

England and Wales Family Court Decisions (High Court Judges)



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Neutral Citation Number: [2020] EWFC 32
Case No. PO19C00408

IN THE FAMILY COURT

Royal Courts of Justice
Strand
London, WC2A 2LL
16 April 2020

B e f o r e :

SIR ANDREW MCFARLANE
(President of the Family Division)
(In Private)

RE P (A CHILD: REMOTE HEARING)

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MR N. TAYLOR and MR M. HEYWOOD appeared on behalf of the Applicant Local Authority.
MISS A. MUNROE QC and MR W. TAUTZ appeared on behalf of the Respondent Mother.
MR C. STRINGER appeared on behalf of the Respondent Father.
MISS P. HOWE QC and MISS L. RAMADHAN appeared on behalf of the Guardian.

HTML VERSION OF JUDGMENT

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THE PRESIDENT:

- The application that I have considered this afternoon, at a remote hearing attended by counsel and solicitors for all parties, arises out of ongoing care proceedings relating to a girl, who is now aged seven, having been born in November 2012. The proceedings are already one year old and they were issued as long ago as April 2019, but it is right to record that this young person has been the subject of contested private law proceedings for a good deal longer than that.
- The issue which is the focus of the proceedings, and will be the focus of a planned fifteen day hearing which is due to start on Monday, 20 April, is a series of allegations made by the local authority, all aimed at establishing that this young child has been caused significant harm as a result of fabricated or induced illness ['FI']. There is a deal of evidence that the local authority seek to rely upon to establish that core allegation against the child's mother; partly a series of referrals to the GP, partly attendances and, indeed, admissions at hospital, partly what has been said or been seen by the school and school attendance, and partly observations that the young person has made to social workers and others. The issues are all fully contested by the mother and it is, in every sense, a full final hearing.
- As would be expected, the court also has the benefit of expert evidence from an expert paediatrician, an expert adult psychiatrist and an expert adult psychologist. The hearing is a roll-up hearing in the sense that the judge is being invited not only to determine the factual issues that are in play but to go on then, at the same hearing, to fix the final care plan for this child. The options are, baldly, that the child should return to the mother – that is the mother's case – or be placed elsewhere. As I understand it, the principal suggestion is that that should be in foster care.
- Since April last year, this young person has been living with a friend of the mother's under an interim care order. I think it is accepted that that placement, beneficial though it has been for her as a holding environment, is not a long-term placement and so she will need to move to a different home at the end of this court process in any event.
- A part of the history is that there was a serious attempt to achieve a final hearing of this matter in the autumn of last year. For reasons that I have not delved into, that had to be aborted and so this is the second time that this seven year old girl has come to understand that a judge is imminently about to determine her future care arrangements.
- The hearing was fixed to be undertaken by a circuit judge sitting as a deputy High Court in the Family Court at Guildford, and fixed to start on Monday, 20 April, sometime ago. The event that, of course, has intervened in the meantime is the Covid-19 pandemic which has led to a lockdown and led to most Family Court hearings that have gone ahead being undertaken remotely, over the telephone or via some form of video platform.
- The case came before the court for a case management hearing on 13 March. At that time the potential for there to be a "lockdown" was not overtly on the horizon and the issue of a remote hearing was not considered at that stage. By the time the case came back before the judge for the final pre-trial review, on 3 April, the lockdown implemented by the Government had come to pass and, indeed, had been in place since Monday, 23 March, nearly two weeks earlier.
- I have been assisted by counsel at the hearing this afternoon, who have explained that at the hearing on 3 April all parties, and the judge, effectively accepted that this hearing would now have to go ahead and be conducted remotely. I was told that all parties and the court had been influenced by the publication, shortly before 3 April, of advice produced by Mr Justice MacDonald on the conduct of remote hearings which gave an account [at paragraph 2.2.1] of a number of remote hearings that had been successfully accomplished in the early days following the lockdown. It would seem that those involved in this case read that advice as indicating that all hearings must now proceed as remote hearings and, I was told, the discussion during the hearing was about how the remote hearing would be conducted and not whether it should be heard remotely. If that was the understanding of MacDonald J's document, it was a misunderstanding. MacDonald J's document is firmly aimed at the mechanics of the process; it does not offer guidance, let alone give direction, on the wholly different issue of whether any particular hearing should, or should not, be conducted remotely. Establishing that a hearing can be conducted remotely, does not in any way mean that the hearing must be conducted in that way.
- There was, therefore, no application to adjourn the hearing on the basis that there should not be a remote hearing. The judge did, however, hear an application for the hearing to be postponed on the basis that the mother, it was said, had unfortunately contracted the Covid-19 virus infection herself and would not be fit to take part in the court process. The judge, understandably, did not accede to that application at that stage but indicated that the mother's health and her ability as a result of her health to engage in the court process would be kept under review. Arrangements, therefore, went ahead for the compilation of an electronic bundle – that has been done – and for the hearing to be set up to be undertaken over the Skype for Business platform.
