COVID-19 AND THE FAMILY COURTS: KEY PRACTITIONER FINDINGS IN CHILDREN CASES

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Key words: family court; Covid-19; remote hearings; access to justice; public law; private law; children

Abstract

In March 2020, the UK government introduced stringent social distancing measures to reduce the spread of Covid-19. These measures have presented significant challenges for the family justice system. This article sets out the findings of interviews conducted with professionals in the North East of England who have represented or otherwise supported litigants in private and public children proceedings since social distancing measures were introduced. The findings reveal that whilst practitioners are broadly positive about their experiences of shorter non-contested hearings, they nonetheless have concerns about the effectiveness of remote/hybrid hearings in ensuring a fair and just process in lengthy and complex proceedings. In particular, the findings indicate that the move to remote hearings has exacerbated pre-existing barriers to justice for unrepresented and vulnerable litigants. The aims of this article are not to 'name and shame' any particular court; rather to highlight evidence of good practice in the North East of England and provide scope for improving practitioner and litigants' experiences within the current restrictions.

Introduction

The introduction of social distancing measures in March 2020 presented significant challenges for the operation of the family justice system, with the need to implement a remote court process in an extremely short timescale. In seeking to navigate the restrictions imposed by new government guidance, the family court promptly distinguished between three categories of work: 'work that must be done', 'work that will be done' and 'work that we will do our best to accommodate' (Courts and Tribunals Judiciary 2020a). Whilst applications for emergency protection, interim care orders and other urgent applications in children cases were prioritised, general administration to progress public and private children disputes fell within the latter two categories, leading to a significant decline in the number of cases being concluded. Prioritised

cases were transitioned to the new remote format and in the two-week period between 23 March and 6 April 2020, audio hearings across all courts and tribunals in England and Wales increased by over 500%, and video hearings by 340% (Nuffield Family Justice Observatory 2020a). At the time of writing HMCTS have confirmed that work should continue to be prioritised in line the President's guidance but indicated that the volume of work was 'slowly returning to pre Covid-19 levels' (HMCTS, 2021). With vaccine rollout now underway the President has remarked with increased optimism that 'the light is now at the end of the tunnel' (Courts and Tribunals Judiciary 2021, p.5), but there remains uncertainty about the likely timescales for returning to the courtroom. Therefore, as we continue to see enhanced provision of remote hearings there is still a pressing need to 'maintain and enhance good practice with respect to the conduct of remote or hybrid hearings' (ibid 2021, p.1).

This article sets out the findings of interviews conducted with professionals in the North East of England who have represented or otherwise supported litigants in family court proceedings since social distancing measures were introduced. The first part of the article sets out the key changes to family court procedure and private and public law children practice as a result of the pandemic. The second part of the article outlines the findings of the research as they relate to private and public law children cases. The findings reveal that whilst practitioners are broadly positive about their experiences of supporting litigants with shorter non-contested hearings, they nonetheless have concerns about the effectiveness of remote/hybrid hearings in ensuring a fair and just process for court users in lengthy and complex children proceedings. In particular, the findings indicate that the move to remote hearings has exacerbated pre-existing barriers to justice for unrepresented and vulnerable litigants participating in children matters. The aims of this article are not to 'name and shame' any particular court, but rather to highlight evidence of good practice in the North East of England and where there is scope for improving practitioner and litigants' experiences within the current restrictions.

The operation of the family courts during Covid-19

(i) Family court procedure

As addressed above, concerns were raised at an early stage of the pandemic around the court's capacity to deal with the volume of cases being generated. The President's guidance has consistently acknowledged that the family court 'was not coping' with the volume of

cases even prior to Covid-19 (Courts and Tribunals Judiciary 2020c; 2021) and that the remote court process was going to impact this further. The recommendation was 'a very radical reduction in the amount of time that the court affords to each hearing', with oral evidence being limited to 'only that which it is necessary for the court to hear' (2020c, para 43). Subsequently, the President raised concerns about the impact that the increased court workload has had on practitioner working hours and the now extended court hours. He noted that some hearings were being listed 'as early as 8.00am or commencing at 4.30pm' (Courts and Tribunals Judiciary, 2021, para 15). The President encouraged a return to normal working hours of between 10.00am and 4.30pm with additional hearings outside those times becoming 'an exceptional occurrence, and not the norm, and limited to no more than a 30-minute extension to the court day' (ibid, para 16).

The format of remote hearings has also been subject to extensive discussion. In his 2020 guidance, the President announced that cases are 'unlikely to be suitable for a remote hearing' where 'parents or other lay witnesses are to be called' (Courts and Tribunals Judiciary, 2020c). Subsequently, this has been replaced with a recognition that 'consideration should be given to conducting a hybrid hearing or a fully attended hearing' and where this is not possible 'the court should make arrangements to maximise the support available to lay parties' (ibid para 17). This signified a move away from simply adjourning most contested cases; something the President accepted had occurred in the early days of Covid-19 (ibid, para 5). Instead, the President recommended a move towards hybrid or fully attended hearings to ensure that hearings could take place in a fair way without further delay, whilst acknowledging that in some cases these hearings may have to take place remotely.

Research conducted in the early stages of the Covid-19 response highlighted issues regarding the experiences of lay parties in the remote family court (Nuffield Family Justice Observatory, 2020a). The Nuffield Family Justice Observatory highlighted a lack of 'support and advice [available] before, during, and after hearings' (2020b, para 4.8). In particular, the following concerns were raised about the engagement of litigants in person in remote family court proceedings:

- Last minute changes to the date/time of hearings, which may then impact on the ability for support services to attend with a litigant in person

- Lack of information about support services
- The inability to communicate with McKenzie friends during hearings
- Behaviour during hearings that would not be accepted at an in-person hearing
- Litigants in person not feeling heard or understanding the information being provided.
- Access to technology

In direct response to the concerns raised in this report, the President recommended that:

> All professionals, court staff and judiciary must maintain a keen eye upon the engagement of lay parties (even if they are represented) during a remote hearing to ensure that they are sufficiently connected with the court process in a technical sense, and are, more generally, following what is occurring (Courts and Tribunals Judiciary, 2021, para 9).

