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Do we need physical family courts?

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ABSTRACT

The family court responded to the COVID-19 pandemic by rapidly transitioning to remote hearings. Almost four years later, remote hearings remain common, although the clear direction of travel, especially for children and domestic abuse injunction cases, has been back towards everyone attending hearings face-to-face. In this article, we explore what might be lost when family court hearings take place remotely, and, more fundamentally, whether we really need physical family courts. We suggest that the family court is 'multifunctional': as well as having an important role in adjudication, it is a physical space in which family members can try to resolve their family law dispute through reflection, negotiation and conciliation, often with the moral support of a legal team, and backed by the judge's authority. We consider guidance issued during the pandemic and show that the non-adjudicative functions of the family court were initially overlooked by the senior judiciary. Finally, we explore legal professionals' experiences of remote family justice to assess how well the family court can perform its various functions remotely. We conclude that physical family courts are an essential part of the family justice system and, for those family disputes that require court involvement, they provide significant benefits.

KEYWORDS

Family court; COVID-19 pandemic; remote hearings; functions of the family court

Introduction

The COVID-19 pandemic led to major changes in the practice of the family court. Before March 2020, almost all hearings were conducted face-to-face, with everyone present inside physical courtrooms. Conducting a family court hearing entirely remotely was unheard of; expert witnesses occasionally gave evidence remotely, but that was an exception. As HHJ Farquhar commented, 'Those who sit and practice in the [Financial Remedies Court] were not at all prepared for the suspension of attended hearings in March 2020' (Farquhar 2021, p. 4.1). But when the pandemic struck, remote and hybrid family court hearings quickly became the norm as the government and the judiciary tried to continue administering family justice while also controlling the spread of the virus. By 'remote' we mean hearings where all participants attend on a video platform or by telephone; and by 'hybrid', we mean hearings where some of the

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participants attend face-to-face at court and others join remotely. At the time of writing, three and a half years after the courts began to reopen, remote and hybrid hearings remain common, although the clear direction of travel, certainly since mid-2022 and particularly in children and domestic abuse cases (Farquhar 2021; Roberts 2022) has been back towards everyone attending hearings face-to-face. Which begs the question: what does physical presence in a family case add? Do we need physical family courts at all, or could family matters be dealt with remotely?

The unintended experiment with a remote family court during the pandemic is an opportunity to consider the role of physical courts in the family justice system and whether anything is lost by taking family court hearings into a virtual world. In the first section of this article, we explore the family court's many interconnected functions – not just adjudication, but also in creating a space for moral support, reflection, negotiation and conciliation – and consider how effectively these functions might translate into a virtual court environment. We then set out how the family court responded to the pandemic, in terms of the practices adopted and guidance issued; what do these reveal about what key players in the family justice system think is special about face-to-face hearings in physical family courts? Finally, using empirical data collected with Mavis Maclean in 2020, we explore legal professionals' (judges, magistrates, solicitors and barristers) experiences of virtual family justice during the early stages of the COVID-19 pandemic, and reflect on what they tell us about the family court's ability to fulfil its various functions remotely. We conclude that physical family courts are an essential part of the family justice system in general and, for those family disputes that require court involvement, physical courts also provide significant benefits. Physical family courts create a space for parties *to be in* to seek final resolution of their family law disputes; a physical space in which, we suggest, the family court's functions – in encouraging reflection, negotiation, conciliation *and* adjudication – are more effectively performed.

The multifunctional family court

The family court, as the name suggests, makes decisions relating to family disputes, governed by the body of rules we term family law. The family court is one (significant) part of a broader system for resolving family disputes – the 'family justice system'. Eekelaar and Maclean (2013, pp. 7–8) describe the family justice system as:

comprising those institutions whose primary purpose is to define, protect and enforce the legal rights family members have *as family members* and to resolve conflicts between family members concerning those rights. The institutions include the court system . . . , the legal profession and mediators in so far as mediation seeks settlement or compromise of legal rights and information providers on these matters.

