or automatic hand dryers) must be supplied for all who will be in the building. This should allow for handwashing roughly every two hours by every person (obviously not at the same time). Judges should allow breaks for this to occur.
- (f) There must be no sharing of documents / iPads/ or any other items in the courtroom.
- (g) The layout of the courtroom must accord with the requirements of Paragraph 11 below.

10. At the outset of the hearing the judge should commence the hearing by reminding those present of the operational public health advice and emphasise its continued applicability in the courtroom.

11. During the hearing, the layout of the courtroom must be arranged so as to ensure that all present stay more than 2 metres from all others present. Counsel, solicitors and parties are to adhere to social distancing by sitting in appropriately distanced seats. A courtroom in which this is not possible should not be used for a live hearing. Where a court building has no courtrooms available that meet this requirement, that court should not be used for live hearings.

12. No party is to enter the court room before their matter is called.

13. Parties are to leave the court room immediately after their hearing has concluded, and then make their way promptly to the court exit.

CLEANING

14. Normal cleaning methods do kill the virus. Objects and surfaces that are touched regularly must be cleaned and disinfected frequently using standard cleaning products.

15. Additional cleaning of courtrooms that are used for face-to-face hearings will occur as often as practicable when the court is adjourned during the day.

16. Any live hearing will have a time estimate of no more than 1 hour. At the conclusion of that hearing, the courtroom will be closed and appropriate surface cleaning will take place before any further hearing is permitted to take place.

17. Where the judge lists a live hearing, the judge should ensure that the Court Manger contacts the cleaning contractor prior to the hearing to ensure that arrangements for cleaning in accordance with this Protocol are put in place.

18. Cleaning must take place in accordance with COVID-19: cleaning in non-healthcare settings (<https://www.gov.uk/government/publications/covid-19-decontamination-in-non-healthcare-settings/covid-19-decontamination-in-non-healthcare-settings>).

~~Appendix 3~~

Appendix 3 has now been removed as many more chambers and law firms have acquired the remote technology and continue to do so, rendering keeping this Appendix properly up to date an impossible task. Chambers and law firms can be contacted directly for more information.

Appendix 3



In the High Court of Justice

No: _____

Family Division /

The Family Court

IN THE MATTER OF _____

AND IN THE MATTER OF _____ CHILDREN

BEFORE _____ SITTING AT _____ ON _____.

UPON the Court determining that in the exceptional circumstances of the current national public health emergency this case is suitable for hearing remotely ('remote hearing') by means of [video link]/[Skype]/[telephone]/[other].

AND UPON the parties and the court having identified and settled on the following communications platform to be used to conduct remote hearings in this case _____.

BY ITS OWN MOTION / BY CONSENT

IT IS ORDERED THAT:

1. All hearings in this matter shall take place by way of remote hearing pursuant to FPR 2010 r 4.1(e) unless the court directs otherwise.
2. The parties and their representatives shall attend all hearings by way of [video link]/[Skype]/[telephone]/[other].
3. No unauthorised person may be present at this hearing. When asked, each legal representative must be able to confirm that no unauthorised person is in attendance or able to listen to the hearing.
4. This matter shall be listed for a remote hearing on _____ at _____ before _____ sitting at _____ with a time estimate of _____.
5. The parties shall arrange and attend remotely an Advocates Meeting no less than 48 hours before the hearing listed above.
6. The [applicant / respondent] shall be responsible for arranging with the Judge's clerk (via _____) the necessary facilities to conduct a remote hearing, allowing sufficient time for any necessary testing to take place. This will include provision to the court of the necessary contact details for the parties and their representatives where these are needed to facilitate the remote hearing.
7. The [applicant / respondent] must confirm the details of the arrangements for the hearing to the other parties by no later than 24 hours prior to the remote hearing taking place.

8. The applicant shall by 1600 hrs on the day before the hearing electronically file a PDF bundle prepared in accordance with the requirements of paragraph 20 of the Protocol For Remote Hearings in the Family Court and Family Division of the High Court, which e-bundle must include:

- (a) A case summary and chronology;
- (b) The parties positions statements;
- (c) The previous orders that are relevant to the remote hearing;
- (d) All essential documents that the court requires to determine the issues that fall for determination at the remote hearing;
- (e) A draft order;
- (f) Completed advocates' forms together with the single address that the signed and sealed forms are to be returned to for distribution to the advocates.

9. [Further Directions].../

Dated _____