The Law Society has strongly advocated against a blanket approach to the format of hearings and has recommended that the President set out a list of factors to be considered when deciding whether a contested case should be heard remotely, suggesting that the more relevant factors a case has, the less likely that fairness would be upheld by holding a hearing remotely (The Law Society, 2020). The Law Society gave the following examples of factors which may indicate that it is not fair to hold a hearing remotely:

- Not all parties have legal representation
- Cross-examination of lay witnesses is required
- Interpreters are required
- Poor technology is available

Despite requesting a review of listed hybrid and in-person hearings with the aim of reducing the current footfall in the courts, the President has acknowledged that the decision as to the format of the hearing will remain with the judge hearing the case (Courts and Tribunal Judiciary, 2021). This allows the Judge to consider the factors laid down by The Law Society, albeit this will not assist with the workload issues highlighted above.

Regarding the court procedure in children cases, on 23 April 2020, the President introduced pilot Practice Direction 36Q, which modifies Practice Direction 12B and provided temporary flexibility for the process that is to be followed in an application for a Child Arrangements Order. Any changes to the usual programme must be approved by the Local Designated Family Judge in consultation with HMCTS and Cafcass with the aim of ensuring 'that the administration of justice is carried out so as not to endanger public health and to take account of available resource' (Practice Direction 36Q). Similar provisions for public law proceedings were set out in pilot Practice Direction 36R. Those practice directions will remain in place until 31 October 2021.

(ii) Private children

In response to confusion amongst parents, the President set out an exception to the 'Stay at Home' regulations that '[w]here parents do not live in the same household, children under 18 can be moved between their parents' homes' (Courts and Tribunals Judiciary, 2020d). Understandably, although perhaps unhelpfully, the guidance created ambiguity by noting that the exception does not mean children *must* be moved between homes; rather, parents should make 'a sensible assessment of the circumstances, including the child's present health, the risk of infection and the presence of any recognised vulnerable individuals in one household or the other' (ibid). It was recommended that parents could depart from the arrangements through mutual agreement, as would be the case regardless of the Covid-19 crisis, however there was also approval for a parent to unilaterally restrict or wholly depart from arrangements that may compromise compliance with Public Health England advice. Parents were encouraged to use technology to support contact when direct contact was not possible. This sentiment does not seem to accord with the provisions for children to still attend school throughout most of the pandemic and mix with peers and teachers. Moreover, the guidance refers to the child's parents, but makes no mention of others with the benefit of a Child Arrangements Order (CAO), such as grandparents or other extended family members.

Where departure from a CAO has been made by one parent in a unilateral decision, an enforcement application may be necessary under s11J Children Act 1989. In consequence of the demand on a stretched justice system and in line with the new practice direction, temporary procedural changes have been permitted. Where an application for enforcement is made, the court will determine whether the enforcement application has arisen due to the pandemic

(Cafcass, 2020a). If so, the court will send a standard letter to the applicant providing advice and recommendations, as well as a note that the First Hearing Dispute Resolution Appointment will likely be listed on a date in excess of 12 weeks from issuing the application (ibid). The Family Court Adviser will contact the applicant and work with the parties with a view to resolving the dispute when completing the usual safeguarding checks. The family court will consider during the proceedings whether each parent acted 'reasonably and sensibly' considering official advice and the rules in place at the time (Courts and Tribunals Judiciary, 2020d). The advice of the President has not changed in respect of private law children cases since March 2020.

(iii)Public children

On 19 March 2020, the President set out that emergency protection orders, interim care orders and issue resolution hearings were likely to be capable of being dealt with remotely, and that any case which could not be listed for a remote hearing 'should be adjourned and promptly listed for a directions hearing, which should be conducted remotely' (Courts and Tribunals Judiciary, 2020a). Similarly, the position for cases of urgency was that a remote hearing should be favoured unless this was not possible (ibid).

At this early stage, concerns were also raised regarding the legislative provisions for adoption and fostering. On 24 April 2020, after being laid before Parliament for 24 hours, The Adoption and Children (Coronavirus) (Amendment) Regulations 2020 (SI 2020/445) came into force, providing temporary changes to local authority duties in relation to children's services and adoption. These amendments allowed visits to a child in a foster placement to take place by telephone, video link or other electronic means (Regulation 8) and relaxed Looked After Children Reviews to at least every six months where this was 'reasonably practicable' (ibid). The amendments were subsequently successfully challenged in the Court of Appeal who considered that the government had acted unlawfully by failing to consult bodies representing children in care before making the amendments. At the time of writing, five amendments to the regulations remain in force and as a result of The Adoption and Children (Coronavirus) (Amendment) Regulations 2021 (SI 2021/261) those provisions will now remain in place until 30 September 2021.

With new guidance and rapid change to day-to-day working, came new case law in care proceedings. This initially reflected the challenges of remote working as the court adapted to the increased use of telephone and video hearings (Nuffield Family Justice Observatory 2020a). The use of remote hearings, while not a new concept to the family court (Re ML (Use of Skype technology) [2013] EWHC 2091 (Fam)), was certainly unfamiliar to most and presented difficulties in the making of final care decisions. In initial cases, the conflict between urgency for the child and fairness for parties became a pressing issue. The case of Re P (A Child: Remote Hearing) [2020] EWFC 32 initially outlined factors for consideration in deciding whether a final hearing should be conducted remotely or adjourned. These include:

- The category of case or the seriousness of the decision;
- The availability of local facilities and technology;
- The personalities and expectations of key family members; and
- The experience of the Judge or Magistrate in remote working

The Judge also emphasised that each case would be fact specific (paragraph 24) and that the court should consider whether a case *should* proceed remotely, even if it can logistically (paragraph 8).

