Court of Appeal considers the cardinal points for remote hearings during the coronavirus (COVID-19) pandemic (Re A (children) and Re B (Children))

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Family analysis: On consecutive days, the Court of Appeal, which included the President of the Family Division, considered two decisions of the lower courts to conduct remote hearings, Re A in relation to a final hearing as to care and placement orders and Re B regarding an interim care order with a plan for removal. Matthew Fletcher, barrister at 1|GC Family Law, compares and contrasts the two decisions and analyses whether common threads emerge that could assist practitioners in advising clients and making submissions to the court as to whether a case is suitable for a remote hearing.

Re A (children) [2020] EWCA Civ 583, [2020] All ER (D) 14 (May)

Re B (Children) (Remote Hearing: Interim Care Order) [2020] EWCA Civ 584, [2020] All ER (D) 18 (May)

What are the practical implications of these cases?

The Court of Appeal's judgment in *Re A*, in particular, sets out in considerable detail the legal basis on which remote hearings can be conducted, the guidance that has been published in respect of remote hearings and reflects on the development of remote hearings during the coronavirus (COVID-19) pandemic. The first 12 paragraphs contain a helpful synopsis of the changing milieu of remote hearings, which informed the court's decision making in these appeals.

It appears to be stressed that whether to hold a remote hearing is a case management decision for the first instance judge and that the appeal court will only interfere if a 'decision falls outside the range of reasonable ways of proceedings that were open to the court' (para [3(i)]). It can be noted that while all three reported decisions as to appeals on remote hearings so far, including *Re P (A Child: Remote Hearings)* [2020] EWFC 32, [2020] All ER (D) 115 (Apr), have allowed the appeals against remote hearings, we do not know how many applications have been made and permission refused.

Re B focuses less on the decision to hold a remote hearing and more on the procedural fairness as to how that hearing was handled.

There are five practical implications that may be ascertained, ie:

- the appeal court will try to give considerable autonomy to the court of first instance to make case management decisions
- it will be sympathetic to attempts to undertake cases where it is fair to all parties
- a case plan for complex remote hearings will be a useful document (*Re A* at para [25])
- that if arrangements for a particular hearing appear to be unjust or unfair were one to remove the fact that coronavirus has imposed these changes upon us, then the Court of Appeal may well find it unfair as well, and
- if possible, an appeal should be made before the hearing has taken place

What was the background?

Re A concerned six children. However, the appeal related to the care plans of the younger two children for care and placement orders. A five-day hearing had been listed to commence on 30 March 2020, which following the coronavirus crisis was adjourned to 3 April 2020 (para [16]).

At the adjourned hearing, HHJ Dodd determined that a seven-day 'hybrid' hearing would take place (para [17]). This 'hybrid' was that the hearing would be heard remotely, except that the father and the mother of the youngest two children would attend to give evidence at court with their solicitors and the

father could attend court each day to view the remote hearing. The father had difficulties with accessing the technology and was dyslexic. This decision was appealed on 4 April 2020 (para [18]).

The judge was invited to review his decision on 17 April 2020, following the message for circuit and district judges from the Lord Chief Justice, the Master of the Rolls and the President of the Family Division dated 9 April 2020. The local authority no longer supported a hearing via the hybrid proposal and nor did any of the parents, only the guardian was supportive (paras [26 and 27]). However, the judge maintained his decision, principally on the basis that due to the age of the second youngest child the decision on adoption could not wait (para [28]).

Re B concerned the first hearing of an application for what was originally an interim supervision order in respect of a child. A chronology is set out at para [12]. However, following receipt of the guardian's position statement at 11.01 am on the morning of the hearing on 4 April 2020, the local authority changed its care plan at 11.30 am.

The case, which was being heard remotely by telephone, was initially called on at 12.31 pm when an adjournment was requested by the grandmother, the carer of the child, and then resumed at 16.22 pm when that application was renewed. A decision was made at 17.41 pm (paras [17–19]) to remove the child from the care of the grandmother, with whom he had lived all his life. Permission to appeal was refused and an appellant's notice lodged on 9 April 2020 (para [32]).

What did the Court of Appeal decide?

In both cases the Court of Appeal overturned the decisions that had been made in the courts below and determined that the decisions to proceed in the ways provided for by the respective judges had been wrong to the extent that they were outside the permissible boundary of fairness, although in *Re B* the court had significant concerns about the evidence as well.

The Court of Appeal clearly felt that the decision in *Re B* was unfair and that an adjournment should have been granted. The court did not give a view that the decision to have a remote hearing in relation to an interim care order was wrong per se, but that the way the court had approached it was wrong, ie:

- at paras [33–34], the court repeated that the evidence did not justify immediate removal
- an adjournment was necessary to permit fairness and at para [36] the court set out the matters which made the decision unfair, ie the lack of notice of change in relation to the care plan, the difficulties the grandmother had in communicating with her representative because of the method of the hearing and that she had no opportunity to file evidence or consider the evidence, and
- at para [39] the court reminded us that notwithstanding the pressures of the situation we all find ourselves in 'fundamental legal and procedural principles came to be compromised'

In *Re A*, as set out above, the Court of Appeal (at paras [1–12]) set out the framework for decisions as to whether to and how a remote hearing might take place in any particular case. It also approved the preparation of a case plan (para [25]) as 'the kind of document that is likely to be useful whenever a court in considering arrangements for a possible remote hearing of any substance'.

In this case, the Court of Appeal's principal reasons for concluding that the judge was wrong and that the case was not suitable for either a remote hearing or a hybrid hearing as set up by the judge were primarily due to the factors listed at para [49], ie:

- the inability of the father to engage with the remote evidence (expanded on at paras [50–56]), either at home or in the court room
- the imbalance of procedure in requiring the parents, but no other party or advocate, to attend before the judge (expanded at para [58]), and
- that the need for urgency was not sufficiently pressing to justify an immediate remote or hybrid final hearing (expanded at paras [59–61])

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