NEW COURT NEWS

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New Court Blog

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New Court News: Issue 15

A very warm welcome to readers of this latest edition of our newsletter.

Since our last full newsletter, in November 2019, life as we know it has changed in the most remarkable and unexpected way.

So many of us have lost loved ones or experienced the other devastating consequences of Covid-19. As regular users of Luton Family Court, our thoughts turn to Mary, a loyal clerk to the Luton Judges, who sadly died relatively early on in the pandemic.

As we grapple with the 'new norm', we hope that the articles in this newsletter will draw together some of the latest developments and assist with an understanding of the impact of Covid-19 on family law.

Part of our 'new norm' is New Court functioning remotely. Like the rest of the profession, we are grappling with the difficulties of hybrid hearings and Saiqa's article expands on some of the challenges associated with such hearings.

In normal times, we would be about to invite you to our summer party. Sadly, that's not happening this year, a casualty of current circumstances. Let's hope that by the time of the next newsletter, we are putting together the guest list for the Christmas do; a bigger and better party than ever. We all deserve that!

Stay safe and well and best wishes, CP and GB.

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New Court News

by Jemimah Hendrick

Chambers

During this difficult time Chambers wants you to know that its members and clerks are here to help. The pressure is on everybody to adapt to a new way of working and Chambers as a whole is striving (and succeeding!) in keeping on top of the ever-changing case law and guidance as well as hearing platforms.

Members are keeping up to date with all the relevant statutory changes and case law and are here if you have any queries. You should be confident that in instructing a member of New Court, you will have a knowledgeable and capable advocate.

The clerks, whilst not in Chambers currently, are still readily available on clerks@newcourtchambers.com or 0207 583 5123.
For Out of Hours applications please ring the normal number and it will provide you with information on how to access someone for an Out of Hours application. Members of Chambers are experienced at undertaking these.

In terms of assistance with hybrid or remote hearings, advocates meetings and conferences the clerks are able to assist with:

- Microsoft teams - video and audio and can include recording
- Zoom – these are most often used for conferences and advocate's meetings but have also been used in hearings. This again can be video or just audio and can include recording and break out rooms.
- Powwow – the clerks are still able to assist with dial in details for those matters taking place via Powwow

The clerks have also been looking at how to assist with electronic bundles and have had success in assisting with the distribution of bundles to the judiciary.
The clerks are keeping on top of the ever-changing landscape in relation to this new way of working so please do contact them if you have a query and they will see if they can assist.

Sisters in Law

In what now seems decades ago, but actually happened on the 17th November 2019, the members of chambers Nisa-Nashim Sisters in Law group hosted a Chanukah party complete with Chanukiah, candles and of course, the traditional fare of doughnuts.

Elissa Da Costa-Waldman gave a short talk on the Chanukah story and the dispute between the Maccabees and the Greeks of that historical period, together with an account of the story of the miracle of the oil which appeared sufficient for one night but lasted for eight. The group of barristers and their solicitor guests enjoyed hearing about the traditions of Chanukah especially the present giving! There then followed a discussion of some Muslim traditions at Christmas while the doughnuts were devoured with gusto.

Moot

In March 2020 members of chambers (Christopher Poole, Saiqa Chaudhry, Jemimah Hendrick and Kathryn Blair) judged a mooting competition at King's College London. The winner was William Nash and he will be offered a mini-pupillage at chambers once the Covid 19 restrictions are lifted.

Pupil News

During these difficult times a thought is spared by all of chambers to our pupils Kiran Channa and Katelyn Gottschling who have started to accept their own work. Appearing 'on your feet' for the first time is, at any time, a nerve wracking experience but they are also having to contend with a worldwide pandemic and the court service attempting to work remotely. Kiran and Katelyn remain supported by their supervisors and Chambers is proud of how they are coping in these extreme circumstances.

Reported Cases

by Jemimah Hendrick

I (Children: Child Assessment Order) [2020] EWCA Civ 281

This case was a real chambers affair, with parties being represented by Saiqa Chaudhry, Kyri Lefteri and door tenant Leslie Samuels QC. The case was a novel case involving a contested Child Assessment Order and the powers of the court to make such an order under s43 CA 1989.
The Court of Appeal ruled that the judge at first instance *could* of made the order and in this instance *should* of.
[This case was also reported on Suesspicious minds (https://t.co/8vdr3m2hP0?amp=1).]

S-P (welfare hearing) [2019] EWFC B77
S-P (FGM; fact finding) [2018] EWFC B101
S-P (FMG; reopening fact finding) [2019] EWFC B76

Joint Head of Chambers Christopher Poole represented the local authority in a series of FGM cases. The court made findings of FGM and attributed those findings to the parents. Following the initial fact finding the parents were subject to criminal proceedings. During those proceedings the parents were acquitted. The family court then considered whether or not its findings should be reopened and the court declined this application.

C (A child) (Special Guardianship Order) [2019] EWCA Civ 2281

Nicola Hall successfully appeared in the Court of Appeal on behalf of the local authority opposing an appeal from the mother that the judge was wrong to make a SGO. The case raised interest for its exploration into 'breatharians' a belief that through mediation and enlightenment a person can achieve a state where they do not need food to survive and can survive on sunlight alone.
[this was also reported on susspiciousminds https://suesspiciousminds.com/2020/01/12/every-breath-you-take/]

K (Children) [2019] EWCA Civ 2264

Christopher Poole successfully supported an application for appeal in the Court of Appeal on behalf of the children through their guardian. The Court of Appeal held that the judge was wrong to discharge ICOs and replace them with ISOs on an interim basis.

