



COURTS AND TRIBUNALS JUDICIARY

# **The Remote Access Family Court**

**Mr Justice MacDonald**

**Version 1**

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**(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).

# The Remote Access Family Court

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## 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.

1.2 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 pending the introduction by the Ministry of Justice of a centralised remote access system (the forthcoming 'Cloud Video Platform' or CVP).

1.3 Within this context and the reasons set out below it is already clear that, whilst through a *Protocol For Remote Hearings in the Family Court and Family Division of the High Court* (see **Appendix 1**) it will be possible to stipulate now and nationally the detailed procedure for remote hearings, it is simply not going to be possible at this point, pending the introduction of CVP, 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) the court and parties choose from a 'Suite' or 'Smorgasbord' 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 4**).

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.

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. 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/>

## 2. PROOF OF CONCEPT

2.1 In the five days since 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 those 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 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 is currently using Zoom to complete the remaining eleven days of a fifteen day fact-finding hearing that is an urgent *second* re-hearing. Judd J has 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 is commencing 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 will hear from 19 witnesses, who will be 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.

2.3 Within the foregoing, admittedly anecdotal, context, it would appear that all the steps that are proposed in this paper have demonstrated themselves, to a greater or less extent, already to have been successful over the past seven days, at the very least as proof of concept.

### 3. 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. 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.

3.3 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.”

3.4 Finally, 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 given 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.

#### **4. LEGISLATIVE FRAMEWORK**

##### **Statutory Basis for Remote Access**

4.1 The Coronavirus Bill 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 Bill 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 Bill 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 Bill in respect of the use of remote hearings by the Family Court or the Family Division of the High Court. Further, the Bill 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 Bill, which defines remote hearings, recognises that participants in those hearings will be differently located and that all participants could be in separate locations. The Bill 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(k) 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. 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. CHALLENGES**

5.1 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.

### **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. 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 and how orders will be drawn and sealed (the Clerk of the Rules advises that an electronic seal for the Family Division of the High Court is still some way off). 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.

### **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 is a critical need to identify which platforms, in addition to Skype for Business and Microsoft Teams, the judiciary can engage with.

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).

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.

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).

## **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**). Within this context there is a need for approval to be sought from the Designated Family Judges with the agreement of the President of the Family Division for the use of e-bundles in the remote hearing class of cases where this has not already been done.

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.

## **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 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 restarted 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. 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. 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.

## **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 there has been anecdotal evidence that interpreters are stating that they must use their own telephone system in order to record their hours but that their system is incompatible system being used by the judiciary. Again, all of these issues need resolution as a matter of urgency.

### **Use of Intermediaries**

5.15 FPR Part 3A governing vulnerable adults will continue to apply to remote hearings. Intermediary companies have contended 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 indicated that it is set up to work remotely. However, their communication also indicates that their intermediaries are *currently* receiving training on how to provide remote intermediary support and that they are *currently* consulting with staff on their respective remote working capabilities. This suggests that there is still significant work to be done. 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.

### **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. 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](mailto:highcourt@pa.media) in advance of a hearing, which would ensure all of PA's High Court team are notified of the arrangements.

### **Litigants in Person**

5.19 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. 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. Second, there is likely to be a not insignificant cohort of 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 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. 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/>

### **Security**

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. This primary security risk has been recognised in the Coronavirus Bill. Section 53 of the Bill 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. It is to be anticipated that these provisions will become law. 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.

## **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. 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. Without such a requirement the attendance time is the hearing time. If the hearing last less than one hour then the fee is significantly reduced. With respect to the use of remote hearings, where the hearings take place by telephone or video link there is no requirement to attend at court beforehand. This is likely to lead to pressure from the Family Bar and solicitors for a direction that replicates the 'attendance for pre-hearing discussion' direction in the context of remote hearings. The following is an amalgam of a number of suggestions received so far:

"For the purposes of the hearing the parties and/or their respective legal representatives are required by the court to attend, remotely if necessary, a pre-hearing discussion no later than 1 hour before the hearing time for the purpose of discussions/negotiations to enable an effective commencement of the remote hearing at the allotted time."

