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Response to	Consultation on the use of remote hearings in the family justice system during the Coronavirus pandemic
Issued by	Nuffield Family Justice Observatory for the President of the Family Division
Link to consultation	https://www.nuffieldfjo.org.uk/news/rapid-consultation-remote-hearings
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About the Magistrates Association

The Magistrates Association is an independent charity and the membership body for the magistracy. We work to promote the sound administration of the law, including by providing guidance, training and support for our members, informing the public about the courts and the role of magistrates, producing and publishing research on key topics relevant to the magistracy, and contributing to the development and delivery of reforms to the courts and the broader justice system. With over 14,000 members across England and Wales, we are a unique source of information and insight and the only independent voice of the magistracy.

Questions

1. Have you had direct experience of a remote hearing?

Our members inform us that remote hearings are being conducted in variable ways in different areas.

Although work is not carried out by Tier 1 judges in all areas, even where they are not sitting magistrates can be on stand-by to deal with any decisions that legal advisers cannot authorise under delegated powers.

2. If yes, what sort of hearing was it, which court centre was involved, through which remote method was it conducted and what was your role?

Our members tell us that case management hearings can work well, as can any hearings that involve ordering adjournments for reports to be prepared.

Some hearings are dealt with via conference call, with others via video link. Video link is seen as preferable, but it seems that audio only can be suitable for progressing certain cases.

3. What factors worked well?

Our members have found that it is very important for there to be a system to triage and review cases in order to decide what matters can be removed from the lists, and what must be taken forward remotely. They say that decisions often need to be made on a case by case basis to ensure an appropriate approach.

Our members report that those hearings where parties are legally represented work well. Public law cases are therefore generally more manageable than private law cases via remote hearing. In private law cases, where parties are litigants in person, it can be more challenging to chair the hearing, especially when they are unable to access assistance from a McKenzie Friend.

Our members found that it was very important for all documents to be shared in advance with relevant parties electronically (in respect of the judiciary, necessary papers are sent via eJudiciary accounts, which works well).

Key to a fair hearing is for all parties to be well-prepared before the hearing starts, and for the Presiding Justice to take the time to explain the process, and ensure everybody understands the ground rules at the start. Conducting remote hearings is a new skill, but local guides have been produced by those with experience, and have been considered very helpful.

4. Did you have any concerns?

The MA has previously expressed concern that fully video hearings are rarely going to be appropriate for hearings in family court, apart from certain administrative hearings dealing with case management issues.¹ We were particularly concerned that the majority of cases involve litigants in person, whose ability to participate may be severely restricted if hearings are carried out remotely. Also, the fact that particularly sensitive issues are being discussed in family court would usually necessitate face to face hearings. While we understand that remote hearings will need to be conducted while 'lockdown' measures are in place in order for cases to progress, we do not consider that this would be a satisfactory approach once restrictions are lifted and would not support increased use of remote hearings if and when face to face court hearings can resume.

In relation to private family law cases, which often involve litigants in person, our members tell us it can be more challenging to chair a hearing where one party is represented and the other is not. We are concerned that if not represented, a party may feel pressurised to agree something during a hearing, without time to consider the full implications. Remote hearings may also limit the opportunity for legal advisers to ensure that litigants in person are fully prepared before the start of a hearing.

Some of our members have identified concerns that relate to it being more challenging for CAFCASS to carry out the necessary investigations and therefore produce sufficiently detailed reports.

An additional concern that relates to remote hearings during the coronavirus epidemic is the appropriateness of accessing hearings from home, rather than using an accredited hearing centre.

¹ See previous responses including: <https://www.magistrates-association.org.uk/Portals/0/20%20Judicial%20Ways%20of%20Working%20FAMILY%20response%20June%202018.pdf>

Relying on parties' own IT technology may put certain people at a disadvantage, if they do not have a laptop, or secure Wi-Fi that allows video meetings. Another concern is practical in nature – if a party is self-isolating at home with their children or other family members, it may not be possible for them to secure privacy for any hearing. This is particularly pertinent in relation to cases where there are allegations of domestic abuse, and there are concerns over the safety of one or more parties. The specific challenges involved in parties seeking emergency Non-Molestation Orders or Occupation Orders while lockdown measures are in place, and alleged abusers may still be living with them, will need to be carefully managed.

A further issue raised by members is that of remote video links from private locations where domestic abuse is a factor is the risk that a refuge location (or alternative accommodation which must not be traced by an alleged perpetrator) may be inadvertently revealed. In such cases, particularly if special measures are requested, it may be beneficial to hold such initial remote hearings without visual display in the interests of safety.

For cases involving children, we are concerned about the risk to children of being exposed to proceedings and adults' discussions of child arrangements if their parents or carers are taking part in remote hearings, considering that adults involved may not have access to a private location in which to attend from home. Where possible, it may be prudent for such parties to use equipment such as headphones, to reduce what can be heard by any children present as far as possible.

5. If you have concerns, do you consider that this way of working was justifiable in the short term?

Although we are very concerned about the use of remote hearings where any parties are litigants in person, and there are contested issues to be resolved, especially those involving children – we also realise that delays can be very damaging for any decisions involving children. Even where cases do not involve emergency orders or hearings, where decisions are being made in relation to where children are to live, and who is to have parental responsibility, delays will have long-lasting impacts. Therefore it is vital that cases are progressed where possible, even if it means working remotely.

6. How could the experience be improved in dealing with the current crisis?

- Legal advice and representation for all parties: it is important that parties understand the process, and accessing legal advice prior to any hearing will therefore be key as well as assisting parties in putting forward any views they may have on the appropriateness of utilising video link technology.
- Guidance needs to be provided to courts to ensure they take into account all relevant factors in deciding whether a remote hearing should go ahead, or whether a case must be adjourned. This will need to include an assessment of the suitability of the location, and available technology that parties will be relying on to access hearings – factors such as who else will be present should be considered. Guidance and online training should be provided for the judiciary on how to manage remote hearings to facilitate participation of all parties. This could include a protocol or checklist of ground rules for the hearing, which can be provided to all parties, and explained at the start of the hearing.
- Considering identification of any vulnerabilities – especially communication challenges which will require additional support to allow participation. Guidance will need to be provided to

courts, and staff, as to what support can be used to support participation for remote hearings. For example, if a party needs a translator, then it may be possible to use sequential, but not simultaneous translation.

We would note that the current court reform programme involves plans to increase the use of live links for court hearings. It may therefore be useful to capture the impact of their use during the coronavirus pandemic, and in particular capture the experiences of parties to inform the future court reform programme.

7. Have you had any direct feedback from lay clients or third parties (intermediaries/interpreters/experts) as to their experience of the remote hearing?

No

8. Are you happy to be contacted for further questions?

Yes