Re C (Female Genital Mutilation and Forced Marriage: Fact Finding) [2019] EWHC 3449 (Fam)

Sam Wallace represented a local authority before Mrs Justice Knowles in a fact finding in relation to FGM and Forced Marriage. Sam was praised for the assistance he provided the court. The court made the findings sought by Sam on behalf of the local authority.

Re N (A Child) [2019] EWCA Civ 1997

Our Andrew Shaw appeared for the local authority in the Court of Appeal. Lady Justice King praised Andrew for his 'considerable skill' in putting parts of the transcript to the court in support of his case. The Court of Appeal upheld the mother's appeal that she had been deprived of assistance of an intermediary that would of enabled her to give her best evidence in a fact finding hearing and the judge was wrong not to consider that her right to a fair trial had been compromised.

Local Authority v Mother & Ors [2020] EWHC 1216 (Fam)

Christopher Poole was led in a fact finding before Mrs Justice Lieven in relation to the circumstances surrounding the death of a 13 year old boy. The case had a number of interesting features including extensive police surveillance that came to light part way through the fact finding. The judge found that the child was killed but that she could not determine who the perpetrator was.

What happened while you were out – things to note in June 2020

By Sam Prout

Public law has been spared from much of the slowdown affecting our colleagues in other areas. This is good news for work enthusiasts, bad news for my summer tanning ambitions.

On the ground we have quickly had to get to grips with novel ways of working and a patchwork of procedures and information technologies. Not all courts are approaching lockdown in the same way but on the whole we're making it work. *[If by making it work you mean hearings in hoodies then I agree! – Ed]*

There have been a few recent decisions which are now routinely being raised at court and public law practitioners should make sure they are familiar with them. So, in case you missed them, here is a whistle stop tour of *Re A*, *Re B*, and *Re H*. Also a word on contact and a threshold reminder.

Re A (Children) (Remote Hearing: Care and Placement Orders) [2020] EWCA Civ 583:
Re A provides us with cardinal points [para.3], principles [para.8], and factors [para.9] to consider where a court is being asked to proceed with a remote hearing. The judgment is concise and should be read in full. Bullet points to remember:

- Whether to proceed with a remote hearing is a case management decision for the judge or magistrate hearing the case.
- Like all hearings, a remote hearing should be fair, accessible, just, and the subject

- children's welfare must be key in the minds of the parties.
- Like all guidance, guidance given by higher courts or by senior judiciary about remote hearings is only intended to give general recommendations for judges and magistrates, based on the prevailing authorities and circumstances at a particular point in time.
- Final hearings may or may not be suitable for remote hearing; it depends on a full range of factors including: the issues in the case, the needs and profile of each party, the intended scope of the hearing, the urgency of the issues for determination, and the technologies available to the court and each party.
- In cases with a plan for adoption there is "*a separate need*" for the child to know and understand in the future that an adoption decision was only reached after a "*thorough, regular and fair hearing*" [para.12].
- An appeal of a decision to hold a remote hearing will consider only the particular decision in that particular case. There is (and implicitly will be) no blanket or general rule for- or against- remote hearings.

Re B (Children) (Remote Hearing: ICO) [2020] EWCA Civ 584:
Essential reading for local authority practitioners (especially those preparing urgent applications for court). Should also be cascaded to court-facing social work teams. *Re B* concerned an ICO / removal hearing which had been conducted by telephone after a very long court day.

> *Any removal hearing must be as fair to all participants as possible*

Re B is a reminder, in very contemporary circumstances, that:

- Removal will only be sanctioned on good-quality evidence (as we all remember from *K (children) [2014] EWCA 1195);).* Your *Re C [1998] EWCA Civ 1998* points must always be satisfied; and
- Any removal hearing must be as fair to all participants as possible.

Crucially the Court in *Re B* identifies the important "*qualitative difference*" [para.35] between telephone and video hearings, implying that contested hearings should only be attempted by telephone in circumstances that are "*so urgent*" that they cannot wait.

In all other contested remote circumstances video hearings should be preferred, even if that requires an adjournment.

Re C (a child) (interim separation) [2019] EWCA Civ 1998 (and its companion, Re C (a child: interim separation) [2020] EWCA Civ 257) are also essential reading for anyone making applications for interim separation or advising local authorities on gatekeeping / legal planning.

One solution to the deficiencies of a fully remote hearing is to have a part-attended or hybrid hearing.

Members of chambers are increasingly representing clients in hybrid hearings and Saiqa Chaudhry describes her recent experiences on page 12. Hybrid set ups are now routinely being used for final hearings but may become useful for contested interim hearings (especially those with evidence). We should have more on this as social distancing measures are relaxed and courts reopen.

