



# Family justice in challenging times

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GARDEN COURT CHAMBERS



6 May 2020



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# REMOTE HEARINGS- CHANGING THE LANDSCAPE

Allison Munroe QC, Garden Court Chambers  
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# INTRODUCTION: AMQC

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- The theme of today's webinar is Family Justice in challenging times.
- In this session myself and William Tautz, will examine 4 main areas;
- William will look at:
  - 1. Update on **Re P** - how is it being applied (see also **Re A**)
  - 2. Judge's assessment of parents - two way engagement
- Then I will consider:
  - 3. Remote hearings from the Perspective of lay clients and the impact upon them. I will make reference to a recent first instant matter before Mrs Justice Lieven.
  - 4. Future of remote hearings – I will reference, the Nuffield Family Justice report published today.



# William Tautz

1. Update on Re P - how is it being applied (see also Re A) – WT
2. Judge's assessment of parents - two way engagement



## How are the courts applying Re: P?

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*Re: A (Children)(Remote Hearing: Care and Placement Orders)*  
[2020] EWCA Civ 583

*Re SX* [2020] EWHC 1086 (Fam)



# A Judge's Assessment of Parents

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*Re P* – Para 26:

*“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.”*



# Allison Munroe QC

3. Remote hearings from the Perspective of lay clients and the impact upon them.

4. Future of remote hearings.





# Remote Hearings from the perspective of lay clients and the impact upon them

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## **It's not all about the Judges and lawyers.**

Much of the discourse has been around how the Judiciary and Lawyers are coping with remote hearings. The lay clients are being lost in the mix.

## **Fairness and Transparency.**

### **The client's voice.**

There are very real practical considerations for many families that militate against them being able to participate in a lengthy contested remote hearing, in which they are fighting for the return of their children, or to clear their names of some alleged wrongdoing.

# Remote Hearings from the perspective of lay clients and the impact upon them

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Other key witnesses Social Workers, Guardians; their perspective.

[Nuffield Family Justice Observatory: Remote Hearings](#)

## **Executive Summary:**

- The respondents were evenly balanced in terms of their overall positive and negative reactions to remote hearings. Most thought that remote hearings were justified for certain cases in the current circumstances; and some felt that this way of working could continue for certain cases in the future.
- Significant concerns were raised about the fairness of remote hearings in certain cases and circumstances, and there were some worrying descriptions of the way some cases had been conducted to date. These concerns chiefly related to cases where not having face-to-face contact made it difficult to read reactions and communicate in a humane and sensitive way, the difficulty of ensuring a party's full participation in a remote hearing,
- and issues of confidentiality and privacy. Specific concerns were commonly raised in relation to specific groups: such as parties in cases involving domestic abuse, parties with a disability or cognitive impairment or where an intermediary or interpreter is required.



# Future of remote hearings

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- The continued use of remote hearings in a post pandemic family justice system.

-Remote hearings are here to stay and may well have a place to play in helping to clear the backlog and also longer term.

- A word of caution.

Will this be used to erode certain aspects of the family justice system?



# Future of remote hearings

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What other areas of law can assist us with:

- These problems are not unique to the family justice system. The response of the Justice system in the UK has been an evolving one and different jurisdictions have acted in different ways. The Chief Coroner made it very clear early on in the crisis that all jury Inquests would be adjourned. The criminal courts have come to a similar conclusion in that no new criminal trials will begin and those listed would be adjourned. That creates a very real and pressing problems, for the defendants, for those remanded in custody awaiting trial but refused bail, for victims.
- Criminal Justice :<https://www.criminalbar.com/resources/news/monday-message-05-05-20/>
- Civil Courts: <https://adminlaw.org.uk/wp-content/uploads/ALBA-Remote-Hearings-Guidance-May-2020-Final.pdf>



## Concluding Thoughts – Where to now?

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- The situation will continue to evolve and develop.
- Will we be back to in person hearings sooner than we think?
- Useful links:
- [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/882822/Ops update - family court business priorities 1 May 2020 FINAL.pdf?utm\\_medium=email&utm\\_source=](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/882822/Ops_update_-_family_court_business_priorities_1_May_2020_FINAL.pdf?utm_medium=email&utm_source=)