- The arrangements for the mother to engage in the process, as they are currently understood, involve her being in her home, alone as I understand it, and joining the proceedings over the internet. She has some basic internet access but it is proposed, although, as I understand it, nothing has been done to set this up, that she should subscribe to a wi-fi dongle supplied by TalkTalk so as to enhance the internet connection. She will, therefore, join the hearing remotely, as everyone else will, over Skype. Miss Allison Munroe QC, who, together with Mr William Tautz, became instructed on behalf of the mother only during the last three weeks, indicate that they anticipate having a break either after the evidence-in-chief or at the end of each witness's evidence, so that they can take confidential instructions from the mother over the telephone or over Zoom or a separate video link. And that was the way in which the hearing was being constituted and planned for until the middle of last week.
- As President of the Family Division, I have been kept informed of developments in remote hearings nationally and I came through that means to understand that this hearing was planned to be undertaken. It is a type of hearing which, certainly at first blush, seemed to be well outside the categories of hearing which could be contemplated as being appropriate for remote hearings before the Family Court. I make that observation in the narrow context of this being an allegation of FI. That category of case is a particular form of child abuse which requires exquisite sensitivity and skill on the part of the court. Dr Evans, the paediatrician instructed as an expert witness in this case, at p.E31 of the bundle, describes this as "an extremely complicated case". And later, at p.E41, he describes FI as "an extremely unusual disorder" and describes the task of investigating it as being "incredibly challenging".
- Dr Evans is right to describe it in these terms. These are particularly unusual cases and, from a judge's perspective and, from experience of having undertaken a number of these cases over a number of years, it is a crucial element in the judge's analysis for the judge to be able to experience the behaviour of the parent who is the focus of the allegations throughout the oral court process; not only when they are in the witness box being examined in-chief and cross-examined, but equally when they are sitting in the well of the court and reacting, as they may or may not do, to the factual and expert evidence as it unfolds during the course of the hearing.
- So, with that background in mind, my reaction on learning that this was a category of hearing which was thought to be appropriate for a remote hearing process was one of surprise. I, therefore, invited the judge to consider adjourning the hearing so that it would be re-listed once the lockdown requirements had been removed and it could be heard in the ordinary way at a full oral hearing. The judge, as I understand it, communicated that to the parties and they, understandably, indicated their concern at that turn of events and thus we have established the short hearing this afternoon to consider whether or not the hearing should be adjourned.
- The position of the parties is thus: the local authority submit that this is, despite the nature of the allegations, a hearing that can be properly undertaken over the remote system. All of the allegations have been well rehearsed in documents, both witness statements and matters of record, and are well known to the mother. All the witnesses – and there are sixteen or so, bar the parents, as I understand it – are professional (there may be one individual from a refuge) witnesses, members of the medical profession, school staff, social workers, and it should be perfectly possible, submits the local authority, for them to give their evidence remotely over the video link and for the process of examination and cross-examination to take place. I accept that that has become established practice in recent times, for witnesses to be beamed in to the courtroom in the course of ordinary events. What normally goes wrong is the technology rather than the professional interaction of the lawyers and the professional witnesses. The local authority therefore submit that the case is ready for hearing and that the mother is sufficiently aware of all of the issues to be able to have already instructed her legal team with the points she wishes to make and then herself to engage in the process fully.
- More importantly, as I think they would say and certainly as I would see it, they submit that this young girl is currently already suffering, on their view, significant emotional harm by being held in limbo and that she will only be released from this damaging situation of simply not knowing where she is going to live and spend the rest of her childhood, at least for the foreseeable future, until the court process comes to an end. She needs a decision, she needs it now and to contemplate the case being put off, not indefinitely but to an indefinite date, is one that (a) does not serve her interests, because it fails to give a decision now, but (b) will do harm itself because of the disappointment, the frustration and the extension of her inability to know what her future may be in a way that will cause her further harm. I understand that. All cases are pressing when the welfare of children is to be determined. The Children Act spells that out. But, on the facts of this case, this young person's welfare particularly requires that a decision be made at this stage if not, frankly, before now. The local authority, therefore, not only says that the case can be heard now but also that it must be heard now to meet her welfare needs.