Re H (A Child) (Parental responsibility: Vaccination) [2020] EWCA 664:
A decision about the scope of local authority parental responsibility under s.33(3) Children Act 1989. The Court considered whether a local authority, which held a care order and placement order in relation to a child, could consent to the child being vaccinated against its birth parents' wishes. In its analysis the Court contrasted two High Court decisions: *Re T (a child) [2020] EWHC 220 (Fam) (the decision below) and the earlier Re SL (permission to vaccinate) [2017] EWHC 125 (Fam).*

The following conclusions can be drawn from King LJ's judgment in *Re H*:

- A local authority that shares PR for a child (by way of care order) can consent to the child being vaccinated where the local authority is satisfied that to do so is in the best interests of the child [para.104(ii)];
- Local authorities must take into account the views of parents but the strength of the parents' view is not determinative [para.104(iv)];
- There is no distinction on this issue between a local authority with a 'full' care order under s.31 and an interim care order under s.38 Children Act 1989 [para.25];
- The inherent jurisdiction is not an appropriate route to determine issues around parents' objection to routine vaccination of children in care - unless, in that child's particular case, it may not be in its best interests to be vaccinated (following strictly the 'significant harm' requirement of s.100(4) Children Act 1989) [para.90, para.104].

Unless a particular child's circumstances contra-indicate routine vaccination then the established scientific view is that routine vaccination is in a child's best interests. Unless there is a contra-indication vaccination is not a serious or grave issue for the court [para.104(i) and (iii)].

Contact:

Courts were initially very tolerant of local authority decisions to withhold in-person contact due to public health restrictions. The backlash has begun, with courts (properly) putting pressure on local authorities to be creative in complying with their obligations under s.34 Children Act 1989. Some options to consider:

- Drive-by contact: visits from the car window / front gate;
- Beauty spot contact: limited attendees, meeting at the park, and socially distancing between households;
- Virtual activity contact: playing games or watching a film together while on a videocall.
- Use of ISWs who are willing to supervise direct contact

Threshold:

Care proceedings, like basketball, are all about the fundamentals. Now is not the time to forget *Re A [2015] EWFC 11* (a.k.a. the other Re A) or the famous old poem: "*everyone enjoys precise, accurate pleadings / at the earliest stage in proceedings*" (- Nobody). A renewed focus on initial threshold will pay dividends if the return to in-person schooling in June 2020 (and phased reintroduction of non-essential services e.g. children's centres and contact centres) leads to an increase in new applications.

New Court Chambers continues to offer pre-proceedings threshold advice to local authorities (including bespoke threshold workshops for care lawyers). Tune into our social media or contact the clerks for more information.

Lastly:

Chambers is in the process of compiling a reference guide to the remote / socially-distanced approaches being adopted by the various Court Centres / Local Family Justice areas we appear in. Members are happy to advise on local practices and / or make suggestions for conducting a fair hearing in your local area. Just drop the clerks a line.

Understanding the implications of the Adoption and Children (Coronavirus) (Amendment) Regulations 2020

By Niamh Daly

The Adoption and Children (Coronavirus) (Amendment) Regulations 2020 ("the 2020 Regulations") were bought into force on 30 April 2020 as a temporary measure to assist the Children's Social Sector. They only apply to England and are set to expire on 25 September 2020. Once in force, they make amendments to the requirements imposed by ten separate Regulations in response to the current global pandemic.

This article seeks to "de-code" some of the key amendments made to the following Regulations:

(i) Care Planning, Placement and Case Review (England) Regulations 2010;
(ii) Adoption Agencies Regulations 2005;
(iii) Fostering Services (England) Regulations 2011; and
(iv) Children's Homes (England) Regulations 2015.

(i) Care Planning, Placement and Case Review (England) Regulations 2010 – ("the 2010 Regulations).

The 2010 Regulations make provision for the care planning of children who are looked after by a Local Authority, be that by virtue of a final or interim care order or not.

Placement with "Connected" Persons:

In practice, the common Regulations that public law practitioners often come across are those which relate to temporary placement of a child with a "connected person" as an alternative to continued placement with a parent or placement in foster care. Connected persons are defined under the regulations as "relative, friend or other person connected with the child" (Regulation 24(3)).

Where the Local Authority is satisfied that (a) the most appropriate placement for the child is with said connected person, but, the connected person is not approved as a local authority foster parent; and (b) it is necessary for the child to be placed with the connected person before their suitability as a local authority foster parent can be assessed, the Local Authority may approve that person as a local authority foster parent for a temporary period which would not exceed 16 weeks. This is known as "temporary approval".

Regulation 24(2) of the 2010 Regulations provides that temporary approval can only be given where the Local Authority has: -

(a) assessed the suitability of the connected person to care for the child including suitability of:

i. the proposed accommodation; and
ii. all other persons aged 18 and over who are members of the household in which it is proposed the child will live taking into account all matters set out in Schedule 4

(b) considered whether, in all the circumstances and taking into account the services to be provided by the Local Authority, the proposed arrangements will safeguard and promote the child's welfare and meet the child's needs as set out in the care plan;

(c) make immediate arrangements for the suitability of the connected person to be a Local Authority foster parent to be assessed in accordance with the 2002 Regulations (the full assessment process) before the temporary approval expires.

The crucial effect of Regulation 8 of the 2020 Regulations is to omit the need for the person to be approved to be "connected" to the child, the definition of connected persons too being removed from the Regulation entirely by virtue of Regulation 8(2).

The 16-week timescale has also been extended to 24 weeks, giving more time for the persons being assessed to be approved by as foster carer/s. Which can then be extended further pursuant to Regulation 25 for a further period of 8 weeks.

It is noteworthy that there is no relaxation of the requirements to allow for temporary approval nor further extension.

This will alleviate some of the pressures faced by Local Authorities seeking to place children outside of the family home in urgent circumstances where no placement with a connected person as prescribed by the previous definition is available nor foster placement. It may also however, raise concerns for parents who may feel they that with no prior knowledge of the proposed person to care for the child, the Regulation 24 assessment provides limited comfort or information and as a result may lead to further challenges to interim placement/ care planning at initial hearings.