5.22 The FLBA has indicated that FAS judges certification forms are not required for remote hearings and, accordingly, FAS forms need not be sent to judges at this time (in contradistinction to the information available at the time of the President's Guidance of 19 March 2020). The FLBA have suggested that the order made by the court records the name of the advocate and the time the hearing is listed (subject to the matters set out in the paragraph above) as FAS 'bolt on' payments can be self-certified.

## **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.

## **6. TIMESCALES**

6.1 It is self-evident that a remote access Family Court must be available now. 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 from today to the introduction by MOJ / HMCTS of CVP and the other remote hearing elements of the reform programme. Second, the period from the introduction by the MOJ/ HMCTS of CVP 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 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 beds down or if it encounters technical issues, in circumstances where its level of immediate and sustained utilisation will be *much* higher than that envisaged when it was in the planning stages.

## **7. PRIMARY REMOTE COMMUNICATION PLATFORMS**

7.1 One of the saving graces that has become apparent in the last seven days is 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**). 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.

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 over the course of the past week:

- (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.

### **MOJ/HMCTS Cloud Video Platform**

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). 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.

### **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 (Legal Connect, Kidatu and Arkadin). 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. 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. 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.

### **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. 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. 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.

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 is also concern about the sustainability of recording the hearing, although this has been remedied by re-starting the recording every thirty minutes. Skype for Business also lacks a side meeting function, which is useful during the course of a remote hearing. 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. 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.

### **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.

### **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 and encryption of the meetings with password protection. 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.

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. 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.

## **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 – 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 is simply not going to be possible pending the arrival of the MOJ/HMCTS Cloud Video Platform 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, the need for a high number of remote hearings will 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, judges, lawyers and litigants should be able to choose from a suite or 'Smorgasbord' 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. Further, subsequent to the arrival of CVP, judges, lawyers and litigants should continue to be able to choose from the 'Smorgasbord' of platforms as a contingency and a means of maintaining multiple failsafe redundancies in what will be a vital public service. Within this context, the Remote Family Court is 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. Flexibility, the use of local resources and expertise and not getting hung up on a single option must be the key operational principles.

8.3 A number of extremely pressing problems remain that will need to be solved rapidly 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) There is an urgent need to consider now, in respect of each court centre, how proceedings will be issued remotely, and how orders will be drawn and sealed, if that court centre and court centres near it are forced to close their doors.
- (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 those 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) There is an urgent need for consistent step by step instructions to be provided to all judges to enable them to use the available software communication platforms effectively.
- (g) Where it is required, there is an urgent need for DFJs to approve, with the agreement of the President of the Family Division, the use of e-bundles in all remotely conducted hearings.
- (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 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) Urgent consideration needs to be given, in co-operation with the legal aid agency, to how the FAS will operate within the context of the majority of hearings being undertaken remotely.
- (p) Urgent consideration is needed of how the new default position of remote hearings is to be communicated to the public at large.

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, 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, 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**.

**MacDonald J**

23 March 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.
- (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.

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.

##### ***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 unless absolutely necessary due to the risk of creating a pathway of infection. 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. When enacted, the s 53 of the Coronavirus Bill will provide 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 will 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. 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.

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.

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."

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

The following communications and IT platforms are available in Chambers in London and in the Regions. I am extremely grateful to the FLBA for the prompt gathering and provision of this vital information.