*Re B (Children) (Remote Hearing:  
Interim Care Order) [2020] EWCA  
Civ 584*

Stephen Lue, Garden Court Chambers

6 May 2020



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# BACKGROUND

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- Sam is a 9 year old boy, he has an 11-year old sister Samantha.
- Their Mother is a drug user with a criminal record and their father died in 2019.
- In July 2013 the children were placed with their maternal grandmother under a special guardianship order. The Maternal grandmother had been Sam's primary carer for his whole life.
- The LA has continued to be involved and has provided a range of support. There were concerns about the actions of the maternal aunt and uncle. The maternal uncle lives nearby and he is also a drug user. The maternal uncle has on a number of occasions behaved in a highly inappropriate way towards the children.
- Allegations have from time to time been made by Samantha of physical abuse by the uncle and aunt.
- The grandmother continued to work with the local authority, including successfully attending a course on attachment in January/February 2020.



# Precipitating Event

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- Incident on 20<sup>th</sup> March where police were called to the home, where Samantha was screaming outside. She said that she had been hit by her aunt; the grandmother and aunt denied it and described Samantha's behaviour as particularly challenging since the family had been in confinement. Samantha was taken into police protection and placed into foster care. Sam was not involved in the incident and he remained with his grandmother.
- On 23<sup>rd</sup> March the grandmother signed s.20 for Samantha. On 1<sup>st</sup> April the grandmother informed social services that she wanted her to return by Friday 3<sup>rd</sup> April.





## COA s.20 Observation

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- The Court of Appeal noted at para 16 of their judgment that if the LA were concerned about the grandmother withdrawing her consent *“it would have been desirable for an attempt to have been made to agree a suitable timetable with the grandmother ahead of the service of proceedings upon her. That would have allowed her to take advice and, if proceedings were necessary, to file some evidence”*.



# Timings and impact on Article 6

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- The LA had issued on 2<sup>nd</sup> April
- Guardian appointed at 16:02
- Guardian appoints a solicitor at 16:40
- The MGM had received her papers at 17:20 at her home
- STL is instructed at 18:05 on 2nd April
- At 23:39 the solicitor for the grandmother obtains access to the electronic bundle. Evidently there was no opportunity to take instructions prior to the hearing.



## Timings and impact on Article 6

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- At 12.48 the LA informed the parties that Sam would be moved on Monday 6<sup>th</sup> April as Sam had a cough that might be virus related. There was no primary evidence underpinning that report.
- Then at 13.43 the LA announced that despite the cough their plan had reverted to one of immediate removal on 3<sup>rd</sup> April
- Primary evidence was requested in relation to Sam's health, but this was not provided. The COA observed that it **was hard to describe this process as anything other than arbitrary, para 25.**
- Sam was removed from his grandmother's home within the hour by 7pm that evening.



# Parties Positions - 1

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- LA's application had been for an ICO in respect of Samantha and an ISO in respect of Sam. The position statement filed by the LA at 10:37am on the day of the hearing outlined the reasons why the LA was not pursuing an ICO in relation to Sam.
- The MGM came to the hearing willing to agree to an ICO for Samantha and to agree to the ISO sought in respect of Sam.
- The Guardian's position was the game changer in the hearing. The COA noted that the Guardian had not spoken with the grandmother or the aunt or the uncle. Indeed, she had not spoken with the children either. The COA were concerned that the "voice of the child" was lost in this hearing.
- The Guardian made certain assumptions in her position statement intimating that since "it was not clear where the Mother is residing since her release from prison; the LA statement refers to the children having had unsupervised contact with her".