The amendments will also allow for once a child is placed under Regulation 24, welfare visits are permitted to be conducted by telephone, video-link or other electronic means (Regulation 8(13) 2020 Regulations). If the Local Authority are unable to conduct a visits within the timescales provided (this being once a week until the first review and once every four weeks thereafter for children placed under Regulation 24 (Regulation 28(4)(a) and (b) 2010 Regulations) then they must visit as "soon as practicable" thereafter.

Emergency Foster Placement:

The Local Authority must be satisfied that the placement with foster carers is the best way of meeting their duty under s.22 Children Act 1989 and that such placement is the most appropriate, having regard to all the circumstances. Before any placement with foster carers can be made the Local Authority must be satisfied that:

(a) The foster carer is approved by the Local Authority; or
(b) Is approved by another fostering service provider, provided the following condition is met:

a. The foster service provider to whom the foster carer is approved and any other local authority which currently has a child placed with that foster care consent to the proposed placement;
b. The terms of the foster care approval are consistent with the proposed placement; and
c. The requirements of Regulation 28 of the Fostering Regulations 2002 ("2002 Regulations") are met, namely that the foster carer has been approved by the relevant fostering service provider and have entered into a foster care agreement in accordance with Regulation 28(5)(b) 2002 Regulations.

Under the 2020 Regulations, a significant amendment has been made to Regulation 23 which provides for where it is necessary to place a child in an emergency, the Local Authority may place the child with any local authority foster parent who has been approved in accordance with the Fostering Regulations 2002, even if the terms of that approval are not consistent with the placement.
Previously such placement was only permitted for a period of 6 working days, the placement being terminated thereafter unless the terms of that person's approval have been amended to be consistent with the placement. Within the Care Planning, Placement and Case Review 2015 ("CPPC 2015") [at 3.92] it is made clear that Regulation 23 should only be used in exceptional and unforeseen circumstances, this seems implicit from the previous short time limits for such placement.

However, Regulation 8(10) of the 2020 Regulations extends the permitted period of placement to 24 weeks. This significant extension does not appear to fit well with the policy behind placements under Regulation 23 and it is important to remember is that importance of contingency planning is not diminished by such extension. Hasty or immediate placements should be avoided as far as possible [3.88CPPC 2015].

Other key amendments:

Whilst not assessed in detail as above, the following amendments have been made which practitioners should be alive to:

a. The Local Authority are also no longer be required to have prepared a placement plan for the child as a pre-requisite of placement pursuant to Regulation 22(B) which provides the conditions to be complied with before placing a child in a long-term foster placement (Reg 8(9) 2020 Regulations).
b. The need for a LAC review to take place every 6-months is amended to take place "where reasonably practicable thereafter" (Reg 8(14) 2020 Regulations). However, it is important to note that this does not diminish the need to comply with statutory duties under s.22-22G Children Act 1989.

(ii) and (iii) Fostering Services (England) Regulations 2011 ("the 2011 Regulations") & Adoption Agencies Regulations 2005

Fostering and Adoption panels

The Fostering and Adoption Panels are key safeguard in the establishment and monitoring of foster carers and provide objective independent oversight to the process.

It is against this background that it was mandatory that prospective foster carers and adopters be placed before a panel under Regulation 23(4) of the 2011 Regulations and Regulation 4 of the 2005 Regulations. It is therefore concerning that the 2020 Regulations remove the requirement for such panels to be convened substituting "must constitute" for "may constitute" (Regulation 9(6)(a)(i) & Regulation 4(2)(a)(i) 2020 Regulations)

Other key amendments:

(a) All providers, managers or directors of fostering services must notify the Chief Inspector in writing of any criminal convictions. Under the 2011 Regulations, this was to be done, in writing, without delay. This is now to be done "as soon as is reasonably practicable".

(b) There is no longer a need for a medical report to be provided when considering the health of a prospective foster parent (Regulation 9(14) 2020 Regulations).

(iv) Homes (England) Regulations 2015 ("2015 Regulations")

Restraint and Depravation of Liberty

"Restraint" is defined in Regulation 2(1) 2015 Regulations as using force or restricting liberty of movement. Regulation 20 2015 Regulations sets out the only purposes for which restraint can be used as follows:

To prevent –
(a) Injury to any person (including the child);
(b) Serious damage to the property of any person (including the child); or
(c) A child who is accommodated in a secure children's home from absconding from the home.

Regulation 20(2) 2015 Regulations provides that these Regulations do not prevent a child being from being deprived of liberty where that deprivation is authorised in accordance with a court order. The 2020 Regulations have expanded Regulation 20(2) to include the powers under Schedule 21 to the Coronavirus Act 2020.

Schedule 21 only applies during a transmission control period and provides power to –

(a) Compel attendance at a place suitable for screening and assessment;
(b) Compel cooperation with screening and assessment; and
(c) Impose requirements and restrictions following assessment.

It relates only to "potentially infectious persons", those who may be infected or contaminated with coronavirus and there is a risk that they might infect or contaminate others or persons who have been in an infected area within the 14 days preceding that time.