Following this decision, the cases of Re A (Children) [2020] EWCA Civ 583 and Re B (Children) (Remote Hearing: Interim Care Order) [2020] EWCA Civ 584 set out that deciding whether a hearing should be dealt with on a remote basis, would be a case management decision for the judge, who therefore held a broad discretion. In Re A, factors to assist with the making of this decision were given and included criteria such as the importance and nature of the decision to be determined, the need for urgency, and whether the parties were legally represented (ibid, paragraph 8). In this case, the ability of the father, who had a diagnosis of dyslexia, to engage with remote proceedings, was found to be a determinative factor in the decision to allow the appeal against the decision to hold a hybrid hearing (ibid, paragraph 10). The case of Re B further considered the procedural fairness of a remote hearing and again overturned a decision made by the lower court. In this matter, the approach of the court was criticised, with decisions such as the lack of notice of change in relation to the care plan, and the grandmother's opportunity to consider evidence and discuss matters with her representative calling into question the fairness of the proceedings (ibid, paragraphs 24 and 25). The court

determined that an adjournment should have been granted but acknowledged the 'highly pressurised circumstances in which all the participants were working' (ibid, paragraph 39).

Amid this context, the Nuffield Family Justice Observatory (2020a) identified concerns about the urgent removal of newborn babies under interim care orders with many expressing concerns at the way in which parties, and particularly new mothers, were able to access and engage with this type of hearing as well as the increase in this type of hearing during lockdown (ibid, p.21). Concerns were also raised regarding parties' ability to participate and engage with remote hearings and technology (ibid, para 3.3). The need to achieve finality in decision making for children subject to care proceedings, particularly considering the overarching consideration of the child's welfare, has also been a key consideration of the President (Courts and Tribunals Judiciary 2020c). Professionals were reminded that 'delay in determining a case is likely to prejudice the welfare of the child and all public law children cases are still expected to be completed within 26 weeks' (ibid, 2020c). To achieve this, a move towards 'hybrid' hearings was identified for those cases previously deemed unsuitable for remote hearing, although it was acknowledged that the ability to achieve this in all cases would be resource dependant. Guidance was also given that while 'telephone hearings may be well suited to short case management or review hearings, they are unlikely to be suitable for any hearings where evidence is to be given or where the hearing is otherwise of substance' (ibid p.6). Suggestions were made to promote support for parties involved in court proceedings, by facilitating their engagement from a location other than their home so that they could be assisted by a member of their legal team (ibid).

The complications of achieving fairness and parity between parties in 'sub-optimal court settings' (ibid p.3) was more fully considered in the cases of A Local Authority v The Mother and Others (Covid 19: Fair Hearing: Adjournment) [2020] EWHC 1233 (Fam) and A Local Authority v M [2020] EWFC 43. The court found that it was clear from the President's guidance at paragraph 6 and 11 (Courts and Tribunals Judiciary, 2020c) that there was a need to achieve finality in decision making and that continuing to adjourn the case would not be a viable option. While arguably 'imperfect' decisions, both cases clearly demonstrate the complexities of achieving suitable arrangements in terms of organisation, resource management, and parties' needs and wishes, but also the evident need to do so in respect of timeframes and overall best outcomes.

The issue of contact between parents and children in care has also become a key issue during the pandemic. Department for Education guidance (2021) makes clear that the expectation is for contact arrangements between children in care and their birth relatives to continue during the pandemic. It is appreciated that in some circumstances face to face contact may not be possible, for example if 'members of households are isolating or continuing to take precautions due to clinical vulnerability' and in those circumstances temporary virtual alternatives should be provided, this being the exception rather than the norm (ibid). Despite this the Nuffield Family Justice Observatory (2020b) reported 'considerable concern that mothers have frequently not been able to have any physical contact with their babies following their removal' and that contact has been predominantly virtual (ibid, p.32). Differences in practice have also been noted between local authorities (ibid, p.33). The case of Re D-S (Contact with Children in care: COVID-19) [2020] EWCA Civ 1031 was an early indication of the difficulties in this area and gave some guidance on the approach to applications for contact with children in care during the pandemic. In this matter, the appeal of the Mother was allowed on the basis that the wrong approach had been taken in consideration of the application, in that the Judge had erred in assessing whether the local authority's contact arrangements were reasonable, rather than determining what was in the best interests of the child. While the Nuffield report indicates that some face-to-face contact now appears to be resuming (p.32), reports are that this continues to be a slow process and one which remains a real issue for parents and families involved in care proceedings. In the North-East of England, local guidance also reiterates that in light of disruption, 'what is reasonable must be considered in that context and s.34 applications for contact made sparingly' (HHJ Hudson and HHJ Matthews QC, 2020).

Methodology

The paper draws on data obtained from 15 in-depth interviews with professionals in the North East of England who participated in remote and/or hybrid hearings in the family court since lockdown measures were introduced in March 2020. The interviews took place between September 2020 and December 2020. This paper draws specifically on findings relating to private and public law children proceedings. The findings in relation to applications for injunctive protection by victims of domestic abuse are reported separately (see Richardson et al, 2021b).

The study is one of the first of its kind to consider the effectiveness of the remote family court during the pandemic. The authors are aware that the Nuffield Family Justice Observatory have held two consultations on this issue (2020a, 2020b). Whilst the Nuffield consultations examined responses across England and Wales, this study is a snapshot of one region - the North East. The respondents primarily practised in courts based in and around Newcastle upon Tyne, Sunderland, Durham and Middlesbrough. Accordingly, the data focusses on the geographic region of the North East of England rather than the judicial definition, which also includes York, Bradford, Sheffield, Leeds and Hull. Where possible, the findings of this study will be compared with the findings of the Nuffield reports to add validity to our findings and highlight any variances. Given that this study also draws on practitioner experiences up to December 2020, it is also likely to shed important light on developments during the second lockdown in November 2020, which is outside the scope of the later Nuffield report.

Semi-structured interviews were used to discuss the respondents' experiences. All the interviews were conducted remotely. This decision was one of 'methodological necessity' owing to the lockdown regulations (Johnson et al 2019, p.3). Johnson et al recognise that whilst interviews conducted remotely 'do not significantly differ in interview length and substantive coding, they likely do often come at a cost to the richness of information produced' (p.1). This is largely because in-person interviews 'provide the most natural conversational setting, the strongest foundation for building rapport, and the best opportunity to observe visual and emotional cues' whereas remote interviews can be 'difficult to manage, more likely to result in misunderstandings and limited in their ability to generate meaningful conversations' (ibid, pp.2-3). It is the authors' position that the risk of remote interviewing resulting in misunderstanding or otherwise affecting the validity of the findings was mitigated by the authors' qualifications as family law practitioners. As a result, the interviews were overwhelmingly natural, conversational, and detailed interactions. Further, utilising video conferencing facilities in the majority of interviews, ensured that non-verbal and emotional cues could be identified.