We should note at the outset that most family law disputes do not end up in court. Policymakers tend to focus on (what they often present as being the *problem* of) court-adjudicated disputes, but it is important to remember that 'cases that are brought before the courts are just the tip of the iceberg, while the rest are settled by the mechanisms of unofficial private law' (Fuszara and Kurczewski 2023).

While numbers are difficult to assess, Dabhi *et al.* (2022, para 5.3) found that of all separated parents, around 19% reported using the family court in relation to

a private law children dispute. Even among those disputes that enter the family court, only a relatively small proportion conclude with a judge-imposed decision. Dabhi, Anand and Tu's research did not differentiate between adjudicated decisions and consent orders, but earlier work suggested that around 11% of separating parents end up getting court orders about their children following a contested hearing (Office for National Statistics, 2008, Table 2.9). Similarly, in financial remedy cases after divorce, we know that 'only around one third leave the marriage with a court order, with the vast majority of these being made by consent' (Hitchings *et al.* 2023, p. 11); only around 10% of financial remedy orders are made by court adjudication rather than by consent (Office for National Statistics, 2018).

As well as demonstrating how few cases go to court at all, these data serve to highlight the limited role of the court as an adjudicator of disputes, as distinct from being a forum for reaching and approving negotiated outcomes. Unlike other types of court, where the main purpose is for the judge to resolve the dispute and impose an outcome that is backed by force of law (Smith 2011), the family court is not just for adjudication; it is also a space for family members to search for a solution they can and will all sign up to – through reflection, negotiation and compromise, often with the moral support of a legal team. Consequently, while adjudication, where the judge imposes a decision, is one key part of what family judges do, it is a surprisingly small part of the family court's function.

This context is important to understand why much government criticism of the family court and those who use it is misplaced. The government has put in considerable effort over a sustained period to reduce the number of people using the family court. Those requiring the family court's assistance were said to be engaging in 'unnecessary litigation' and failing to take 'personal responsibility for their problems'; family disputes were said to 'result from a litigant's own decisions in their private life' and to represent 'personal choices' for which the state had no responsibility (Ministry of Justice 2010, paras 2.11 and 4.19). The government assumes that those with family disputes are 'asking a judge to decide . . . without trying other options first', and presents 'families reaching an agreement themselves' as being specifically a different thing from using the court (Ministry of Justice 2023, p. 7). This rhetoric largely misrepresents what actually happens in a family court, where there is a central focus throughout proceedings on negotiation, compromise and conciliation in any case where this is appropriate and feasible (see Family Procedure Rules 2010, r 3.10). A focus on the family court's adjudicative function is therefore narrow and misleading, and overlooks the far wider range of functions the family court performs.

In understanding this wider role of the family court, it is important to consider how the various legal professionals within it operate. If a family dispute reaches a solicitor, the main aim is to settle the case by negotiation (Eekelaar, Maclean and Beinart 2000). Solicitors pursue this aim by drawing on their legal knowledge, and their experience of how the courts operate to advise clients about the likely outcome in their case. Clearly this is not unique to the family law context, but the borrowed authority of the judge is perhaps of particular importance for family disputes as a tool for reaching informed settlements. Family solicitors are very effective in doing this, working to reduce the 'mismatch between the aspirations of the client and the solicitor's perceptions of what was a realistic outcome' (Eekelaar and

Maclean 2013 p. 29; Murch 1980; Davis 1988; Eekelaar, Maclean and Beinart 2000). In this way, the family court wields moral authority even for families that never come before it.