The quality standards

The 2015 Regulations set out the standards that must be met by all Children's homes. Where a child is placed in a care home Regulation 6(3) 2015 Regulations provides that the conditions to be satisfied are –

(a) The care is approved, and kept under review throughout its duration by the placing authority;
(b) The care meets the child's needs;
(c) That the care is delivered by a person who –
    a. Has the experience, knowledge and skills to deliver that care;
    b. Is under the supervision of a person who is appropriately skilled and qualified to supervise that care;

That the registered person keeps the child's GP informed, as necessary, about the progress of the care throughout the duration.

The effect of the 2020 Regulations is that paragraph 6(3)(c) now reads "the care, in so far as is practicable, is delivered by…" This draws into question satisfactory the support for children will be in the event it is not practicable to ensure the care is delivered by someone appropriately skilled and qualified.

The education standard

Regulation 8(1) 2015 Regulations "provides that the education standard is that children make measurable progress toward achieving their educational potential and are helped to do so".

The registered persons are required to ensure that staff help and support the child in a number of ways set out at Regulation 2(a)(i)-(x). The 2020 Regulations dilute this, so that the registered person need only "use reasonable endeavours to" achieve the standards set out in Regulation 2.

Contact and access.

The 2020 Regulations provide that where defined persons under Regulation 22(1)(a)-(i) are unable to meet privately in person, (which importantly includes solicitors or other adviser or advocate acting for the child), then they must be able to speak privately over the telephone, video link or other electronic communication

Conclusion:

The amendments have certainly diluted some of the key safeguards in place and whilst this article has not been able to reflect in great detail upon the impact of the Regulations, it is safe to say that they are controversial and have been subject to widespread criticism by professionals and lawyers. Sir Kier Starmer has himself motioned a prayer against the Regulations, requesting that they be annulled[1].

Whatever practitioners' personal views, unless there is a review by the Secretary of State, they are in force until, at least 26 September 2020 and therefore understanding the changes made by these Regulations is crucial. It is hoped that the above has done what it aimed to do, and de-code what are, at face value perplexing.

[1](See https://edm.parliament.uk/early-day-motion/56926/children-and-young-persons)

Hybrid Hearings

By Saiqa Chaudhry (Barrister) and Kiran Channa (Pupil)

The phrase “a brave new world,” has taken on a new meaning; I recall it being used when the only thing concerning family practitioners was how we would ever be able to complete a care case in 26 weeks. However, in the last 3 months, in the midst of an unprecedented national health crisis, we are all becoming very familiar with not only those two phrases but also the ingenious ways in which we can all attend court without actually leaving our beds.

Many of us will now be comfortable with remote hearings and the various platforms which allow us to see exactly what kind of kettle the Judiciary favour, some of us may even have been so adventurous/desperate to leave the home and have attended court in person. What better than, to take the next step and combine the two into what is being described as “hybrid hearings”.

A hybrid hearing, as the name would suggest, is partly in person and partly via a remote platform. My recent experience was the use of Skype for the professional witnesses and everybody else attended in person. It was not smooth sailing but we made it work- necessity will do that. Below we look at the case law and guidance on remote hearings.

Case Plans

In *Re A (Children) (Remote Hearing: Care and Placement Orders)* [2020] EWCA Civ 583, the importance of a case plan when holding a remote/hybrid hearing was emphasised. In this case, HHJ Dodd ordered that the final hearing be listed as a hybrid hearing, over the course of 7 days, with the Mother and Father to attend court in person and all other parties and advocates to attend remotely. The Father successfully appealed this decision, the Court of Appeal’s primary reasons for concluding the matter was not suitable for a remote or hybrid hearing were as follows:

1. The Father had limited abilities, and some disabilities, which meant that he was less able to take part in a remote hearing. Fairness and the need for a party to ‘engage’ in the process includes their ability to follow and understand what transpires in the hearing and to be able to instruct their lawyers adequately and in a timely manner.
2. The imbalance of procedure in requiring the parents, but no other party or advocates, to attend before the judge.
3. The need for urgency was not sufficiently pressing to justify an immediate remote or hybrid final hearing.

The Court of Appeal emphasised that their decision does not mean that there can be no remote/hybrid final hearings on an application for a care or placement for adoption order. Instead, the appropriateness of proceeding with a particular form of hearing must be individually assessed depending on the nature of the case.

Prior to the appeal, and in preparation for the proposed hybrid final hearing, HHJ Dodd prepared and circulated a detailed case plan for the final hearing. This was a narrative document which recorded the salient features of the case and described the arrangements that had been proposed for the hearing. The Court of Appeal commented that this kind of document is likely to be useful whenever the court is considering the arrangements for a possible remote hearing of any substance.

It follows therefore, that in cases where a remote/hybrid hearing is being proposed, the parties and judge should consider collectively drafting and agreeing a case plan prior to the hearing. This document can cover all eventualities and circumstances that are relevant to the facts of the case to ensure that the hearing runs smoothly, some examples are:

- Intermediaries – how will they communicate with the party? What social distancing measures will be in place?
- Agreeing a witness template which accurately reflects the need for regular breaks during the course of the hearing. Many of us have experienced how tiring remote/hybrid hearings can be and therefore it is crucial to ensure that regular breaks are factored in.
- Interpreters – how will they be able to properly interpret for the party? What social distancing measures will be in place?
- Technology – ensuring that those participating remotely are able to join the hearing, be heard, listen and seen by all involved. This may involve parties and witnesses being provided with a device (i.e. laptop/tablet) to ensure that they can participate - participating in a hearing via a screen on a mobile phone is unlikely to be sufficient. A test run well in advance of the hearing for all witnesses who are going to be attending remotely should be undertaken, to ensure that any issues can be ironed out before the actual hearing.
- Ensuring that those who are giving evidence remotely are able to do so in a private setting and have been provided with a copy of the bundle and any other relevant paperwork they require to properly participate in the hearing.
- If a party is attending remotely, how they can provide their legal team with instructions and equally, how can their legal team advise them. The simplest way seems to be via email/message/telephone. However, this will of course increase the time estimates of the hearing and the need for breaks.
- Enquiring with the court prior to the hybrid hearing as to what social distancing measures they have in place and understanding exactly how each party will be able to socially distance from each other. This may help to reassure an anxious client who is nervous about attending court in person that the right safety measures are in place.