The data reflects the experiences of the broad range of professionals who support litigants through the family court process, including paralegals, trainees, solicitors, and barristers (working in privately paying, legal aid and local authority settings) and non-legally qualified volunteers at court-based charities. A snowball (or chain-referral) sample was utilised to recruit the respondents. Naderifar et al (2017, p.3) note that 'in snowball sampling, the fragile

population is selected in a social context and in a multi-stage process… after gaining access to the preliminary samples, the samples begin to introduce other people to take part in the research… this process will continue in a semi-automatic and chain-like manner until data saturation'. As the research team comprised family law practitioners, initial access proved unproblematic and referrals to other colleagues were forthcoming. Qualitative thematic analysis was conducted on the interview data using NVivo, which is recognised for providing a more rigorous method of coding compared to manual or other digital processes (Hoover and Koerber 2011). Two of the authors separately coded three of the interview transcripts to ensure a consistent approach. Thereafter, each of the remaining transcripts were coded by one of those two authors. Following both Urquhart (2013, p.194) and Given (2016, p.135), saturation was considered to be reached at the point in coding where there were 'mounting instances of the same codes', but no new codes or themes emerged from the data. Many of the practitioners interviewed specialised in a particular area of family law. Whilst a regional study, the issues that have emerged will resonate with the national and international legal community.

Findings and discussion

(i) Operational Guidance

National guidance has developed 'in a piecemeal fashion' over the course of the pandemic and has been supplemented with regional guidance from the Local Designated Family Judges. Respondents were specifically asked about their ability to keep on top of guidance and changing court practice. One court-based support service was critical of the lack of guidance from the local family court, indicating that they have had to ask directly for updates and have had to seek out information for themselves, rather than the court providing this. They noted that, where guidance was provided, it was '*at a national level*'. They felt that their local court had not been '*great at keeping updated or keeping in touch with us at all*'. In contrast, none of the legal practitioners interviewed raised concerns about being provided with guidance. They gave examples of colleagues and other agencies trying to be helpful by recirculating information to ensure that everyone had it but how '*sometimes you end up getting the same information three times just because everyone wants to make sure that at least it's been disseminated*'. Practitioners also commented on the amount of guidance being provided, the frequency of the updates and the number of times that guidance is revised

and reissued with some documents now having multiple iterations. This reflects concerns raised by the Law Society that members were experiencing 'guidance fatigue' (Law Society 2020).

Whilst most practitioners appeared to have been able to keep on top of the guidance, they did not think it was as easy for their clients and noted that it was even more difficult for litigants in person. This issue has been exacerbated by limitations in the assistance that can now be offered by Support Through Court, law clinics and McKenzie Friends. One respondent suggested that information must be made more accessible, such as through the provision of leaflets. The Transparency Project have taken steps to try and make information accessible for lay parties through online documents, including a guidance note on 'Remote Court Hearings' (Transparency Project, 2020). However, this guide was produced in June 2020 and may not therefore reflect the most recent guidance on remote court proceedings. The success of guidance notes also relies on litigants in person knowing where to find them.

The findings also demonstrate some inconsistency in judicial interpretation of guidance. The respondents noted that, particularly at the outset of the pandemic, this made advising clients a difficult task. Discussing private law children disputes, one respondent noted:

> *Say I'm instructed by someone who didn't want to hand the child over and I said 'look, I can't advise not to especially with a court order in place, but you have parental responsibility; you need to do what's in the best interest of your child. You've got to balance that with the fact that it's within the best interests to have contact with the other parent as well'. And then as soon as the guidance came out, I mean, it kind of depended on what judge you got, but a lot of judges were saying no contact needs to take place. And that was just kind of the line…it's obviously got a lot better now, but at that point, when the guidance was initially released, it was really confusing. I don't think anyone really knew exactly what to do*.

Different practices were acknowledged in relation to the conduct of holding remote hearings, which sometimes caused confusion for court users. For example, the respondents noted that in some courts, the judge dials in the parties whereas in other

courts, parties are provided joining instructions. A consistent approach should be taken by all courts across all regions, technology permitting. Where this is not possible, the authors would echo the recommendation by Speed et al (2020) that regional versions of the Transparency Project guide should be produced and updated regularly. The authors recommend that these guides are made widely accessible to litigants in person, perhaps through the court providing a copy enclosed with the notice of hearing to any self-representing parties in proceedings. This recommendation is echoed by The Law Society in their response to the Nuffield Family Justice Observatory second consultation (2020b, p.30). Acknowledging that parties with representation can also experience confusion about the process, solicitors could also provide this guidance to their clients, alleviating some of the onus on legal professionals at a time when the workload is so high.

(ii) Delay

Many of the respondents commented on the '*significant delays, resulting from adjournment of hearings during the initial lockdown*' and felt that, while cases were now beginning to return to court, there continued to be delays in decision making for families involved in children proceedings. Comments about delays were made in relation to both public and private children cases, notwithstanding that a considerable proportion of public law children work has fallen into the category of 'work that must be done' and should in theory have faced lower levels of disruption (Courts and Tribunals Judiciary 2020a). As a result of delays, cases were effectively forced to restart. The respondents noted, '*you can't just jump straight back in when you've got young children; you have to start it all over again*' and *'Covid stopped a lot of plans from progressing*'.

Some respondents reported positive benefits to the delay, in that it offered parents an opportunity to demonstrate a change in circumstances:

> *It gives parents more opportunity though because obviously if you have an IRH in June and you're not having a final hearing until March then they're saying well reassess me.*

However, respondents also noted the impact that this could have on the 26-week limit on public law proceedings implemented by s14 Children and Families Act 2014, particularly

where new expert evidence was required because of the delays since the original assessment took place. In direct conflict with the guidance issued by the President that proceedings should still be concluded within these timescales (Courts and Tribunals Judiciary, 2020c), respondents gave examples of some public law cases being at '*35-40 weeks'* already due to adjournments and requests for reassessments. This issue is also evidenced by the most recent family court statistics from July to September 2020, which demonstrate that the average length of public law proceedings from application to disposal is 40 weeks, with only 29% of cases being disposed of within the 26-week limit (Ministry of Justice, 2020b). That said, if this gives an opportunity for parents to make positive lifestyle changes and for children to potentially remain with their biological families in the long term, this is arguably a positive use of this time. As raised earlier, this always needs to be balanced against the need for urgency for the child (Re A (Children) [2020] EWCA Civ 583) and the implementation of the no delay principle in section 1(2) Children Act 1989.