If a barrister is instructed, they add a fresh perspective to the client's case, with additional perceived authority (in particular, greater experience of judges) and experience as a powerful negotiator under significant time pressure (Maclean and Eekelaar 2009, p. 119). Before, during and after a court hearing, barristers need to be able to give advice and take instructions. If a hearing is remote, barristers usually have a video or phone call with their lay client for this purpose, and – a pandemic innovation – communicate with their client during the hearing via an instant messaging service. Taking instructions demands greater care if the client is in some way vulnerable – for instance, if English is their second language, if they are anxious, or autistic (see generally George *et al.* 2020). And vulnerability is common, by comparison affecting around half of *unrepresented* litigants in private family law cases (Trinder, 2014). The barrister may need to give advice and take instructions multiple times on various issues, in between meeting with opposing counsel (or a litigant in person) to discuss proposals and negotiate. For face-to-face hearings, these meetings take place in a conference room or corridor at court; for remote hearings, they happen by video link, phone call or instant messaging. The space – physical or virtual – in which the family court exists must therefore facilitate barristers giving advice, taking instructions, and negotiating. Barristers are also duty-bound by their regulator to 'try to avoid any unnecessary distress for [their lay] client' which is 'particularly important where [they] are dealing with a vulnerable [lay] client' (Bar Standards Board, Code of Conduct, gC41). The means open to a barrister to try to reduce a client's distress and offer support differ hugely depending on whether they are sitting next to their client or only in contact with them digitally.

When a family case comes to court, there is often a new sense of urgency. For the first time, litigants are faced with the judge (or magistrates) whose job is to deal with the case 'expeditiously', proportionately, and allocating the case 'an appropriate share of the court's resources, while taking into account the need to allot resources to other cases' (Family Procedure Rules 2010, Rule 1.1). In other words, time in the family court is precious. This was never more so than at the start of the pandemic. Save for a dip in the first weeks of lockdown, the volume of applications being made in children cases continued at pre-Covid rates, and applications for domestic abuse injunctions rose in some inner-city areas (McFarlane 2020b). But hearings were taking longer, as everyone – court staff, judges, lawyers, litigants – adjusted to the remote process (Maclean and George 2021), and so the backlog was growing. In June 2020, the President of the Family Division called for expedition (McFarlane 2020b, p. 11):

If the Family Court is to have any chance of delivering on the needs of children or adults who need protection from abuse, or of their families for a timely determination of applications, there will need to be a very radical reduction in the amount of time that the court affords to each hearing. Parties appearing before the court should expect the issues to be limited only to those which it is necessary to determine to dispose of the case, and for oral evidence or oral submissions to be cut down only to that which it is necessary for the court to hear. (emphases in original)

Taking FHDRAs ('First Hearing and Dispute Resolution Appointment') and DRAs ('Dispute Resolution Appointment') in private children cases as an example, these hearings are typically listed for 1 hour. This is demanding: litigants are expected to have clear, reasoned positions on all contested issues, and attend court '1 hour prior to the listed time for pre-hearing discussions' (Standard Family Orders, October 2023, Order 7.0, para 110); in effect, to narrow the issues. In our experience as barristers in the family court, if parties do not engage in pre-hearing discussions, judges can come down heavily, thereby illustrating the perceived importance of reflection and negotiation in the family court process. And if the parties cannot agree on something, they have to accept that the matter will be taken out of their hands and the judge will decide it. This all creates a sense of urgency when a dispute reaches the family court, which in turn fosters willingness on the part of litigants to reflect on their positions – and potentially to compromise. For parties experiencing power imbalances, the court is an important safeguard by forcing the parties to negotiate within the bounds of what *it* considers acceptable. For example, a judge's input at a 'financial dispute resolution' hearing (FDR) in financial remedies proceedings may require the financially stronger party to reflect on their open offer and move towards the judge's indication, even though the judge has no power to impose that outcome at that hearing.

Inside the courtroom also, the family court is multifunctional. Eekelaar and Maclean (2013, pp. 80–1) identify three core activities that occupy a family judge's time: *legal activity* (acting as adjudicator of a dispute or scrutiniser of a proposed settlement, for example), *management* before or during a hearing (preparing for and then controlling the process, separate from substantive decision-making), and *help* for the parties (where the judge provides information or works to facilitate agreement). Their study suggests that legal activity occupies only about half (46.9%) of family judges' time, with the remaining time divided between management (29.8%) and help (23.2%) (Eekelaar and Maclean 2013, p. 82).