Depending on the facts and nature of the case, there may be other aspects that need to be taken into account in the case plan, for example if there are domestic violence allegations then special measures will also need to be considered. It appears invaluable therefore to have this written document agreed and ready for the hybrid hearing, so the parties, legal team, judge and anyone else involved in the case knows and understands exactly how the case is going to run.

This level of detailed case planning will no doubt require the trial advocates to have lengthy advocates meetings - whether and how that is funded remains unclear.

Intermediaries

A key example where a hybrid hearing may be considered more appropriate as opposed to a remote hearing is where an intermediary is required. Often, when an individual requires an intermediary, their stress/anxiety 'tells' are small and therefore this requires the intermediary to be physically present in order to be able to provide assistance, as the 'tells' will not be picked up via video. There are cases where an intermediary can effectively assist a party via video, however this will be in cases where the 'tells' are much more obvious. From my own experience, I have seen a fact finding hearing conducted remotely via Zoom, where two intermediaries were involved. The judge ensured that there were regular breaks and the intermediaries communicated with their client via messages throughout the hearing to ensure that they fully understood what was going on. Overall, the hearing was effective. However, each case must be looked at on its own facts, taking into account the individual's cognitive difficulties. In the case where a party requires an intermediary to be physically present in order to effectively participate in a hearing, it seems fair that a hybrid hearing is considered.

Professional Witnesses

The proposal for most hybrid hearings is that the professional witnesses (guardians, medical professionals, police officers, social workers etc.) give evidence remotely, and the parties, along with their advocates, attend the hearing in person.

One of the main reasons for this is that a crucial element of the judge's analysis is to assess the manner in which the parties give their evidence, as well as their demeanour in the court room, for example how they react to hearing other witnesses' evidence. This assessment is not easily achieved through a remote hearing. This differs from professionals, for example, CAFCASS very recently published their protocol for working with the family courts. They stated that they will continue to attend remote hearings, but where it is necessary to physically attend a court hearing, an assessment will be made about the vulnerabilities of the staff member and the safety measurements in place at the court.

A key example where a hybrid hearing may be considered more appropriate as opposed to a remote hearing is where an intermediary is required.

Ultimately, every hearing has to be decided on individual merits as to its suitability for a remote or hybrid hearing – unfortunately, there is no 'one size fits all' approach and the guidance is rapidly changing. The recent report from the Nuffield Family Justice Observatory *"Remote Hearings in the Family Justice System: A Rapid Consultation"* stated that the experiences of some parties, especially parents, in remote hearings have been extremely poor. For justice to work, there has to be equal access to it, as emphasised by the President in *Re P (A Child: Remote Hearing)* [2020] EWFC 32, practitioners must be alive to the issue of fairness and to ensure all parties are on an equal footing. Therefore, my view is hybrid hearings are inevitable, particularly in public law cases, where vulnerable parents are unable and incapable of mastering the technology required to join a hearing remotely.

Enforcing Court Orders – to commit to committal proceedings or not?

By Katelyn Gottschling (Pupil)

The decision to commence committal proceedings in family cases is one of last resort. It is a serious application that engages the respondent's human rights and may impact upon their personal liberty.

Committal proceedings may be brought when there is:

- A breach of a court order;
- A breach of an undertaking given to the court;
- In the face of the court (i.e. insulting a judge or misbehaving in court);
- Interference with the administration of justice; or
- For making a false statement of truth.

However, they are most often initiated when there has been a breach of an order.

These proceedings are quasi-criminal in nature and each allegation must be proved beyond reasonable doubt. The applicant needs to prove to the criminal standard that (a) the respondent has not complied with the order; and (b) it was within their power to comply with it (*Re L-W [2010] EWCA Civ 1253*, Munby LJ, paragraph 34).

The procedure for committal is detailed in Part 18 and Part 37 of the Family Procedural Rules ("FPR"). The rules detail the procedure that must be strictly complied with given the potential criminal repercussions of committal proceedings (i.e. imprisonment up to 2 years). In *LB Wandsworth v Lennard (Application for Committal) [2019] EWHC 1552 (Fam)*, at paragraph 3, MacDonald J, helpfully outlines the checklist of cardinal requirements prior to the commencement of any committal hearing. These are derived from FPR 2010 r37 and the authorities. They are as follows:

> *"(a) The committal application must be dealt with at a discrete hearing and not alongside other applications.*
>
> *(b) The order, the breach of which the alleged contempt is founded upon, must contain a penal notice in the required form and in the required location on the order.*
>
> *(c) The order, the breach of which the alleged contempt is founded upon, must be proved to have been personally served on the defendant or it must be proved that the defendant has otherwise made fully and properly aware of its terms in accordance with the rules.*
>
> *(d) The alleged contempt must be set out clearly in a notice of application or document that complies with FPR 2010 r 37, FPR r 37.10(3) requiring that the summons or notice identify separately and numerically each alleged act of contempt.*
>
> *(e) The application notice or document setting out separately each alleged contempt must be proved to have been served on the defendant in accordance with the rules. FPR 2010 r 37.27 requires a period of 14 clear days after service. Where the*

committal hearing is adjourned personal service of the adjourned hearing is required unless the respondent was in court at the time of the adjournment.

