Extract from FLBA address – 16th October 2021

On Saturday 16th October, in an address given to the Family Law Bar Association National Conference, I set out my view of the approach that should now be taken to remote working in the Family Court. This approach has subsequently been endorsed by each of the Designated Family Judges [DFJ] and Family Division Liaison Judges attending the President's Conference. It is not intended that further or different guidance will be issued by individual DFJ's.

I am therefore reproducing the relevant part of the text of my FLBA Address for wider distribution.

"The Future of Remote Hearings

We have now reached a stage in the playing out of the pandemic when it is possible to contemplate a gradual increase in the volume of cases that are heard in person in court, as opposed to remotely or at a hybrid hearing. Thus far, Baker LJ (as the judge overseeing 'recovery' in the Family Court and the COP) and I have decided against issuing any national guidance, let alone any Practice Direction, on this topic. It has been, and remains, our firm view that the circumstances around each case and each local court centre will vary to such a degree that any firm 'black-letter' direction or guidance would be inappropriate. The experience of the past 18 months has shown that judges and magistrates can and should be trusted to exercise their discretion on a case-by-case basis, within broad parameters, rather than being subject to unnecessarily restrictive and clunky national guidance.

It follows that, moving forward, it is not my intention to issue any formal Practice Direction or Presidential Guidance (with a capital 'D' or 'G') setting out firm categories of case that should, or should not, continue to be heard remotely.

The primary reason for not doing so is that I continue to believe that the decision as to the format for each hearing should be taken by the judge in charge of the case, unfettered by any prescriptive diktat from on high. From the start of the pandemic I have trusted the judiciary to exercise discretion in these matters. I consider that my trust has been well placed and there is no reason to change that approach now.

A second factor, amongst many others, is geographical. Whether it is necessary or proportionate to conduct an in person hearing, or a remote one, may well vary depending upon the distance from court, availability of public transport and other factors. National guidance that is unduly prescriptive might land well in the big urban conurbations, yet cause real difficulties in places such as Cornwall (where I conducted my first post-Covid court visit this week) or Cumbria.

Not issuing formal Guidance does not, however, address the desire of many involved in the work of the Family Court to have some basic understanding of what is now expected in general terms with respect to remote working. I therefore intend to use this address to set out some broad parameters within which judicial discretion will continue to be applied. What follows is NOT therefore formal 'Guidance', or, even less, a 'Direction'. My aim is to offer a steer and to describe the general direction of travel which courts should expect to follow, depending on the individual circumstances as they apply in each case and other local factors. As you would expect, I will be discussing this topic further with the DFJ's and FDLJ's when we meet next week for the President's Conference.

No one working in the Family Court or the COP now expects a return to the status quo, in terms of working practices, that existed in February 2020. Supported by enhanced IT, the courts have now become used to remote working and, for an appropriate hearing, and there will be many, this should now be the format of choice.

The central theme running through the approach that should apply is that the parties and their lawyers should normally be physically present at court on those occasions when an important decision may be taken.

There are a number of positives about remote hearings, but one clear negative is the absence of that time outside court, in the 45 minutes or so before a hearing, when the presence of 'the court door' and the proximity of the other parties and their lawyers will not infrequently lead to a focussing of issues or even settlement. That time and space simply does not exist before a remote hearing and it is important that this valuable opportunity for advice, negotiation and possible settlement is regained. Further, it is clear that, at least some lay parties afford less respect to the court process, and the outcome of it in terms of any order, when the hearing is online or by phone. The use of remote attendance is not necessarily more efficient and quicker and it is possible to process more cases at court than it is to do so remotely. More generally, the obvious benefits of an attended, in court, process before a judge or magistrate makes an important decision in a family case do not need to be stated. Remote platforms are good for undertaking transactional communications, but there is more to a Family Court hearing than simply transacting business. Much that goes on has a 'human' perspective, which can often be lost online, but is fully present in a court room.

We need to continue to embrace the technology and to use it, for the right hearings, to the full. There are clear detriments to attended hearings in terms of travel time and the inability to attend to other cases at other centres during the extended time needed for physical attendance. There are also unwelcome collateral consequences in terms of additional expense, carbon foot-print and other factors. Part of my message is, therefore, that remote hearings, for the right case, are here to stay.

A balance has to be struck in each case, but generally that balance should come down in favour of the parties and their lawyers attending all hearings where an important decision in the case may be taken.

In public law children cases, the hearings were an important decision may be made are likely to include the first CMH, ICO hearings, the IRH and final hearings.

In private law children cases, those hearings are likely to include the FHDRA, fact-finding, DRA's and final hearings.

In the FRC, they are likely to include FDR's and final hearings.

In all three categories of work, a straight-forward directions or case management hearing is likely to be appropriate for a remote hearing.

Although the granting of an injunction is obviously an important decision, the benefit of conducting Family Law Act cases remotely, or at a hybrid hearing, are likely to outweigh the need for an attended hearing, whereas a fact-finding hearing in a FAA case is likely to require attendance.

Whilst an important decision will normally be taken at the end of an appeal hearing, the question of whether an appeal is heard remotely or in person may turn upon the issues to be raised and whether both parties are represented or in person. The format of an appeal hearing is therefore a matter for judicial discretion in each case.

More generally, there is a common view that it is beneficial (in many cases it is indeed an improvement) for expert evidence to be given remotely and, subject to individual factors in any particular case, this is now likely to be the default position.

CAFCASS and local authority social services are currently under extreme pressure in marshalling sufficient resources to cover the volume of work. I anticipate that judges and magistrates will take these matters into account when deciding whether a CAFCASS officer or local authority social worker should attend an in-person hearing remotely and, if so, whether they need to attend for all or only part of it.

When deciding whether or not to hear a case remotely, judges and magistrates should take account of health related issues raised by a party or professional. Such issues may not be determinative in the choice of format, but must be taken into account in the exercise of judicial discretion.

Earlier this year, a working group under the leadership of HHJ Stuart Farquhar produced a report on the future use of remote hearings in the FRC. I am very grateful to Judge Farquhar and his group for this work and for agreement that it should not be published until the overall direction of travel for the Family Court as a whole was more clear. That point has now been reached and I am pleased to publish the report of the Farquhar Group today with my endorsement. The report is, obviously, not itself a Practice Direction or Presidential Guidance and is not writ in stone. It is

published, alongside the words of this Address, as a broad steer to judges who will exercise their discretion in determining whether any particular hearing will be attended or remote.

Sir Andrew McFarlane

President of the Family Division

10th November 2021