

Working with the Family Courts during the COVID-19 pandemic

Policy position for stage 1 recovery: 1st June – 1st September 2020¹

Introduction

Cafcass closed all its offices on 20 March 2020 and since this date as our default position all work with children, families and the family courts has been conducted remotely. We have continued to operate business as usual as far as possible, filing reports, attending remote hearings and progressing cases accordingly. However, some cases have had to be adjourned – some to an unspecified date – and there is an inevitable backlog of work building up within the family justice system. Case law is emerging on the need for fair and just hearings, balanced against what can be achieved remotely to minimise delays for children and their families.

Planning is ongoing nationally to expand the opening of courts to enable in-person or hybrid hearings for those cases that cannot be heard remotely. We need to provide representation for children and assistance to the court whilst ensuring we are not putting anyone at risk. This document sets out the expectations of Cafcass staff.

Background

On 19 March the President of the Family Division set out guidance on how the family court would operate following the ‘lockdown’ and confirmed a default position that all family court hearings would take place remotely. On 23 March the President clarified that this did not prevent live hearings taking place in urgent cases provided this could be done safely. The [Protocol for conducting safe live court-based family hearings during the COVID-19 pandemic](#) (Appendix 2) sets out a number of expectations of HMCTS as well as proposals for the conduct of live hearings. This document is being regularly updated to reflect government guidance.

A [letter](#) from the Lord Chief Justice, Master of the Rolls and President of the Family Division, to judges provides suggestions on when to list a hearing remotely and includes a list of factors that may indicate a case is not suitable for a remote hearing. Most open courts will have produced a plan to set out how they intend to manage hearings during the restrictions, and local liaison leads within Cafcass will work with courts to identify these plans.

At the time of issue of this policy position, we understand that the President may publish further guidance having considered the views of families and professionals about remote working in the family courts, which were presented to him in the recent [rapid review](#) conducted by the Family Justice Observatory.

The first phase of recovery from national lockdown

A recovery group (chaired by Cafcass Chief Executive, Jacky Tiotto, with representatives from across family justice) is considering how the family court can move towards operating a less restrictive regime to expand the capacity of the courts to hold hearings while ensuring participants are kept safe. The task is to resolve the apparent tension between protecting staff and reinstating, as far as possible, the system of court hearings.

The need for Cafcass to review the current restrictions on attending court is reflected in the decisions of the Court of Appeal, which has confirmed that many cases are not appropriately dealt with remotely and the consequent delay in making final decision is harmful to children (Section 1 Children Act 1989).

¹ [Government advice](#) at the time of writing on social distancing

There is no current prohibition on court hearings taking place in person and some courts (though by no means all) remain open with a skeleton staff, hearing urgent cases. Judges are conducting remote hearings from the court if it is open, although many are also heard by judges from home. In the weeks and months ahead, consideration is being given to establishing some open courts that could manage live hearings and which are large enough to accommodate social distancing. Full assessments are being made about the need for frequent and regular deep cleaning and we understand that advice and protocols will emerge from HMCTS in due course. The Protocols on hearings sets out more detailed expectations of the court and the physical environment, see below.

[HMCTS Organisational Covid-19 Risk Assessment](#) published 15 May 2020

[HMCTS Covid-19 Assessment Tool](#) published 20 May 2020

In respect of this next phase however, we can be certain that given: limitations on physical court space, the social distancing that will continue, the nuances of this for people in 'vulnerable' health groups, those with child care or caring responsibilities and transport/hospitality restrictions, remote hearings will continue in some form for much of our work and for the rest of 2020. For these reasons, we are issuing this protocol to try to set out our position (initially for 12 weeks) to enable our staff to negotiate and work with the courts, local authorities, families and children. We hope it will enable us to manage our work in a balanced, transparent and fair manner, taking account of our duty to safeguard and promote the welfare of children, advise the family courts and to be a responsible and kind employer.

Cafcass attendance at court

The Family Procedure Rules require children's guardians to attend final hearings and the authors of section 7 reports to attend if directed to do so. Our starting point is that we attend hearings remotely unless there is a compelling reason to attend in person, even where others involved in the hearing are attending in person.

The court can direct that attendance may be remote, and the decision whether to hold a hearing remotely is one for the judge. There is no binding guidance for the judiciary on this, which means judges have wide discretion about how to manage hearings.

FCAs and Cafcass managers should work with the court to determine attendance in advance of a hearing, whether remote or not. Open courts will have the facility to arrange for evidence to be given remotely. The Court of Appeal has emphasised the need in some cases to have the parties in court to assess their demeanour when giving evidence. The same does not apply to professional witnesses and there would need to be a compelling reason during the pandemic and this consequential recovery phase for the FCA to attend. There is potential for a hearing to take place with the parties in person together with their advocates while other professionals attend remotely. This type of hybrid hearing is likely to be in operation for the foreseeable future.

The children's guardian would in most cases expect to be present throughout a final hearing but if circumstances do not allow this to be feasible, the court will be informed, and agreement reached as to which parts of the hearing the guardian can attend in addition to the giving of evidence.

There will, however, be times where it is necessary for FCAs to be present in court and these will be discussed between the FCA and the line manager. In these cases, we must ensure that the arrangements are as safe as possible and that any vulnerabilities of the staff member

have been considered. Before agreeing attendance, we expect HMCTS to provide confirmation that appropriate measures identified in the protocols are in place, that it is possible to maintain a safe distance between parties, their advocates and professional witnesses, and that there is sufficient space within communal areas. HMCTS should be asked to provide confirmation of these specific arrangements before the court convenes any live hearings so that there is an assurance that safety has been addressed and the court has followed government guidance on safe working environments.

Where an FCA is asked to attend court in person to give evidence, the following aspects must be considered:

- Travelling to court should be by car, walking or cycling as a first option. If the FCA must travel on public transport and they are not prohibited by recorded health vulnerabilities, they must abide by the government guidelines of wearing a face covering.
- If the FCA has family commitments as a result of the restrictions or phased recovery from COVID-19 that means they are unable to work outside the home, such as school-age children who cannot attend school or younger children whose child care arrangements have been suspended, they will not be expected to attend in person and this needs to be discussed with the court.
- Any FCA in a vulnerable category as defined by the Department of Health or any member of their family in that category which places them at additional risk will not be able to attend court in person until the government guidelines change in respect of shielding.

The manager should discuss the above with the FCA and the court, being careful not to disclose personal information about the FCA to the court without their consent. The court will need to be told if the FCA is unable to attend, with remote attendance offered if this is an appropriate alternative.

If the court directs the attendance in the form of a court order, and in circumstances where the direction would put the FCA or others at risk, then Cafcass will challenge the order with the assistance of Cafcass Legal if necessary.

Cafcass will make every effort to avoid adjournments when the only reason is the pandemic and will, together with the court, attempt to ensure that decisions for children can be reached taking account of the need for fairness in the process.

Evidence

Our tools for working with children have been received positively and support detailed and thorough remote assessments. FCAs need to be confident that the work they have undertaken allows them to provide enough evidence to the court to support their recommendations, and it is for the court to decide if any further, or alternative direct work, is required. This is a case-specific issue determined by the characteristics of the child and family as well as the physical circumstances. The court must balance the need to avoid delay with consideration of the adequacy of the evidence and it will be a matter of professional judgment for the FCA to assess whether they have enough information to justify their conclusion.

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