

CASE LAW UPDATE

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1. This brief update covers some of the most recent decisions over the last few months. It is no substitute for legal advice and simply provides a broad overview of the cases discussed.
2. This document will focus on two judgments that the Court of Appeal gave on 30th April 2020. The judgments relate to remote court hearings. It can be deduced that these judgments represent an effort by the Court of Appeal to give a clear message on remote hearings as they relate to both interim and final contested hearings.
3. It should be noted that all of our family practitioners, at Oriel Chambers, are well equipped and available to undertake remote court hearings should you require our assistance. Please contact clerks@orielchambers.co.uk.

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

4. This case involved six children. Proceedings were issued on 15th March 2019. Mr A fathered all six children. Mrs A was the mother of the youngest two and Ms B was mother to the oldest four children. The oldest child was living with Mrs B and the local authority had withdrawn their application in respect of him in April 2020. On the same day, the second oldest child was made subject to a supervision order, he was living with his father and step-mother (Mr and Mrs A). The remaining younger children were in foster care with the plan for the youngest two children being adoption.
5. Threshold was agreed and the matter was listed for a five-day contested final hearing. The final hearing which was listed on 30th March 2020. The original final hearing was vacated due to the COVID-19 pandemic. It was then listed for directions before HHJ Dodd on 3rd April 2020. HHJ Doss listed a 'hybrid' final hearing. This meant that Mr and Mrs A were to attend court in person and the advocates were to be heard remotely via video link.
6. Mr A sought to appeal this decision. Permission to appeal was lodged the following day on behalf of Mr A. A further hearing was listed on 17th April 2020. HHJ Dodd was to review the decision to list a remote final hearing as a result of the Message for Circuit and District Judges sitting in Civil and Family from Lord Chief Justice, Master of the Rolls and President of the Family Division, dated 9th April 2020.
7. At this hearing on 17th April 2020, the local authority had a shift in their position and no longer supported the case proceeding as a remote hearing. However, HHJ Dodd maintained his original decision and that the 'hybrid' hearing was to take place. Mr

and Mrs A were to attend court (separately) to give evidence and would be accompanied by a representative from their firm of solicitors.

8. One of the major concerns for Mr A was his ability to access the remote hearing when he was not at court. Mr A had a lack of suitable technology and was also dyslexic. HHJ Dodd gave Mr A the option of attending court throughout the hearing. Mr A's counsel was to join the hearing remotely via video link/skype.

The Appeal

9. The Court of Appeal heard submissions on both decisions that HHJ Dodd made in respect of listing this remote/hybrid final hearing. At the time of the appeal, it was only the children's guardian who supported HHJ Dodd's decision to list the final hearing as a remote 'hybrid' hearing.
10. The appeal was granted for three reasons:
 - Mr A was unable to engage adequately with remote evidence (either at home or in the court room). He had limited abilities and some disabilities which rendered him less able to take part in a remote hearing. It was unclear how Mr A would be able to communicate with his legal team. Fairness and the need for a party to fully engage in the process includes their ability to follow and understand what happens in the hearing and to be able to instruct their lawyers adequately and in a timely manner. The Court emphasised that the fairness of the process had to be seen as a whole, including from the perspective of the lay party.
 - The second reason was the imbalance of procedure in requiring the parents to attend before the Judge but no other party or advocate. The judgment noted that there is a need for caution where, as in this case, a lay party is required to attend to give evidence, but the key social worker is not and where the advocate for the lay party is not attending in person. The judgment referred to **Re P (A Child: Remote Hearings) [2020] EWFC 32** and the importance of the court being able to see all the parties in the room. This added more weight to the argument that there was a lack of a fair process.
 - The need for urgency was not sufficiently pressing to justify the remote or hybrid final hearing. The age of the second youngest child did not establish this case as exceptional and as such did not justify the need for a remote hearing at this time. Furthermore, the family finding process was on hold until the COVID-19 restrictions were lifted.
11. The Court emphasised three very important points in this judgment. The decision whether to conduct a remote hearing and the means in which it is heard remain a matter for the judge or magistrate who is conducting the hearing. Secondly, guidance issued by the senior judiciary are aimed at supporting the judge or magistrate in making the decision as to whether or not to conduct a remote hearing in a particular case. Thirdly, the temporary nature of the guidance on the issue of remote hearings should always be remembered. The courts and the legal profession are developing, so that what might, or might not, have been considered appropriate at one time may come to be seen as inappropriate at a later date, or vice versa.

12. At paragraph 9, the Court of Appeal list a number of factors that arise from this judgment.

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

i) The importance and nature of the issue to be determined; is the outcome that is sought an interim or final order?

ii) Whether there is a special need for urgency, or whether the decision could await a later hearing without causing significant disadvantage to the child or the other parties;

iii) Whether the parties are legally represented;

iv) The ability, or otherwise, of any lay party (particularly a parent or person with parental responsibility) to engage with and follow remote proceedings meaningfully. This factor will include access to and familiarity with the necessary technology, funding, intelligence/personality, language, ability to instruct their lawyers (both before and during the hearing), and other matters;

v) Whether evidence is to be heard or whether the case will proceed on the basis of submissions only;

vi) The source of any evidence that is to be adduced and assimilated by the court. For example, whether the evidence is written or oral, given by a professional or lay witness, contested or uncontested, or factual or expert evidence;

vii) The scope and scale of the proposed hearing. How long is the hearing expected to last?

viii) The available technology; telephone or video, and if video, which platform is to be used. A telephone hearing is likely to be a less effective medium than using video;

ix) The experience and confidence of the court and those appearing before the court in the conduct of remote hearings using the proposed technology;

x) Any safe (in terms of potential COVID 19 infection) alternatives that may be available for some or all of the participants to take part in the court hearing by physical attendance in a courtroom before the judge or magistrates.”