(f) The defendant must be given the opportunity to secure legal representation as he or she is entitled to.

(g) The committal hearing must be listed publicly in accordance with the Lord Chief Justice's Practice Direction: Committal / Contempt of Court – Open Court of 26 March 2015 and should ordinarily be held in open court.

(h) Consideration must be given to whether the allocated judge should hear the committal or whether the committal application should be allocated to another judge.

(i) The burden of proving the alleged breaches lies on the person or authority alleging the breach of the order.

(j) The defendant is entitled to cross examine witnesses, to call evidence and to make a submission of no case to answer.

(k) The alleged breaches must be proved to the criminal standard of proof, i.e. beyond reasonable doubt. A deliberate act or failure to act (actus reus) with knowledge of the terms of the order (mens rea) must be proved.

(l) The defendant must be advised of his or her right to remain silent and informed that he is not obliged to give evidence in his own defence.

(m) Where a breach or breaches are found proved on the criminal standard the committal order must set out the findings made by the court that establish the contempt.

(o) Sentencing must proceed as a separate and discrete exercise, with a break between the committal decision and the sentencing of the contemnor. The contemnor must be allowed to address the court by way of mitigation or to purge his or her contempt.

(p) The court can order imprisonment (immediate or suspended) and / or a fine, or adjourn consideration of penalty for a fixed period or enlarge the injunction.

(q) In sentencing the contemnor the disposal must be proportionate to the seriousness of the contempt, reflect the court's disapproval and be designed to secure compliance in the future. Committal to prison is appropriate only where no reasonable alternative exists. Where the sentence is suspended or adjourned the period of suspension or adjournment and the precise terms for activation must be specified.

(r) The court should briefly explain its reasons for the disposal it decides."

One of these mandatory requirements is that the defendant is given the opportunity to secure legal aid and be represented at the hearing. In *Hammerton v Hammerton [2007] EWCA Civ 248* the decision was successfully appealed on this very issue. Wall LJ states that Moses LJ's lead judgment in this case is required reading for committal proceedings. If these procedures are not complied with the application can be struck out.

In *Re K (A Child) [2014] EWCA Civ 905*, Russell J fell into error and was successfully appealed for not complying with the cardinal rules detailed above. The Court of Appeal held that the committal hearing and sentencing were unfairly approached. Lord Justice Macfarlane commented, that Russell J was rightly robust in her message to the father to return the child and emphasised the consequences of these breaches. However, this made it increasingly inappropriate for her to conduct the committal process. A further procedural error was that during the hearing, the father was not warned that he was not obliged to give evidence and was immediately cross examined. The Court of Appeal held that it was wrong for the Judge to proceed straightaway to sentencing without giving the father any opportunity to secure representation or make submissions about the gravity of the contempts or address mitigation.

Committal proceedings during the COVID-19 restrictions have not come to a halt.

In summary as to procedure, Part 18 and 37 of the FPR, outlines that the application must be made with evidence identifying each alleged breach and an attached draft order to be served personally on the respondent including the date of the forthcoming hearing. Holman J in *Re Dad (Application to Commit) [2015] EWHC 2655 (Fam)* emphasised that the order which the applicant is seeking to commit the respondent for not complying with, must have a warning prominently displayed on the front in line with Rule 37.9 FPR 2010. The committal application must be dealt with at a discrete hearing and not alongside other applications.

The FPR 2010, r37.27(5)(d) sets out as a general rule that committal proceedings are to be heard in public, however they may be heard in private to protect the interests of a child or protected party. Simply because the proceedings relate to a child does not in itself justify that the application should be heard in private. However, what must always be made public is the name of the respondent, nature of the contempt of court and the punishment imposed.

Hale LJ (as she was then), in *Hale v Tanner [2000] 2 FLR 879* at paragraph 26-35, details the available options that the court is able to impose including which punishments may be appropriate depending on the individual being committed. Once a committal order is made it must be served on the respondent either before or at the time of the execution of the warrant of committal. Warrant of committal must not be enforced more than 2 years after the date it was issued.

Committal proceedings during the COVID-19 restrictions have not come to a halt. The Lord Chief Justice considers that these applications are urgent work and require prioritisation. Most recently in the Chancery Division of the High court, committal proceedings have taken place via Skype and in the absence of the defendant. In *Frejek v Frejek [2020] EWHC 1181*, Mr Justice Roth had regard to the factors in Cobb J's judgment in the case of *Sanchez v Oboz [2015] EWHC 235 (Fam)* at paragraph 4 and 5, these were:

"i) Whether the respondents have been served with the relevant documents, including the notice of this hearing;

ii) Whether the respondents have had sufficient notice to enable them to prepare for the hearing;

iii) Whether any reason has been advanced for their non-appearance;

iv) Whether by reference to the nature and circumstances of the respondents' behaviour, they have waived their right to be present (i.e. is it reasonable to conclude that the respondents knew of, or were indifferent to, the consequences of the case proceeding in their absence);

v) Whether an adjournment for would be likely to secure the attendance of the respondents, or at least facilitate their representation;

vi) The extent of the disadvantage to the respondents in not being able to present their account of events;

vii) Whether undue prejudice would be caused to the applicant by any delay;

viii) Whether undue prejudice would be caused to the forensic process if the application was to proceed in the absence of the respondents;

ix) The terms of the 'overriding objective' (rule 1.1 FPR 2010), including the obligation on the court to deal with the case 'justly', including doing so "expeditiously and fairly" (r.1.1(2)), and taking "any … step or make any… order for the purposes of … furthering the overriding objective" (r.4.1(3)(o)).”