Whilst some families will undoubtedly make use of this extra time to improve their position within proceedings and endeavour to make long lasting changes, there were concerns that remote working had impacted lay parties' willingness to participate with third party services. Those services may be crucial to overcoming the concerns of the local authority, for example if there are concerns around drug or alcohol misuse or domestic abuse. Many felt that there was greater opportunity for evasion for those unwilling to engage:

> *I know a lot of the services have been doing things remotely, but getting someone to remember to answer the telephone when it rings as opposed to going sitting in a group somewhere, I think they could get a lot more out of it. And again, that formality, the same with the whole court process in respect of lay people we're finding that it's sort of like dropping back. It's like, 'well I've rang We are Recovery, they didn't ring me back' or 'oh well, I missed my session that day', 'well they're not allowing people in anyway, well the COVID-19 said that we couldn't do this and this.*

> *I don't know whether there's some people that have tried to play the system, I can imagine that that has happened on quite a few occasions. Where people*

are 'ah, I can't attend I need to isolate, because so and so, I've come into contact with this person and that person.

Considering this, it is understandable why some respondents have taken the view that delay was unlikely to make a material difference to the outcome of proceedings and, if anything, could be detrimental to their client's case:

I've yet to see [delay] actually assist a parent. I do know that a lot of them out there have already said "oh well this is going to give me some more time now. I can show you that I do this, this and this and the sustainability that you didn't have before, I have now got". I think it could help some parents, but again, on the flip side of things, if things haven't improved or digressed...

It is not just parents creating delay. There was mention of local authority delay through inconsistent working methods as well as prioritisation of urgent matters only. There were also delays in awaiting safeguarding disclosures from the police.

Similar findings can be made in relation to private children proceedings where contact has been prevented by one parent. In such cases, delay provides an opportunity for a parent to argue that the child is now in a routine, and contact should be gradually increased over a period of time, rather than returning immediately to the original level of contact. It is reassuring that guidance from the President acknowledges that avoiding delay will be an important, sometimes determinative, factor in case management (Courts and Tribunals Judiciary, 2021). However, the reality may be different. A respondent noted that, '*there were significant delays, resulting from adjournment of hearings during the initial lockdown – hearings have been delayed for months*'. The standard court letter to applicants seeking enforcement provides that the first hearing will have to be listed on a date in excess of 12 weeks, thus stifling contact and prompt access to justice.

A respondent noted that they '*did have a couple of parents where the conflict was already there, that [they] felt they were using Covid as an excuse not to promote contact…citing Covid when it was very clear that contact could be promoted*'. Where there is conflict, parents will inevitably look for reasons to prevent contact and Covid has presented a justification which is indirectly supported by government and the court.

Notwithstanding, many parents have legitimate concerns arising from the government regulations. For example, where parents have booked holidays, there has been uncertainty regarding quarantine periods changing while they were away with the other parent. In some cases, arrangements have also been stopped where one parent or a member of the household being vulnerable. Guidance on contact arrangements where a child is self-isolating or has to quarantine on return from a trip abroad has since been provided in a House of Commons briefing paper (Foster and Loft, 2021). In relation to quarantining, a shared care arrangement is a permitted reason for moving between two households (ibid). The position is less clear where a child is self-isolating, with parents being encouraged to agree 'for a child to remain at the same address during their period of self-isolation' and to seek 'specialist advice' if contact is court ordered (ibid).

The respondents noted that in public law children proceedings, judges are listing subsequent hearings during the course of the hearing, yet with private law children proceedings, there is a tendency to list after the hearing has concluded, therefore causing further delays. This has led to occasions where the court has listed hearings when representatives, local authority, Cafcass, or experts may not be free. It would be sensible for a consistent approach to be taken to ensure that professionals are consulted about their availability.

(iii) Backlog/workload

The respondents talked about a 'backlog' of cases, echoing a similar view to the President that the backlog had existed long before Covid-19, but had been exacerbated by the reduction of cases concluded in the immediate response to the first lockdown (Court and Tribunals Judiciary, 2020c; 2021). There was a general agreement from respondents about the backlog contributing to a high volume of public law cases, with one practitioner reporting public law proceedings having been issued during the first lockdown, but not having a final hearing listed until the first quarter of 2021. This is also evident in the July to September 2020 family court statistics which show that the number of public law case law starts have risen, with the average time for a care or supervision case to reach first disposal at the highest average since mid-2013 (Ministry of Justice, 2020b). Echoing the President's guidance, respondents considered that caseloads were likely to remain high:

> *I'm forecasting ahead that our cases aren't going to go down. We're going to have more cases listed in court. We had 24 cases this week in court. So, to prepare for those is a nightmare.*

Many of the respondents noted the strain on the family justice system in tackling this increase in both volume and complexity, whilst meeting the necessary time management requirements (Courts and Tribunals Judiciary, 2020c, paras 42 and 43). There was significant concern at the impact this had on the decision-making process:

> *…I mean there is a massive backlog that always has been a massive backlog and the pandemic hasn't helped at all, but we need to think how to get rid of the backlog, but also how it's fair…I don't think getting rid of the backlog by rushing through cases by remote means for public law is acceptable at all. I just don't.*

> *And it does feel that we are pushing cases through really quickly. We're almost shoehorning cases into the time that we've got, rather than actually the time being allowed to be used in the way that we feel is most appropriate.*

> *I worry about rights to a fair trial and their human rights. I worry about us rushing cases through by telephone. I worry about appeal cases coming through, which I think at some point is going to be a massive amount of appeals.*

Practitioners also talked about the increased workload experienced as the family court clears some of the backlog. Practitioners reported starting work as early as 5:00am and not finishing court hearings until 6.30pm. The working day of course does not end with the last court hearing. After court, practitioners need to catch up with calls and emails from that day and potentially prepare for the next day of hearings. For practitioners who are qualified as mediators, the working hours can be even longer, with one participant reporting that her mediator colleague had been running mediations that would begin at 8pm or 9pm and last for '*a couple of hours*'. The reason for this was '*during the lockdown period that was the only time that the parents could guarantee that they would be on their*

own because the children were in bed'. Those working hours are clearly not sustainable. Whilst the President's proposal of resuming normal working hours will no doubt be welcomed by practitioners and is necessary to protect wellbeing within the profession, it will no doubt lead to delays in the 'backlog' being cleared (Courts and Tribunals Judiciary 2021).