With respect to the 'help' that judges provide, when parties in a private law children case have agreed at least some of the contested issues, in our experience judges and magistrates are keen to applaud: 'It is very pleasing to see that you are working together'. Judges are bringing their authority to bear not by adjudicating, but by acting as quasi post-separation relationship counsellors, encouraging the parties to see the progress they have already made and what more they might achieve if they set their minds to it. The family court is therefore a space for conciliation, albeit backed by judicial authority (and the pressure of further legal costs and inevitable stress) if the court process prolongs. And by using turns of phrase such as 'You are to be commended for reaching agreement on [an issue]', judges are implicitly trying to prevent agreements from unravelling pending their being recorded in a court order. Of course, the state, and indeed the family court, has an interest in separated parents working together to co-parent or to divide their assets on separation. As Lady Hale (1998, p. 125) has said, 'We all have an interest in promoting stable families, functioning effectively as the first social security system, as the first nursery and educator of children, as the first nursing home for the sick, the old and the disabled'. Similarly, if family members can work together after relationship breakdown, the role of the state in supervising and adjudicating family disputes – with attendant costs, especially in the form of court time – is reduced. This explains the

current policy drive towards diverting cases away from the family court (McFarlane 2018; Public Law Working Group 2021; Ministry of Justice 2023).

We wonder if the effectiveness of such judicial comments, in encouraging parties to work together to find a resolution to their family dispute, is different when they are uttered remotely as opposed to face-to-face. Gill and Hynes (2020) have asked a related question: what difference does it make to actually be there, in the flesh, to watch legal processes? They are writing about the different context of what they term ‘courtwatching’, in which activists watch court hearings to scrutinise and challenge legal decisions, but their conclusions bear on litigants’ experiences of the family court:

We would argue that the intimacy of courtwatching in the flesh – hearing the same sounds, experiencing the same atmospheres, feeling the same heat and cold as litigants – can equip courtwatchers with a heightened empathy with experiences of state power. (p. 573)

We are interested in the heightened empathy and intimacy which might be shared by litigants, lawyers and judges who are physically present in the family court. By sharing the same physical space, are litigants more likely to heed the judge’s words of encouragement and work together effectively? Are lawyers and social workers more able to find a way forward when they can gauge a litigant’s thoughts and feelings, not only from their words and tone of voice but also from body language and facial expressions which can be lost in the virtual world?

Applauding family members on working together is also an example of the family court’s role in *persuasion* – in that case, persuading parties to cooperate with one another. The family court can of course *order* people to do some things, but there are limits to the orders that can be made, and the court may nevertheless seek to influence parties’ behaviour by invoking its moral authority. For instance, the family court cannot require a local authority to fund transport for a parent to visit their child who is in local authority care, but in our experience that does not stop the court expressing ‘disappointment’ at the local authority’s refusal to do so, even recording its views in a court order. In enforcement proceedings also, for instance if a resident parent has not complied with a child arrangements order that the child spend time with their other parent (Children Act 1989, s 8), the court *can* make punitive orders – it can fine or ultimately even imprison the parent for contempt of court (see *M v M* [2005] EWCA Civ 1722) or impose an unpaid work requirement (Children Act 1989, s 11J). But it rarely does so. Trinder *et al.* (2013) found that the family court sought compliance through punitive measures in only 9% of enforcement proceedings; it overwhelmingly took a non-punitive, problem-solving approach. In our experience, in a case where there are no safety concerns, judges often use rhetoric to persuade and apply pressure: ‘Why haven’t you taken your child to contact? You have no reason not to have done so’. They might even threaten more punitive action in future, if the litigant does not comply – but still without making the order. Indeed, making punitive orders goes against the family court’s conciliation function.

We wonder if the family court’s powers of persuasion are diminished when the judge cannot look a party in the eye. Hynes *et al.* (2020, p. 7) suggest that:

In a Western cultural context eye contact is a key means by which trust between individuals is secured. However, for a judge in a hearing using video-conferencing to sense that eye contact with the applicant is being maintained, the applicant must speak directly into the

camera, obstructing their view of the screen where they can see the judge. This is unintuitive and presents a trade-off of senses for the applicant. (references omitted)

In care proceedings, for example, it is common for judges to impress on parents the importance of engaging with the local authority while social workers conduct assessments. Do those messages carry the same impact if conveyed by telephone while the parent is at home or in their car? Similarly, it is common for judges to seek to steer a local authority; do social workers and their managers feel more able to ‘disappoint’ the judge if they are not physically in the judge’s courtroom?