REGION	TYPE OF EQUIPMENT	CHAMBERS	FACILITY TO RECORD	OFFER TO JUDICIARY
<b>London</b>				
	Lifesize	29 Bedford Row	YES	TBC
	Lifesize	4 Paper Buildings	YES	TBC
	Lifesize	1 KBW	YES	TBC
	Lifesize	4 Pump Court	YES	TBC
	Lifesize	QEB	YES	TBC
	Zoom	36 Family	YES	TBC
	Zoom	1GC	YES	TBC
	Zoom	Fourteen	YES	TBC
	Zoom	1 Hare Court	YES	TBC
	Microsoft Teams	Harcourt Chambers	YES	TBC
	Lifesize	Pump Court Chambers	YES	TBC
	Skype for Business	42 Bedford Row	YES	TBC
	Zoom	Coram Chambers	YES	TBC
	TBC	Newcourt Chambers		
	No Facilities	5 Pump Court		
	No Facilities	3 Doctor Johnson's Buildings		
<b>Yorkshire, Humberside and North East</b>				

	Zoom and in process of obtaining Lifesize.	Wilberforce Chambers, Hull	YES	YES
	Skype for business	St John's Building, Sheffield	YES	YES
	Lifesize and Zoom	Spire Barristers, Leeds	YES	YES
	Horizon Collaborative video link Members will download Lifesize and Zoom	Dere Street, Newcastle and York	YES	YES
	Aethra v Tech (ISDN)	Trinity Chambers, Newcastle	NO	
	Lifestyle and Teleconferencing	Park Lane Plowden, Leeds and Newcastle	YES	Possibly depending on demand
	Polycon Convene 6	New Park Court, Leeds	NO	YES
	Will look to subscribe to Zoom/Lifesize	Broadway House Chambers, Leeds and Bradford	YES	YES
<b>North West, including North Wales and Chester but excluding Manchester</b>				
	Skype for Business and Microsoft Teams	St Johns Buildings, Liverpool and Chester	YES	Yes but note admitting other people to Chambers
	Secure Bridge Video Link to courts via Vodafone and Involve cloud room for video conference and could do hearings	15 Winckley Square, Preston		YES

<b>Manchester</b>				
	Skype for Business and Microsoft Teams Will to subscribe to zoom/Lifesize	St Johns Buildings	YES	YES but not admitting other people into chambers
	Skype	Cobden House	YES	
	Meet me and Microsoft teams	Kenworthys		
	Starleaf	Exchange		
	Zoom and Lifesize	Central	YES	YES
	Lifesize/Zoom Willing to subscribe	18 St John Street	YES	YES
	Will look to subscribe to Zoom/Lifesize	Deans Court	YES	YES
<b>West Midlands</b>				
	Video Link. Looking to obtain Lifesize or Zoom	No5, Birmingham		
	Video link ISDN. Looking to obtain Lifesize or Zoom	St Ives Chambers, Birmingham	NO	YES
	Video link IP/ISDN and Skype ( not for business). Looking to obtain Lifesize or Zoom	St Philips, Birmingham	NO	YES
	Zoom through a third party bridging Link provider with secure links and Microsoft Teams Willing to sign up to Webex or another service	Cornwall Street, Birmingham	YES	YES
	Video Conference Suite	Regent Chambers, Stoke	NO	YES

<b>East Midlands</b>				
	Skype for business on individual laptops	St Mary's, Nottingham	YES	NO
	Video Link, Skype for business	KCH Garden Square Chambers, Nottingham	YES	NO
<b>Devon and Cornwall</b>				
	None			
<b>Kent and Sussex</b>				
	None			
<b>Bristol, South Gloucester and Somerset</b>				
	Lifesize and video link	3 PB, Bristol	YES	YES
	Video conferencing, skype, getting Lifesize	St John's Chambers, Bristol	WILL HAVE	YES
	Skype Lifesize recommended for individual laptops	Albion Chambers, Bristol	YES	YES
<b>Wessex</b>				
	Lifesize	Pump Court Chambers, Swindon and Winchester	YES	TBC
	Skype	College Chambers, Southampton	YES	TBC
	Yes , type unknown	3PB, Winchester	TBC	No due to containment policy
<b>East Anglia</b>				
	Skype/ Microsoft Teams and Zoom	Fenners Chambers, Cambridge	YES	YES
	None	East Anglia Chambers		

	None	Regent Chambers		
<b>South Wales</b>				
	Skype professional and Vodaphone secure	30 Park Place, Cardiff	YES	YES

## Appendix 4



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 \_\_\_\_\_