In private law disputes, the volume of cases was considered to be higher than pre Covid-19 levels owing to the fact that '*a lot of previous arrangements have gone out of the window'*. One respondent noted *'when the first lockdown was announced, it was incredibly quiet, I mean there was nothing coming through, no referrals. Then I would say over the last two months, or really since September, it's just been really, really, really busy, very busy'*. This increase is supported by Cafcass' Private Law Data (2020b), which demonstrates there were 2,560 cases in April 2020, compared with 4,200 cases in September 2020, as well as the national statistics for July to September, which show private law case starts increasing by 8% compared to the equivalent quarter in 2019 (Ministry of Justice, 2020b).

As with public law proceedings, concerns were raised about the impact of high volumes of private children cases on case management decisions. Respondents noted that in cases where domestic abuse or safeguarding concerns are alleged, few fact-finding hearings are currently being granted, with practitioners being required to justify the need for such hearings. The respondent stated, '*fact-finding hearings have been reduced because obviously the amount of court time it takes and being able to do it remotely*'. Some necessary fact-finding hearings simply had to keep being adjourned and one respondent said they '*worry about later on what's going to happen because these haven't gone ahead*'. Literature suggests that the low rate at which fact-finding hearings are ordered is a concern which precedes Covid-19. Hunter et al (2017) identified that fact-finding hearings are 'inconsistently and rarely held' (p.405), whilst a study by Cafcass and Women's Aid found that fact-finding cases were only held in five out of 134 cases where allegations of domestic abuse were raised (2017 p.10). It is therefore concerning that the court is seemingly more reluctant to order such hearings at present, particularly given that they are one of the leading mechanisms for safeguarding compliance with Practice Direction 12J of the Family Procedure Rules 2010. A balance must be struck between tackling the

backlog and preventing cases being rushed through, particularly where the outcome may be life changing for those involved.

(iv) Format of hearings

In line with the guidance set out by the Courts and Tribunals Judiciary (2020a, 2020b), the respondents acknowledged that the format of hearings has developed since the initial lockdown. They reported that initially *'everything was taking place via telephone', then it 'moved to hearings via CVP',* whereas *'hybrid hearings…are the new sort of thing now at this moment in time'*. Many of the respondents were interviewed prior to the most recent guidance issued by the President, which emphasised the need to minimise footfall in the court (Courts and Tribunals Judiciary, 2021) and the introduction of the third national lockdown in January 2021. The responses provided may therefore be different if the participants were interviewed again.

Of those who had been involved in hybrid hearings, several administrative difficulties were highlighted. Respondents commented that '*those types of hearings take an enormous amount of time and effort, energy and are just very stressful to deal with, from judges and across the board to be honest*'. One respondent commented on the administrative onus that the court places on representatives in setting up those hearings, commenting that they felt like they '*almost became the judge's PA… it was just constant'.* They gave examples of having to make all the arrangements with witnesses and having to give witnesses' details to the clerk multiple times. One of the support services interviewed reported similar issues with providing their details to the court, only for those details to be lost at some stage meaning that they were not called into a hearing to support a vulnerable litigant in person whose first language was not English. However, it should be noted that the respondent was referring to a court elsewhere in England when giving this example, not within the North East. Nonetheless, these examples point to a clear administrative issue with communication of and recording of key details by the court; an issue that is perhaps not surprising given the cuts made to the court staffing over recent years (Kaganas 2017; Ministry of Justice 2019). The authors therefore support the recommendation made by Speed et al (2020) that a specific court form and designated email address is needed for the provision of such information.

Despite practical difficulties, many respondents were in favour of the continued use of remote hearings in straight forward case management hearings to counter some of the additional delays. A representative from Cafcass discussed being able to attend more hearings, rather than prioritising one if she is listed in one court at 10am and another at 11am, leading to more cases being finalised within a shorter period. Respondents were particularly positive about the reduced travel time for short case management hearings, where the travel time would often be longer than the hearing itself. However, there was also a strong feeling that '*remote hearings do not work for final hearings'* or for contested hearings, particularly in public law cases.

> *I think the final hearing shouldn't be [remote] at all. Even if it's an agreed hearing and settled on submissions. I think emergency hearings are very difficult to do via telephone and I think ones where evidence is being given are impossible because not just withstanding the fact that the audio isn't always great on CVP, people drop out of it, people can't be joined and they're waiting and then they are not there anymore and you've got to dial them back in or somebody hangs up by mistake. People are on mute and are speaking and think people can hear them. I'm not fantastic at IT, but I don't think the IT is of the level where it is appropriate for a hearing at all. It's very difficult to hear what judges are saying. Parents sitting at home on a telephone line can't hardly hear anything at all.*

In public law proceedings, there will inevitably be cases where urgency prevails over the time it would take to make arrangements for a hybrid/in person hearing, but respondents raised some very concerning examples of where urgency has led to parents being expected to participate in wholly inappropriate circumstances:

> *I've had a case very early on in lockdown where I think the courts were just desperately trying to keep things going where it was a removal case, an interim care order and the mother was in hospital, crouched under a stairwell in the hospital. Listening to, well being cross examined, giving evidence about why she should keep her child in a, well she was trying to be in a public quiet place, but she was in the hospital and she had just given birth. I appreciate*

that it wasn't a case of 'oh well we will come back next week.' It was an urgent case. It has to be dealt with urgently, but it just didn't feel right at all.

