Remote hearings

An overview of the most recent case law

Practitioners will be only too familiar with the plethora of guidance we have received in recent weeks in connection to remote hearings. 'The Remote Access Family Court' guidance by Mr Justice MacDonald, version 4 dated 16th April 2020, is essential reading. Yet court judgments are now filtering through which provide guidance as to how remote hearings should be dealt with.

One key case is that of *Re A (Children) (Remote hearing: Care and placement orders)* [2020] EWCA Civ 583, heard in the Court of Appeal, the leading judgment having been written by the President of the Family Division.

The case involved care proceedings for six children. The final hearing was set to decide the long-term plans for the four youngest children. The local authority proposed long-term foster care for the two eldest, and adoption for the two youngest.

The case had been listed for a five-day final hearing. That had been vacated at the beginning of the Covid -19 crisis but a hearing was listed to consider how best to progress the case. The Judge had decided that a hybrid hearing ought to take place whereby the parents could attend in person and give live evidence, and the father could attend during the whole hearing as he did not have suitable technology to engage otherwise. A further hearing took place which ended with the same conclusion. The father appealed that decision. At the first hearing, both the local authority and children's guardian had favoured a remote hearing in view of the adoptive plan for the two youngest children, time being of the essence. At the second hearing, the local authority no longer submitted the need for a remote hearing, although the children's guardian did. It is noteworthy that the Judge had incorrectly cited the second youngest child's age as being a year more than what it was, which appeared relevant to the Judge in view of the adoptive plan.

The appeal was allowed. The case was not considered suitable for a remote hearing because of the father's inability to engage adequately owing to his particular vulnerabilities, the imbalance of procedure in requiring the parents, but not all parties, to attend court, and the need for urgency was not sufficiently pressing.

We are reminded that the case law is guidance and the following 'cardinal points' are emphasised:

a) This approach should not apply generically in every case. The appropriateness of a particular type of hearing, remote or otherwise, must be individually assessed by the tribunal of that hearing. We are reminded that the court of first instance has a wide ambit of discretion when making case management decisions;
b) Guidance issued by the senior judiciary is nothing more than guidance;
c) The situation is changeable and what may have been deemed appropriate at one stage of proceedings may no longer be the appropriate way forward now.

As such, the key issues which parties and the court are likely to have to grapple with when determining decisions on remote hearings are:

a) The importance and nature of the issues to be determined – is the outcome sought an interim or final order;
b) Whether there is a special need for urgency or whether there could be a later hearing without causing significant disadvantage to the child or other party;
c) Whether parties are legally represented;
d) The ability of lay parties to properly engage in a remote hearing. This should consider their own abilities as well as the resources available to them;
e) Whether the case is to proceed on evidence or submissions;
f) How the evidence to be considered has been sourced;
g) The length of the hearing;
h) The means of technology proposed to be used;
i) The experience of the court and those involved in conducting remote hearings;
j) Any available safe alternatives.

The second key case, that of *B (Children)* [2020] EWCA Civ 584, was an appeal heard the day after the aforementioned case. This case dealt with an interim hearing. The appeal concerned a nine-year-old boy – Sam - (and his sibling, although the order made for her was not appealed) now subject to an interim care order and having already been removed from his grandmother's care (who was his special guardian) following a telephone hearing. On 20th March 2020, the police were called to the home following the sibling reporting she had been hit by her aunt, an allegation denied by the grandmother. In any event,

that child was made subject to a police protection order whereas Sam remained in his grandmother's care. The grandmother later revoked her section 20 consent for the older child's accommodation in foster care which prompted the local authority to issue proceedings. Notably, that application was for a supervision order for Sam with no plan of removal. The social worker did not, in the initial SWET document, analyse the removal of Sam into foster care, this not being the position of the local authority.

Thereafter, the case progressed speedily over the course of twenty-four hours. It was apparent from the chronology that there was an exceptionally limited window of opportunity for those representing the grandmother to take full instructions, even without the shift in the local authority's plan. Furthermore, the way the case progressed meant that it was not possible for those representing the grandmother to prepare any sort of evidence or position statement on her behalf in advance of that first hearing. An application to adjourn made by the grandmother was never fully considered.

What caused the local authority to change its plan was the position statement of the children's guardian – that document recommended Sam ought to be removed from his grandmother under the auspices of an interim care order. What was apparent to the Court of Appeal was that the guardian had not made any enquiries with the grandmother (nor with Sam) and had based the analysis entirely on the written evidence of the local authority. Furthermore, the children's guardian was not then available for the hearing. The court expressed concern there was no written analysis by any professional as to the possibility of Sam being removed with no or little notice, nor any information about his wishes and feelings. The reality was that nothing had happened between 20th March 2020 to the hearing to justify immediate removal, only the views of the guardian.

The thrust of this case emphasised the importance of fairness to all parties and the need to ensure justice is delivered. It was described as a 'classic case' for an adjournment and that legal and procedural requirements had been compromised.

Where then does that leave practitioners? These cases both serve to usefully restate reminders of procedural fairness, which should be obvious. It is to be expected that difficulties may arise as a result of the Covid-19 pandemic (not least because we are all still learning how to deal with these circumstances) but, no matter the issues in the case or the current progress of the pandemic, justice cannot be sacrificed

– the premise of the overriding objective remains crucial and the right to a fair trial remains a fundamental human right.

(law correct as of 5th May 2020)

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