## Parties Positions - 2

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- However, there was no primary evidence to substantiate that claim by the CG. The Guardian was concerned that with the severe limitations in social work visits being undertaken due to the current pandemic Sam may be at risk if he remains at home.
- The Guardian was concerned that Sam *may* be at more risk of physical and emotional harm if he is left without his elder sibling. The Guardian made much of the fact that Sam had stated that his family matters were confidential and it is therefore not clear whether he will actually disclose any concerns should they arise in the home.
- The COA were **surprised** that “the Guardian and the children’s solicitor felt it appropriate to make such a bold recommendation from such a low knowledge base”. Neither of them had met or spoken to Sam or to his grandmother or his grandmother’s solicitor , para 22



## Parties Positions - 3

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- COA were troubled by the lack of any balanced analysis in the case for removal that was put by the Guardian and also by the LA.
- There was no reference to Sam's wishes and feelings.
- The COA dismissed the proposition by the Guardian that the current "lockdown" provides a reason for the removal of a child where none would otherwise exist. The COA observed that Sam's voice was not heard at a critical moment in the proceedings and his interests were not protected by his Guardian.
- LA also criticised: The fact that the LA sought to align themselves with the Guardian also put them in them in the firing line for criticism by the COA. It is a keen lesson for all professionals, that they should arrive at their position on their own analysis and not rely on the logic, or otherwise, of another party. If the LA had stuck to their guns then they would have avoided harm being caused to Sam and in the end their decision to change their plan for Sam was "undocumented" and "the change of plan unreasoned", and "arbitrary".



# Warnings at First instance given by MGM

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- Para “During the submissions at first instance it was raised on behalf of the grandmother that Sam would be at risk of emotional harm if he was placed with his older sister who had been displaying concerning behaviour, this was prophetic as on 8<sup>th</sup> April the children’s foster carer gave notice on the placement due to Samantha’s behaviour. Because there was no available foster home for both of them, they were placed apart on 15<sup>th</sup> April.
- At first instance MGM argued that *Re S applied (Authorising Children’s Immediate Removal)* [2010] EWCA Civ 421, [2010] 2 FLR 873: “In a sentence, the case for immediate removal was neither formulated nor communicated to the mother in a proper manner:”
- At first instance MGM argued that *Re C applied “C (A Child) (Interim Separation)* [2019] EWCA Civ 1998 (and in *C (A Child: Interim Separation)* [2020] EWCA Civ 257) “The high standard of justification that must be shown by a local authority seeking an order for separation requires it to inform the court of **all available resources** that might remove the need for separation”.
- In this index case of *Re B* removal was neither necessary nor appropriate



## COA decision in Re B

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- COA allowed the appeal but expressed their appreciation of the highly pressurised circumstances in which all the participants were working.
- Those circumstances led to a chain reaction in the course of which fundamental legal and procedural principles came to be compromised despite the best intentions of a range of dedicated professionals.





# Takeaway Lessons

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1. LA changed its position when it should not have done. Each party need to think independently, undertake their own analysis of the facts and legal framework.
2. S.20 and parents. At para 16 *“it would have been desirable for an attempt to have been made to agree a suitable timetable with the grandmother ahead of the service of proceedings upon her. That would have allowed her to take advice and, if proceedings were necessary, to file some evidence*
3. Guardians:- prior to supporting an ICO make attempts to speak to the primary carer, e.g. the parents, or the SGO, and the child.
4. Guardians:- where supporting removal, you have to provide a balanced analysis. You have to apply the law to the facts. You must reference the emotional and psychological impact on a child if you are supporting removal.
5. Guardians: where supporting removal, you must reference the child’s wishes and feelings.



## Takeaway Lessons 2

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Guardians:- Your standards prior to the lockdown for removal, should not change during the lockdown. The COA said ““we firmly dismiss the proposition that the current “lockdown” provides a reason for the removal of a child where non would otherwise exist.

LA’s:- if you are coming to court with a change of plan, then you need to have a revised care plan.

LA’s:- if you are changing your care plan due to a child’s health, then all parties need to have sight of the primary evidence relating to the child’s health and time to process it and take instructions- in this case Covid-19 related symptoms.

Advocates:- Make sure your application for an adjournment is made fully and clearly.

Advocates:- Don’t forget to apply for permission to appeal, pre-load these reasons if you can.

Advocates:- Apply for a “Stay” of the order if permissions to appeal is refused.

## Takeaway Lessons 3

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Advocates:- In planning for remote hearings, consider whether it is agreed between the parties that the hearing format is going to be Art 6 compliant. Para 35.... There is a qualitative difference between a remote hearing conducted over the telephone and one undertaken via video platform.