Unfortunately, it is clear from the responses to the Nuffield Family Justice Observatory follow-up consultation, that this was not a one-off incident, with multiple examples being provided of mothers of newborn babies being forced to attend emergency court proceedings by telephone (2020b, p.19). The family court has been critical of local authorities who have sought consent to section 20 accommodation in similar circumstances (Coventry City Council v C [2013] EWHC 2190), so it is difficult to understand how fairness can be achieved by expecting a mother to participate in emergency proceedings in similar circumstances, without any support due to the restrictions that hospitals now have in place on visitors attending.

Even in 'normal' circumstances where a parent has been able to seek legal advice and is participating in the proceedings from home, a primary concern for respondents was the available support for parents involved in care proceedings. Concerns have been highlighted above about the need for privacy, but for many parents, this will not be possible even within their own homes due to the presence of their children. One respondent discussed a situation where the subject child was not only present, but was asked to become involved in the proceedings:

At the first hearing, there was a concern about the dad's behaviour towards both him and his sister who's about seven and allegations that the daughter had made about the dad… their father was saying 'well that's not true at all… you can ask him 'cause he's here'. And then this child was put on the phone in the middle of a hearing with the dad shouting in the background at the child to tell the judge what had happened, that it 'wasn't f-ing true'.

While some respondents highlighted occasions where additional arrangements were made to assist with children who would otherwise be present in the family home, they indicated that these arrangements were often down to the discretion of, and resources available to, the relevant local authority.

For many, there were strong concerns at the level of support available to parents in situations where a care or placement order was made under remote circumstances:

> *I've attended a number of hearings where the plan has been for permanency outside of the family by way of adoption and two of those hearings in recent weeks have been dealt with by telephone and I found that as a professional very upsetting. She couldn't see anybody, she couldn't see who was talking about her, she couldn't see the judge giving his judgment at the end of the day. She, one particular mother, was extremely distressed and it was harrowing to listen to her audibly upset, understandably so on the telephone…I was concerned about what support she had after the hearing because I had no idea who she was with... I was so concerned I actually contacted a solicitor to see if there was anything that could be done to see if there was any support that could be offered to this mother who'd just effectively lost her child.*

Again, this is a clear argument against remote proceedings being used for final hearings in public law proceedings. For professionals, there was an overwhelming feeling that remote hearings were impinging on their ability to engage and empathise with clients and parties involved in proceedings, something which many felt to be a key part of their role.

There was also particular concern for lay parties with additional needs, who have a strong accent or whose first language is not English, and whether these needs were being fully met in remote circumstances. One respondent noted, '*it is really difficult to have an interpreter on the phone for [a hearing]. It's not ideal. I don't think it's very supportive at all for someone to have to sit and go through an interpreter on the phone. It's difficult enough as it is to have someone at a court hearing.*' The need for an interpreter was one of the factors listed by The Law Society as a reason against holding a hearing remotely (The Law Society, 2020). The difficulty with using interpreters in remote proceedings was also accepted by the President (Courts and Tribunals Judiciary, 2020c). However, he indicated that hybrid or in person hearings may also have similar difficulties due to the interpreter needing to remain two metres away from the party who requires their assistance because of social distancing requirements (ibid, para 29). In debating this issue, he suggested that:

> *Active thought should be given to arranging for a lay party to engage with the remote process from a location other than their home (for example a solicitor's office, barrister's chambers, room in a court building or a local authority facility) where they can be supported by at least one member of their legal team and, where appropriate, any interpreter or intermediary (*ibid, para 28).

However, social distancing requirements would apply equally to any of those venues, as they would to a courtroom, so it is difficult to see how this would assist. A better solution proposed by the President is for interpretation to be provided 'over a separate open phone line with the interpreter and client using earpieces, or typed interpretation over linked computers or email' (ibid, para 29). However, this relies on the party having access to this technology themselves or their solicitor being able to provide them with access. Whilst many solicitors are working from home (something that may be unavoidable if they are isolating or have childcare responsibilities during lockdown), this may have practical difficulties, and courts may have to be willing to either provide access to this technology themselves or accept that hearings are likely to take far longer (and need to take place in person or in a hybrid format) where an interpreter is required.

(v) Litigants in Person

a. Accessibility of technology

In the 2020 version of The Road Ahead, the President recommended that 'in all cases active thought should be given to arranging for a lay party to engage with the remote process from a location other than their home (for example a solicitor's office, barrister's chambers, room in a court building or a local authority facility)' (Courts and Tribunals Judiciary 2020c, para 28). This need for collaboration was again emphasised in the 2021 version where the President stated, 'much will depend upon continued communication and cooperation between each agency involved in the delivery of family justice; the importance of collaborative working, both locally and nationally, cannot be overstated' (Courts and Tribunals Judiciary, 2021, para 13).

To some extent it is to be expected that solicitors may assist their own clients with the remote court process by providing an office space. However, this study revealed that

this expectation was also extended to professionals assisting litigants in person. In public law proceedings, this primarily appeared to be an expectation placed on local authorities or the solicitor for the children to provide a room or other remote assistance. No participant reported rooms being provided by the court for this purpose.

One practitioner reported being instructed to set up a Skype meeting with two unrepresented parents before then spending most of the day on the phone to them, talking them through how to use Skype in preparation for a final hearing. It was not clear from the conversation with that practitioner whether they provided that service for free or whether this time was charged to the party that they represented (whether through a legal aid certificate or otherwise). Either way, this is clearly not an economic use of a representative's time.

b. Experiences in the hearings

Several respondents reported litigants in person not feeling listened to in proceedings and the noticeable frustration to which this led. One respondent identified a tendency of some judges to ignore the litigant in person and speak mostly with the representative of the other party.

> A*lthough this judge was very good, they sometimes - and I had that in another case - they can almost ignore the litigant in person and just talk with the other solicitor. That happened a couple of weeks ago and it's - if you were live in court, you can sort of counter it to some extent. This guy was very upset afterwards, because he didn't feel he'd the chance to even say anything. They'd done a deal with Cafcass and the solicitor before. He didn't have chance to say anything.*

In another case, a respondent noted how a litigant in person had been cut off from the hearing because of technological difficulties, but the hearing proceeded in their absence. In such cases, it is vital that attempts to contact litigants through alternative channels are made and if unsuccessful, the hearing should be adjourned to enable the litigant an opportunity to participate.