Roth J decided that given the defendant's previous conduct, it was appropriate to hear this matter remotely and in their absence. He found the defendant in contempt of court on all grounds. However, the court did not proceed with the sanction and issued a bench warrant in order for the defendant to be brought before the court for sentencing. The Chancery Division has continued to hear committal applications but will not sentence the defendant in absentia. Conversely, Mr Justice MacDonald in the Remote Access Family Court Guidance dated 16 April 2020, states that committal proceedings "will always need to be heard physically in court." Although the procedure for issuing and conducting committal proceedings is clear, there is a difference of opinion between the High Court Divisions on the issue of whether committal proceedings can and should be conducted remotely.

Members of Chambers are happy to advise you if it is in the interests of your case to pursue committal proceedings.

Arbitration and Covid 19 - a Webinar
Notes by Elissa Da Costa Waldman
Webinar by IFLA and 1GC

Elissa Da Costa Waldman attended a webinar on the impact of Covid 19 on alternagtive disupute reosltuion and specicialy on arbitration. This was held on 27 April 2020 and what follows are the key notes that Elissa found of interest from this webinar. The webinar was run by IFLA and 1 GC.

The President of the Family Division spoke first and said that this was originally a face to face seminar with 60 people and had, in the advent of corona virus become a remote webinar with in excess of 300 participants. The President said that 40-50% of hearings are talking place than normally take place and that these are the simpler hearings such as directions and case management. It is the longer and more complicated hearings that are being put off and there will be a substantial backlog of cases.

Also lockdown means that lots of relationships will not survive and there will be an upsurge after in that also. Private FDRs and Arbitrations are being offered remotely now and I encourage that because the courts will need all the help they can get – we live in very interesting times and the President said he was struck by the family lawyers' 'can-do' attitude. Arbitration now encompasses leave to remove cases which is helpful given that the courts will be dealing with care cases and domestic violence which has risen in lockdown.

HHJ Cryan spoke about the impact of the pandemic on DV cases, increased number of divorces and a tsunami of public law work. He went on to say that when the lockdown ends, arbitration can deal with matters swiftly, safely and possibly more cheaply because can deal with matters on paper, single issue cases and there will be much more for IFLA to do in the new post Covid-19 landscape. Arbitration etc will give the family justice system and the courts space to remarshal their resources.

Janet Bazley QC talked about relocation cases and that in the 'new normal', arbitration is the perfect arena for these cases because it gives the courts more space. It is hoped that the courts will encourage arbitrations under FPR 3.3 and 3.4. Suzanne Kingston said that she is working with seven London Chambers on a Protocol for remote arbitrations and a best practice document for private FDRs She said there are 301 Arbitrators of whom 210 deal only with finance, 91 deal with children and 41 do both kinds of work.

Nadia Beckett spoke about the Certainty Project and mentioned that fees are more certain. Baker J said there are three phases to be considered for family work which are-

1. Lockdown – now
2. Number of months where there will be continued social distancing
3. When social distancing will be lifted

This raises all sorts of questions such as where will cases be heard? Not all courts and courtrooms are suitable for hearing cases in a socially distanced way. Many are not suitable at all and this will vary across the country. Few DJ hearing rooms will be suitable. How many hearings cab be fairly heard remotely?

The consultation and report to the President will be available shortly. Remote hearings will continue for some time although it is often difficult for lay parties to participate. Social distancing restrictions impose significant burdens regarding conference rooms, cleaning, security just to name a few. There will likely be consideration of what other spaces can be used for socially distanced hearings. DFJs and the local HMCTS staff will have to deal with these issues in different geographical areas. The family justice system needs more judges although there are many recorders and deputy district judges although the restrictions on sitting days may need to be lifted but having said that there will still need to be consideration of the lawyers and other staff if there are to be more and longer sitting days. It will be very difficult to clear the backlog; therefore it will grow till long after social distancing comes to an end and a range of ADR is necessary, especially for private law children cases. Courts will have to triage work and give priority to domestic abuse cases, and public law children cases – costs are capped and its fast.

Munby LJ was asked about judicial encouragement of ADR and said that although it is in the FPR, it is sadly honoured more in the breach than in the observance but should be encouraged more now in the current climate. Munby LJ said that either people either have the knack or they don't for conducting a private FDR and he did not consider it was a skill to be taught or learned – these skills are not necessarily judicial.

Obviously things have moved on from this webinar at the end of April and the President has now circulated his map of 'The Road Ahead'. It is clear that he family court will not be operating in anything like the normal way before the end of this year and possibly not until the spring of 2021. On that basis it is incumbent upon us all to encourage our professional and lay clients to engage in the various forms of non-court dispute resolution.

I am pleased to say that New Court Chambers is able to offer mediation, collaborative law, family arbitration (finance) and private FDRs to enable you to progress your cases without waiting for the courts. Please contact the clerks for further information on clerks@newcourtchambers.com

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