- The fallback position put forward by Mr Nigel Taylor QC, who leads for the local authority, is that if the court is concerned about the mother's ability to engage in the three week hearing and give her best, as it were, by giving evidence in these rather artificial circumstances, then the fallback position should be either that the court, at the very least, hears the professional witnesses at this period in time remotely and then takes stock and may adjourn hearing the lay witnesses, particularly the mother, until an ordinary oral hearing can take place maybe for three days or so in a few months' time. A further option is for the court to undertake the fact-finding process at this stage but adjourn the final welfare determination. I understand those submissions and why they are put forward.
- The local authority's position is supported by Mr Stringer for the father. The father plays no part in the FI part of the case. There are other issues relating to his past involvement with his daughter but they are not to the fore in the proposed hearing. He is concerned for his daughter's welfare and he wishes the determination to be made now. He, therefore, opposes the adjournment.
- For the Children's Guardian, Miss Penny Howe QC, having considered all of the arguments that are now ranged before the court, urges the court to hold to the fixture either for the full hearing or, as the local authority submit, in some way that at least achieves the hearing of the professional witnesses at this stage. Miss Howe submits that if there are technical matters that can be addressed to assist the mother, by perhaps having an open Zoom connection for her to be constantly in touch with her lawyers, or by other means, then that should be done, but that is not a reason of itself for the hearing to be adjourned.
- For the mother, Miss Allison Munroe QC, leading Mr Tautz, opposes the local authority position and submits that the hearing must now, unfortunately, be adjourned. Miss Munroe frankly explained the journey that she and the mother's team travelled, both up to the hearing on 3 April, through it and since, and it is plain, and she accepts, that the mother was not objecting to the remote hearing which was being contemplated at the hearing on 3 April. The primary focus for them there was whether their client was simply well enough to take part in it. Miss Munroe explained that during those early days following lockdown the profession was "feeling its way", to use my phrase, into uncharted territory and there was an understanding that many family hearings would be undertaken remotely and that this, therefore, was one such that had to be now conducted over a video platform rather than face to face. But now, both having considered the difficulties that will be experienced by the mother's legal team and by the mother in actually taking part in this process, but also because further advice has recently been given to judges by myself and others centrally, the mother's team now consider that this is a case that falls outside the category of hearings that could be contemplated as being able to be conducted over a remote platform in a manner that meets the requirements of fairness and justice.
- The mother's health remains a matter of concern. She has not been well. I have not seen any further medical evidence and it may be that further medical evidence would have to be provided if the case goes ahead, and I am certainly not determining the health issue today save to say this, that an option which has now been developed and is being used, as I understand it, more and more in cases elsewhere is for the parent, as it would be in this case, not simply to be in their home on their own but to go to some neutral venue, maybe an office in local authority premises, maybe a room in a court building, maybe elsewhere, and be with a member of the solicitors firm that they are instructing, keeping a safe socially isolated distance at all times, so that they can be supported both professionally and in ordinary human terms during a remote hearing. It seems to me that that is not possible to contemplate that option in this case simply because, although proving that the mother has had Covid-19 may be a matter for a judge to determine if an adjournment was being sought on that basis may be one thing, but finding a member of the solicitors' staff or asking a member of the solicitors' staff to sit in a room with someone who thinks that they have had or are getting over Covid-19 is more than can be properly asked of anyone in that position. So that simply does not seem to be an option here. So I have to proceed on the basis that the mother will join this hearing, if she does, on her own from her home in the manner that I have described.
- Miss Munroe's position statement makes it plain that what is proposed now is, in her submission, unable to provide a hearing in which the mother can have effective participation and a hearing that could be fair. The mother therefore objects to the proposed remote hearing. And so the case moves into a category where, rather than all the parties accepting that there would be a remote hearing, to one where the parent, who is at the centre of the allegations, is now objecting to the remote process and it is on that basis that I have to determine the issue.
- In a letter from the Lord Chief Justice, Master of the Rolls and President of the Family Division to judges on 9 April 2020, rather than giving formal guidance, a number of parameters were suggested to assist a court in deciding whether or not to conduct a remote hearing. The following three factors were identified as being of particular relevance to Family cases:
 - Where the parents oppose the LA plan but the only witnesses to be called are the SW & CG, and the factual issues are limited, it could be conducted remotely;
 - Where only the expert medical witnesses are to be called to give evidence, it could be conducted remotely;
 - In all other cases where the parents and/or other lay witnesses etc are to be called, the case is unlikely to be suitable for remote hearing."
- In addition, in guidance that I issued on 27 March I said:

"Can I stress, however, that we must not lose sight of our primary purpose as a Family Justice system, which is to enable courts to deal with cases justly, having regard to the welfare issues involved [FPR 2010, r 1.1 'the overriding objective'], part of which is to ensure that parties are 'on an equal footing' [FPR 2010, r 1.2]. In pushing forward to achieve Remote Hearings, this must not be at the expense of a fair and just process."
- The decision whether to hold a remote hearing in a contested case involving the welfare of a child is a particularly difficult one for a court to resolve. A range of factors are likely to be in play, each potentially compelling but also potentially at odds with each other. The need to maintain a hearing in order to avoid delay and to resolve issues for a child in order for her life to move forward is likely to be a most powerful consideration in many cases, but it may be at odds with the need for the very resolution of that issue to be undertaken in a thorough, forensically sound, fair, just and proportionate manner. The decision to proceed or not may not turn on the category of case or seriousness of the decision, but upon other factors that are idiosyncratic of the particular case itself, such as the local facilities, the available technology, the personalities and expectations of the key family members and, in these early days, the experience of the judge or magistrates in remote working. It is because no two cases may be the same that the decision on remote hearings has been left to the individual judge in each case, rather than making it the subject of binding national guidance.
- Turning to the particular case now before the court, although I am extremely aware of and sensitive to the position of this young girl and the negative impact that a decision to adjourn will have on her wellbeing and the potential for it to cause her emotional harm, I am very clear that this hearing has to be adjourned. I make the decision also being aware of the impact that this will have professionally on all of those who have had this fixture booked in their professional diaries for a long time and who are now ready for the hearing to take place. That cannot be a factor that weighs very significantly in the decision-making process but it is one of which I am aware.
- The reason for having the very clear view that I have is that it simply seems to me impossible to contemplate a final hearing of this nature, where at issue are a whole series of allegations of factitious illness, being conducted remotely. The judge who undertakes such a hearing may well be able to cope with the cross-examination and the assimilation of the detailed evidence from the e-bundle and from the process of witnesses appearing over Skype, but that is only part of the judicial function. The more important part, as I have indicated, is for the judge to see all the parties in the case when they are in the courtroom, in particular the mother, and although it is possible over Skype to keep the postage stamp image of any particular attendee at the hearing, up to five in all, live on the judge's screen at any one time, it is a very poor substitute to seeing that person fully present before the court. It also assumes that the person's link with the court hearing is maintained at all times and that they choose to have their video camera on. It seems to me that to contemplate a remote hearing of issues such as this is wholly out-with any process which gives the judge a proper basis upon which to make a full judgment. I do not consider that a remote hearing for a final hearing of this sort would allow effective participation for the parent and effective engagement either by the parent with the court or, as I have indicated, the court with the parent. I also consider that there is a significant risk that the process as a whole would not be fair.
- The observations that I have made in the preceding paragraph apply equally to the options for dividing the hearing process up that have been helpfully suggested by Mr Taylor as, with each option, the judge would not have the opportunity to engage fully with the parent during the whole of the hearing as would be the case in a courtroom.
- Given the wealth of factual detail that is to be placed before the court in relation to this mother's actions over the last three or four years, for her to have a full real-time ability to instruct her legal team throughout the hearing, not just by a phone call at the end of each witness's evidence, seems to me to be a prerequisite for her to be able to take an effective part in a fair process at the trial of issues such as this.
- For those shortly stated basic reasons, I consider that a trial of this nature is simply not one that can be contemplated for remote hearing during the present crisis. It follows that, irrespective of the mother's agreement or opposition to a remote hearing, I would hold that this hearing cannot properly or fairly be conducted without her physical presence before a judge in a courtroom. Now that the mother is in fact opposing the remote hearing, the case for abandoning the fixture is all the stronger.
- For the reasons that I have given, I direct that the hearing listed to start on 20 April must now be vacated. This case is to be re-listed once the current restrictions have been lifted, either before a High Court Judge or a deputy, either sitting in the local Family Court or at the Royal Courts of Justice.