



Cafcass protocol for working with the courts in the recovery period – Updated 1/9/2020

Introduction

Following the decision to work exclusively remotely during the lockdown period Cafcass has continued to operate business as usual as far as possible and has been able to file a large number of reports, attended remote hearings and cases have progressed accordingly. However, there are also a large number of cases which have had to be adjourned, some to an unspecified date or for a listed date several months in the future. There has also been the creation of a small number of “Nightingale Courts” to add capacity and to deal with those cases which cannot be heard remotely.

The issue for Cafcass is to ensure that we can provide appropriate representation for children and assistance to the courts while at the same time not putting either the staff or the families at risk.

On 19 March the President of the Family Division set out guidance on how the family court would operate following the “lockdown” and confirmed that the default position would be that all family court hearings would take place remotely. However, on 23rd March the President clarified in further guidance that this did not preclude live hearings taking place in urgent cases provided they could be achieved safely. The **Protocol for Conducting Safe Live Court Based Family Hearings during the COVID-19 (link)** was published which set out a number of expectations of HMCTS as well as proposals for the conduct of live hearings. It is possible that this protocol will be amended as the government guidance on safe distancing changes.

In addition to that protocol a letter from the *Lord Chief Justice, Master of the Rolls and President of the Family Division to judges dated 9 April 2020* set out suggestions (as opposed to guidance) which was intended to assist the judiciary when deciding whether to list a hearing remotely and includes a list of factors which indicate that a case is not suitable for remote hearings.

Courts will have produced their plans which set out how they will manage hearings during the restrictions.

Cafcass initially closed all its offices on 20 March and confirmed that all its work with children and families and the courts would be conducted remotely. There is now a planned process in place for offices to open, with the majority of offices open by early September. While Cafcass has been successful in transforming the organisation into one which has been able to fulfil the majority of its functions remotely and the courts have conducted a huge number of hearings remotely there is an inevitable and significant backlog of work building up.

The task is to resolve the apparent tension between protecting staff and reinstating as far as possible, the system of court hearings. This protocol sets out the expectations of Cafcass staff.

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 a final decision is harmful to children (Section 1 Children Act 1989).

There is no current prohibition on court hearings taking place in person and a number of courts have remained open to hear urgent cases or those where it is viewed necessary to conduct hearings in person. Judges are conducting remote hearings from the court if it is open, although many hearings are also heard by judges from home. The expectation is that the courts which are open and have live hearings will be subject to frequent and regular deep cleaning to protect the individuals attending, and they are large enough to accommodate social distancing. The Protocol published on 23 March by the President referred to above sets out more detailed expectations of the court and the physical environment.

Attendance at court

The Family Procedure Rules require the children's guardian to attend final hearings and the authors of section 7 reports to attend if directed to do so. The court can direct that attendance may be by telephone or video link (or any other remote facility). The decision whether to hold a hearing remotely is one for the judge and despite the number of documents from the President there is no binding guidance. Judges therefore have wide discretion about how to manage hearings. It is the professional decision of the FCA on whether attending court in person will assist them in carrying out their professional tasks.

It should be a matter of discussion between the FCA and the court how they attend and in advance of a hearing, whether remote or not, an agreement reached. The courts which are open 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 should be discussion with the court about whether the Cafcass officer needs to attend even when the hearing is live. There is potential for a hearing to take place with the parents, carers in person together with their advocates while the guardian, social workers and other experts attend remotely.

There will, however, be cases where it is necessary for the guardian to be present in court. The needs of the children Cafcass represents may require that a hearing in person takes place. If giving evidence remotely is not appropriate Cafcass will ensure that the arrangements are as safe as possible. Before agreeing attendance in person Cafcass expects that HMCTS would provide confirmation that appropriate measures identified in the Protocol issued by the President are in place, that it is possible to maintain a safe distance between parties, their advocates and professional witnesses, and there is sufficient space within the communal areas.

If a guardian or section 7 author is asked to attend court in person to give evidence the following issues must first be considered:

- Is the staff member self-isolating and on what basis? Have they had a positive test, do they have symptoms (in which case they may be recorded as off sick) or does a

member of their household have symptoms? This would mean they would be placing others at risk in attending court;

- Does the staff member have family commitments as a result of the lockdown which means they are unable to work outside the home, such as school age children who cannot attend school or under school age children whose child care arrangements have been suspended?
- Does the member of staff have any adjustments in place as part of an Individual Health Risk Assessment ?

All the above may need to be discussed first with the FCA and then with 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 that if the FCA is unable to attend, in accordance with any of the considerations above and unless off sick could give evidence remotely.

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

In any other circumstance unless the FCA comes within the categories above there is an expectation that they will attend court in person, having been provided with the assurances from HMCTS in relation to the safe distancing guidelines within the court building. Cafcass will make every effort to avoid adjournments of hearings when the only reason for the delay is the pandemic and will, together with the court, attempt to ensure that decisions for children can be reached taking into account the need for fairness in the process.

Evidence

Cafcass has developed guidance and tools for working with children and young people which have been received very positively and have led to detailed and thorough assessments. The FCA will need to be confident that the work they have undertaken allows them to provide good enough evidence to the court to support their recommendation and it is for the court to decide if there are any deficiencies which require further or alternative direct work to be completed. This is a case specific issue and will depend on the characteristics of the child and family as well as the physical circumstances. The court will need to 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 sufficient information to justify their conclusion.

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