Before turning to consider how the family court adapted to the COVID-19 pandemic and remote working, it is important to consider how physical court spaces might contribute to the family court’s moral authority. There is ‘pomp’ and ceremony in the physical family courts which is missing from remote hearings. Barristers adorn the corridors in typically sombre-looking, dark suits. There are no wigs, but everyone is instructed to stand as the judge/magistrates enter the courtroom, and to bow in deference to their authority. Barristers have to ask to turn away from the judge in order to take instructions from their client. Research into legal geographies has explored the link between physical space and the delivery of justice, as Rowden (2018, p. 275) explains:

Framing the court environment as out-of-the-everyday creates complex effects. It does more than simply impress the seriousness of the event; the structure and quality of the court setting conveys important messages to those subject to its processes.

Rowden’s work considers the difference between physical, face-to-face hearings and remote, video-link hearings, drawing on empirical work in Australia with stakeholders experienced with both. Rowden (2018, p. 276) quotes a judicial officer who:

questions the capacity of videolinked interactions to adequately convey to court participants a sense that the judge is dispensing justice on behalf of the community and in accordance with its values. This is due to the tangibility of that community, through proximity to other community members, being absent for those at the remote end of the videolink.

Rowden (2018, p. 278) questions whether the removal of the physical court space may go beyond the potential for the individual to feel (or be) disconnected from decision-making: ‘The unspoken fear is that by removing certain participants from the courtroom, those appearing remotely may fail to perceive the court – and hence the judge – as legitimate and authoritative’. Rowden’s ‘unspoken fear’ is supported by research in US immigration detention settings, which found that remote hearings negatively impacted on litigants’ engagement in court process, and on their perception of its legitimacy (Eagly 2015). This could damage the justice system as a whole, but particularly the family court in which enforcing court orders is known to raise particular challenges, especially in children cases (Ministry of Justice 2013). As Lady Hale has written, ‘the law is not good at enforcing personal relationships’ (Hale 1998, p. 133; see also Law Commission 1988, para 4.5): the family court cannot *make* a parent take their child to spend time with the other parent, it can only punish them or threaten to punish them if they fail to do so in contravention of a court order. In this sense, the ability of the family court to secure the end it considers best for the child depends on its moral authority; by making orders, encouraging conciliation and persuading. If remote hearings weakens the family court’s moral

authority, because of how differently litigants perceive the family court in the virtual world, it will reduce its ability to perform any of its functions (including adjudication, which relies on parties following court orders) and, more fundamentally, undermine its efficacy as a space for resolving family disputes.

The family court's response to the pandemic

We have so far set out the various functions which the family court performs and hypothesised how effectively the family court might perform these functions remotely. In this section, we explore how the family court responded to the pandemic in terms of the practices adopted and guidance issued. We are primarily interested in what these reveal about what the senior judiciary think is special about face-to-face hearings in physical family courts.

At the start of the pandemic in March-April 2020, the family court responded to the government-imposed national lockdown in England and Wales by transitioning to remote hearings. HMCTS (2021b) published data on the number of audio, video, and face-to-face hearings conducted in the family court each week between 24 May 2020 and 30 May 2021, which we have represented graphically in Figure 1. 'Face to face' hearings include any hearing where at least some of the participants were present in the courtroom, which for our purposes therefore includes hybrid hearings. On our calculations from Table 4 (HMCTS 2021b), on average 80% of courts provided data.¹ There are no equivalent data for the family court from before 24 May 2020, but HMCTS (2021a) did publish earlier data for *all courts* combined. These show that on 19 March 2020 there