Para 35- “a video link is likely at this time to be the default option in urgent cases”.

See **Re A (Children) (Remote Hearing: Care and Placement Orders) [2020] EWCA Civ 583**

"The factors that are likely to influence the decision on whether to proceed with a remote hearing will vary from case to case, court to court and judge to judge. We consider that they will include:

- i) The importance and nature of the issue to be determined; is the outcome that is sought an interim or final order?
  
- ii) Whether there is a special need for urgency, or whether the decision could await a later hearing without causing significant disadvantage to the child or the other parties;
  
- iii) Whether the parties are legally represented;

## **Re A (Children) (Remote Hearing: Care and Placement Orders) [2020] EWCA Civ 583**

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- iv) The ability, or otherwise, of any lay party (particularly a parent or person with parental responsibility) to engage with and follow remote proceedings meaningfully. This factor will include access to and familiarity with the necessary technology, funding, intelligence/personality, language, ability to instruct their lawyers (both before and during the hearing), and other matters;
- v) Whether evidence is to be heard or whether the case will proceed on the basis of submissions only;
- vi) The source of any evidence that is to be adduced and assimilated by the court. For example, whether the evidence is written or oral, given by a professional or lay witness, contested or uncontested, or factual or expert evidence;
- vii) The scope and scale of the proposed hearing. How long is the hearing expected to last?
- viii) The available technology; telephone or video, and if video, which platform is to be used. A telephone hearing is likely to be a less effective medium than using video;
- ix) The experience and confidence of the court and those appearing before the court in the conduct of remote hearings using the proposed technology;
- x) Any safe (in terms of potential COVID 19 infection) alternatives that may be available for some or all of the participants to take part in the court hearing by physical attendance in a courtroom before the judge or magistrates."



## s.25 Secure Accommodation Order during Covid-19

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- Recent Case where a young person is the subject of a SAO, the LA this week sought an extension of the Secure Accommodation Order for 3 months for the sole reason that during the current pandemic it will take the LA longer to find an appropriate residential placement. There was no primary evidence that the young person, who the parties accepted had made progress and “been a model student”.
- Guardian John Collins successfully persuaded HHJ Redgrave that the s.25 factors does not allow for a draconian order to be made due to the current pandemic whilst the LA searched for an appropriate residential placement. The court can only make a s.25 order in the context the well established legislative framework, i.e. where there is a risk of absconding etc.
- All the lessons from the recent case show us that we must “keep our heads” whilst others lose theirs.



# Direct Contact for children in care during COVID-19: What is happening?

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6 May 2020



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# S 34 of the Children Act 1989 – Parental contact etc. with children in care

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(1) Where a child is in the care of a local authority, the authority shall (subject to the provisions of this section and their duty under section 22(3)(a) or, where the local authority is in Wales, under section 78(1)(a) of the [Social Services and Well-being \(Wales\) Act 2014](#)) allow the child reasonable contact with –

- (a) his parents;
- (b) any guardian or special guardian of his;
- (ba) any person who by virtue of section 4A has parental responsibility for him;
- (c) where there was a child arrangements order in force with respect to the child immediately before the care order was made, any person named in the child arrangements order as a person with whom the child was to live; and
- (d) where, immediately before the care order was made, a person had care of the child by virtue of an order made in the exercise of the High Court's inherent jurisdiction with respect to children, that person.



# S 34 of the Children Act 1989 – Parental contact etc. with children in care

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- (6) An authority may refuse to allow the contact that would otherwise be required by virtue of subsection (1) or an order under this section if –
- (a) they are satisfied that it is necessary to do so in order to safeguard or promote the child's welfare; and
  - (b) the refusal –
    - (i) is decided upon as a matter of urgency; and
    - (ii) does not last for more than seven days.





## **S 34 of the Children Act 1989 – Parental contact etc. with children in care**

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(6A) Where (by virtue of an order under this section, or because subsection (6) applies) a local authority in England are authorised to refuse to allow contact between the child and a person mentioned in any of paragraphs (a) to (c) of paragraph 15(1) of Schedule 2, paragraph 15(1) of that Schedule does not require the authority to endeavour to promote contact between the child and that person.'