Examples were also given by four respondents of judges using technology to actively mute parties (and in one example, a representative). Reasons for this varied from the need to prevent background noise to '*parents shouting and screaming in the middle of court hearings.*'

Whilst a judge may take the view that muting parties is necessary in circumstances like this to progress the hearing, it can have an impact on a litigant in person's perception of justice and whether it has been achieved in their case. Commenting on this, one support service stated:

> *I don't think the outcome would have been any different, but the fact that he didn't get chance, really, to say anything much, I think was what upsets him. I doubt if it would have changed the outcome, but he just felt as though he was just treated unfairly. And to be fair, I think he was*.

That said, respondents accepted that some judges have taken this approach because litigants in person may not be taking hearings as seriously as those conducted in-person. Examples were provided of parties attending telephone hearings whilst in the supermarket doing their weekly food shop, on the toilet or audibly speaking to other people who should not be in the room/privy to the proceedings. The Nuffield Family Justice Observatory (2020b) set out similar concerns, demonstrating that this is a national, rather than regional issue. It is difficult to identify a solution to this issue, as it does not seem to be a result of lack of information, with respondents to both research studies noting that warnings are provided to court users in advance and at the start of the hearing, but that these warnings are occasionally ignored.

(vi) Contact with children in care

Contact with children in care was a key issue for respondents involved in public law proceedings. Many discussed the initial difficulties with variations in contact following a sharp decrease in March 2020:

> *Direct contact that was to take place, especially for children that were in a local authority foster care arrangement, had just completely stopped. I know that quite a lot of people were having video contact like Facetime, but again, that was dependent upon the social workers because they would have to provide their telephone number to the client.*

Although respondents acknowledged that contact arrangements were now progressing, issues with the frequency, quality and form of contact remained apparent for many, with a lack of available local authority venues being a major barrier to contact taking place on a more regular basis. The extent of this barrier varied depending on the age of the child and the local authority involved. Respondents were mindful of the consequences for children in care placements and felt that this would impact on their overall welfare. They discussed that children were not only seeing their parents less, but they were also unable to see their friends or go to school, limiting their social networks and peer support considerably. As was the case in the Nuffield consultation (2020b), concerns were also raised about the impact of reduced contact on much younger children, specifically newborn babies, where indirect contact is not an option. Whilst it is appreciated that local authority budgets will vary, national guidance on a minimum standard needs to be implemented to establish some level of consistency and fairness.

Respondents acknowledged that there remain difficulties with contact in cases where a staged reduction of contact was ordered, or rehabilitation plan agreed, following a care or placement order, reporting that this was much quicker or non-existent. One respondent gave the concerning example of parents being offered '*30 minutes, next Friday and that's it'* as a final pre-adoption contact, rather than the usual 6-8 week reduction in contact. Regardless of the impact that Covid-19 has had on contact arrangements, it is difficult to see the humanity in a decision of this kind in circumstances where this will be the last opportunity for parents to spend time with their child.

Despite voicing concerns about the impact of this disruption on families, many felt that the disruption was, while distressing, inevitable:

In usual circumstances, that would give rise to us saying 'we're making application for contact with a child in care and you're not adhering to your care plan'. And some parents have picked up on that and gone 'hang on a second, this contact plan from January says I get it three times a week.' And we're having to say to them: we appreciate that, however there's nothing anybody can do and we don't want to sort of flood the courts with applications where we know that, at the minute, there isn't anything that we can do.

(vii) The voice of the child

Respondents raised concerns about the ability to hear the voice of the child during proceedings. They noted that at the outset of the pandemic, face-to-face meetings with children stopped entirely and whilst this was gradually reintroduced in Autumn 2020, they are likely to have stopped again during subsequent periods of lockdown. Overwhelmingly, the respondents were negative about their experiences of meeting children remotely. They agreed that the quality of information obtained is often compromised by meetings being held remotely, both because children are reluctant to engage and because professionals struggle to assess whether information provided is a free and genuine reflection of the child's wishes and feelings. As such, they were concerned about the impact of remote assessments on the outcome of proceedings.

Children aren't really known for wanting to chat on the telephone at all with somebody and sometimes it's difficult to get internet reception so they can't get on Teams, they can't do FaceTime. They can't go anywhere private because somebody's just walked into the room.

Somebody doesn't just tell a stranger how they're feeling or where they want to live. These are life changing decisions, and you need to have that rapport and build it with the child.

It isn't the same at all. Meeting a child that you're discussing their wishes and feelings about long-term decisions which is life changing for them via social media. It's just not the same at all.

Interestingly, the Family Justice Young People's Board has expressed the alternative view that…

> Whilst face-to-face meetings are very important, remote direct work does provide an extra positive option to children and young people. For some young people this could feel a more comfortable and usual setting, it could be less intimidating, and it might allow a young person to be a bit more open as they are in their own space. It could also feel less intrusive than a worker going into school (Cafcass, 2020c)

This was considered by Cafcass as part of its protocol on returning to in-person work with children. While ultimately, like the majority of respondents, Cafcass staff felt strongly in support of a return to in-person work, given the risks associated with new variants of coronavirus its default position that at least one in-person meeting should take place with a child has currently been halted, with face-to-face work only taking place where it is considered to be essential and safe for all involved (ibid).

Conclusions

With the imposition of a third lockdown on 4 January 2021, the dominant use of remote hearings, remains, at the time of writing, part of the day-to-day working of the family courts. In the President's most recent guidance (Courts and Tribunals Judiciary, 2021), issues of remote working remain at the forefront of the family law landscape, with emphasis on the importance of the findings of the Nuffield Family Justice Observatory and the wellbeing of practitioners at the coal face. With a period of 'enhanced provision of remote hearings' (ibid, paragraph 2) ahead, it is increasingly evident that 'the need to maintain and enhance good practice with respect to the conduct of remote or hybrid hearings therefore remains a priority for all professionals, court staff and judiciary' (ibid, paragraph 3) for the foreseeable future. In reality, the remote court is needed at this time, but the importance of safeguarding access to justice for court users and mitigating the impact on litigants in person cannot be overstated.

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