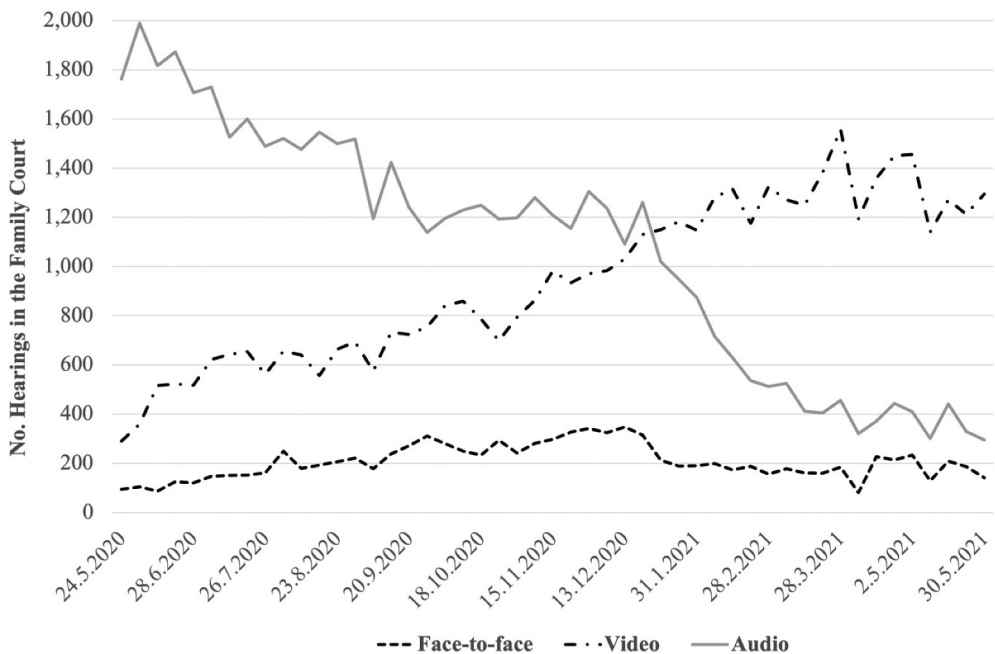


Figure 1. Graph showing the number of face-to-face, video and audio hearings conducted weekly by the Family Court of England and Wales, data taken from HMCTS (2021b).

were just 100 audio and 150 video hearings in England and Wales in total, which by 6 April 2020 had increased to 1,850 and 1,100 respectively; by then, only 15% of all hearings were taking place face-to-face.

As Figure 1 shows, initially most remote family court hearings were held by telephone, but this began to change as judges were encouraged to hold video hearings instead where possible. The Court of Appeal, for instance, noted that ‘there is a qualitative difference between a remote hearing conducted over the telephone and one undertaken via a video platform’ (*Re B (Remote Hearing: Interim Care Order)* [2020] EWCA Civ 584, para 35). There was a steady rise in the number of face-to-face hearings taking place through 2020 as pandemic restrictions gradually eased and HMCTS set up several socially distanced courtrooms. Public law children cases were generally given priority for physical court space (George 2023).

The number of face-to-face hearings dropped in January 2021 as the UK entered its third national lockdown. At this point, video hearings overtook audio hearings, with the latter dropping markedly: the number of audio hearings more than halved between the end of December 2020 ($N = 1260$) and the end of February 2021 ($N = 512$). The number of video hearings did not increase by anything like the same amount over that period ($N = 1,130$ to $N = 1,324$) and face-to-face hearings also dropped ($N = 314$ to $N = 156$). The total number of family court hearings reported in the study therefore dropped by around 20% between the end of 2020 (around 2,500 cases per week) and spring 2021 (around 2,000 cases per week) (HMCTS 2021b, our calculations from Table 3): see Figure 2.