# S 34 of the Children Act 1989 – Parental contact etc. with children in care

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[ChA 1989, Sch 2, Pt II](#), para 15, a local authority which considers that it is not reasonably practicable or consistent with the child's welfare to promote that contact will need to file evidence to justify its stance (*Re M (Care: Contact: Grandmother's Application for Leave)* [1995] 2 FLR 86, CA).



## S 34 of the Children Act 1989 – Parental contact etc. with children in care

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This domestic law duty also reflects the requirements of Article 8. See *Johansen v Norway* (1997) 23 EHRR 33 at [64]:

“Thus, the Court recognises that the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care. However, a stricter scrutiny is called for both of any further limitations, such as restrictions placed by those authorities on parental rights and access, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between the parents and a young child are effectively curtailed.”



## S 34 of the Children Act 1989 – Parental contact etc. with children in care

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And at [78]:

“In the present case the applicant had been deprived of her parental rights and access in the context of a permanent placement of her daughter in a foster home with a view to adoption by the foster parents. These measures were particularly far-reaching in that they totally deprived the applicant of her family life with the child and were inconsistent with the aim of reuniting them. Such measures should only be applied in exceptional circumstances and could only be justified if they were motivated by an overriding requirement pertaining to the child's best interests.”



# S 34 of the Children Act 1989 – Parental contact etc. with children in care

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The Court of Appeal has emphasised that section 34(4) orders preventing parental contact are to be granted “restrictively and stringently”: *Re H (Termination of Contact)* [2005] EWCA Civ 318.

**Contact with father is just as important as contact with mother**—Where a care order was made in relation to children who had suffered serious injuries caused by one of the parents, although the court was unable to say which, and the mother was to continue to have contact, there was no reason to terminate the father's contact. The benefit of keeping the family link alive by way of contact operates just as much for the father as for the mother (*Re G (Adoption: Contact)* [\[2003\] 1 FLR 270](#), CA).



# The benefits of contact for a child: aren't these even more important now ?

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- To allow a child to know that their parents love them.
- To minimise the damaging sense of loss and abandonment.
- To allow the child to settle into care with their parents' approval.  
[\(\*Re E \( Minor\) \(Care Order: Contact\) \[1994\] 1 FLR 146.\*\)](#)

Whilst life has changed so drastically for everyone during this pandemic these principles have not. And of course for children in care during a time of such heightened anxiety perhaps the need for meaningful contact is all the more pressing.

# The Guidance – There is no bar to direct contact

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- **Coronavirus (COVID-19): guidance for local authorities on children’s social care.**

<https://www.gov.uk/government/publications/coronavirus-covid-19-guidance-for-childrens-social-care-services/coronavirus-covid-19-guidance-for-local-authorities-on-childrens-social-care>.



# There is emergency funding for , inter alia ‘vulnerable children’

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- **Emergency funding to support most vulnerable in society during pandemic**

<https://www.gov.uk/government/news/emergency-funding-to-support-most-vulnerable-in-society-during-pandemic>





# What about court orders related to contact for children in care?

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We expect that contact between children in care and their birth relatives will continue. It is essential for children and families to remain in touch at this difficult time, and for some children, the consequences of not seeing relatives would be traumatising.

Contact arrangements should therefore be assessed on a case by case basis taking into account a range of factors including the government's [social distancing](#) guidance and the needs of the child. It may not be possible, or appropriate, for the usual face-to-face contact to happen at this time and keeping in touch will, for the most part, need to take place virtually. We expect the spirit of any contact orders made in relation to children in care to be maintained and will look to social workers to determine how best to support those valuable family interactions based on the circumstances of each case.



# Conclusion

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- Need to be proactive in enabling contact to take place- without of course placing social workers (anyone at risk).



# Contact and Expert Assessments

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## Proposals for assessments

- Parenting assessments [PAMS]
- Observations of contact between parents and children
- Assessment of adults /families
- Timescales



# Any Questions?

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