Re B (Children) (Remote Hearing: Interim Care Order) **[2020] EWCA Civ 584**

13. The maternal grandmother became special guardian to boy (aged 9) and girl (aged 11) in July 2013. There were ongoing issues however, the maternal grandmother remained the children’s primary carer.
14. In September 2019, due to risks posed by their uncle, the children were placed on child protection plans. The grandmother was working with the local authority and while there had been some allegations of physical abuse, the main concern was the children’s emotional well-being.
15. On 20th March 2020, the girl was taken into police protection and placed into foster care after an allegation was made that she had been hit by her aunt. The boy was not involved and remained with his grandmother. A s.20 agreement was initially signed by the grandmother however, a few days later, the grandmother wanted the girl returned to her care by 1st April 2020.
16. On 2nd April 2020, the local authority issued proceedings and sought an interim care order in respect of the girl and an interim supervision order in respect of the boy. The prospect of the boy being removed from grandmother’s care had not featured in the social worker’s analysis.
17. The matter was listed before Recorder McCarthy QC on 3rd April 2020. The hearing took place via telephone. The solicitor on behalf of the child had filed a six-page position statement and the Guardian supported interim care orders in respect of both the boy and girl with them both being placed in foster care. This position from the Guardian, led to a change in the local authority’s position. The local authority now sought removal in line with the Guardian’s recommendations.
18. The hearing was dealt with by way of submissions, via telephone. Counsel for grandmother requested an adjournment to another day so that he could take proper instructions. He also made reference to the change in the local authority’s position and the inadequacy of the evidence as a justification for immediate removal.
19. The Judge refused to allow an adjournment. Recorder McCarthy QC made the interim care orders and approved the plan for interim removal. The Grandmother appealed the decision.

The Appeal

20. The Court of Appeal noted that remote hearings have the ability to respond very quickly to issues however, this quickness led to a considerable amount of pressure on the parties in this case. There had been no pre-proceedings process with access to proper and full legal advice. There was also no evidence from the grandmother in response to the local authority's evidence. The Court also noted that after the withdrawal of s.20 consent from the grandmother, it would have been desirable for an attempt to agree a suitable timetable with the grandmother ahead of the service of proceedings.
21. The Court also noted that the Guardian, in this case, had no time to make inquiries, beyond reading the papers and having one conversation with the social worker. The Guardian was also unavailable on the afternoon of the hearing. Despite the solicitor for the Guardian advising the Court that he was fully instructed, the Court of Appeal felt that the Guardian's absence left her unaware of such arguments made by the grandmother's representative and the Guardian was deprived the opportunity of being able to reflect on her recommendation.
22. The Court of Appeal was also troubled by the lack of balanced analysis in the case for removal that was put forward by the Guardian and also the local authority. There was no reference to emotional detriment to the boy being removed from his only paternal figure without notice of such separation. There was also no reference to the boys wishes and feelings about the immediate removal. Furthermore, the Court of Appeal went on to say that there was no credible explanation for why there had to be an emergency decision. The Court of Appeal also firmly dismissed any proposition that the current lockdown provides a reason for the removal of a child where none would otherwise exist.
23. The local authority's change in their interim care plan was determined as being undocumented and unreasoned. The Court of Appeal described it as 'arbitrary'.
24. The appeal was granted and the boy returned to the care of his grandmother. Two important points arise from the decision to grant this appeal:
 - The pressured circumstances in which all the participants were working at the time led to fundamental legal and procedural principles becoming compromised despite the best efforts of the professionals.
 - Where video link is an available option, this is likely, at this time, to be the default option in urgent cases.

PRACTICAL POINTS FOR PRACTITIONERS

- When considering contested hearings (whether interim or final) thought must be given to the factors set out in paragraph 9 of **Re A**.

- Practitioners **MUST** be proactive in assisting the court to determine whether a particular case is suitable for a remote hearing.
- Ascertain what available technology is available to the client and their ability to use this effectively.
- Attempt to prepare or agree a case plan.
- Provide a case summary ahead of each hearing.
- Obtain email addresses and contact details.
- Consider ways in which lay parties can participate in giving evidence (live video or hybrid hearings with the witness attending court to give live evidence).

CONCLUSION

25. The Family Court has heard many contested final hearings and will continue to do so, where appropriate during the COVID-19 pandemic.
26. The President's Guidance on Remote Hearings issued on 19th March 2020 states:

“It is possible that other cases may also be suitable to be dealt with remotely. As the current situation is changing so rapidly, and as the circumstances that will impact upon this decision are likely to differ from court to court and from day to day, the question of whether any particular case is heard remotely must be determined on a case-by-case basis.”
27. Barristers and solicitors must continue to consider the practical and forensic detail for each hearing. Oriel Chambers are here to help. The judiciary are receptive to creative solutions to ensure that justice is not delayed. At the same time, they are more alive to the competing Article 6 and 8 rights of the parties.
28. A good example of an effective remote hearing taking place is **Re EK [2020] EWFC 25**.
29. If I can be of any further assistance. Please do not hesitate to contact me or my clerks at clerks@orielchambers.co.uk

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