It was not until autumn 2021, outside the time window reported on by HMCTS, that significant steps were taken to return cases to physical courts as a matter of course. Even

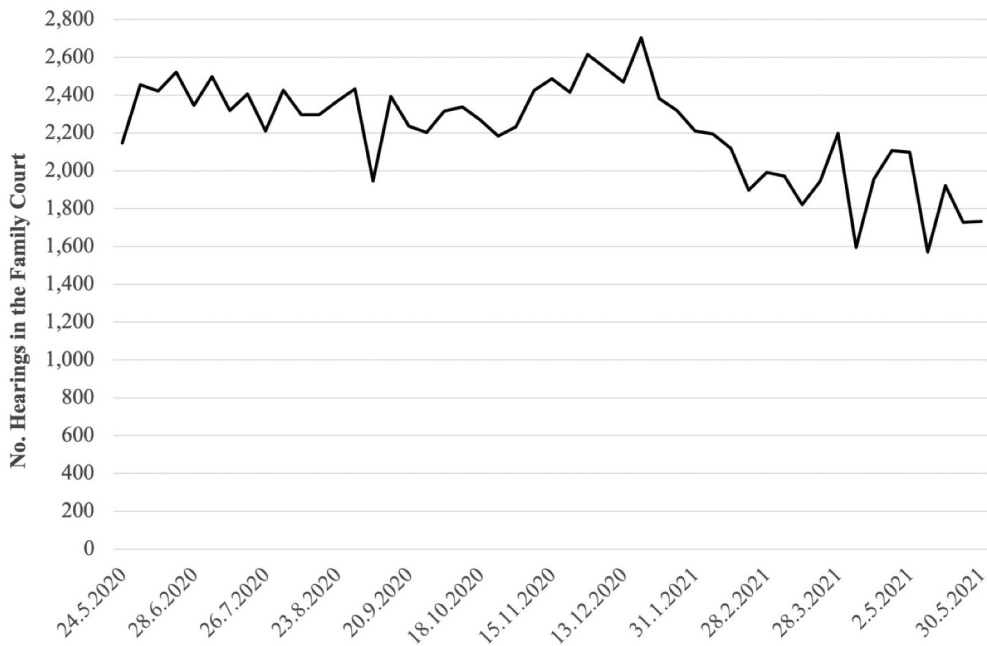


Figure 2. Graph showing the total number of hearings conducted weekly by the Family Court of England and Wales, data taken from HMCTS (2021b).

then, the plan did not come to fruition as intended as further waves of the pandemic took hold.

Turning to the guidance issued on remote working in the family court, the President's guidance (McFarlane 2020a) of 19 March 2020 reveals his instincts about the ability of the family court to function online – prior to anyone having significant experience of remote family court hearings, and prior to the consultations that followed. The President stated that the default position must be that family court hearings should take place remotely – although, 'where the requirements of fairness and justice require a court-based hearing, and it is safe to conduct one, then a court-based hearing should take place' (McFarlane 2020a, p. 1). For the President, in this guidance and throughout the pandemic, whether a particular hearing should proceed remotely was a *judicial* decision to be determined on a case-by-case basis, governed by case-specific factors, such as the ability of the lay parties to engage remotely, whether there is a special need for urgency, and the nature of the evidence (oral or written) (see *Re A (Children) (Remote Hearings: Care and Placement Orders)* [2020] EWCA Civ 583 at para 9). A one-size-fits-all model would not therefore be decreed from above (see *Re P (A Child: Remote Hearings)* [2020] EWFC 32, para 24; *Re A* (above), paras 3, 10 and 11).

The President set out a list of hearing types suitable be conducted remotely, which included shorter hearings, such as for EPOs and ICOs in care proceedings, case management hearings, and FHDRAs and DRAs in private children cases where limited evidence (if any) would be heard. Final welfare and fact-finding hearings were excluded. Similarly, guidance issued jointly by the Lord Chief Justice, the Master of the Rolls and the President on 9 April 2020 (Burnett *et al.* 2020) suggested that family cases were unlikely to be suitable for remote hearing where the parents/other lay witnesses were to give evidence. In the first weeks of the pandemic, most final welfare and fact-finding hearings were therefore adjourned in the hope of face-to-face hearings returning (McFarlane 2020b). Financial cases were treated differently from others in the family court: in guidance issued on 17 March 2020 by Mr Justice Mostyn, the default position for *all* Financial Remedies Court hearings was that they should be conducted remotely; face-to-face hearings should only take place 'where this is absolutely unavoidable' (McFarlane 2020a, p. 9). In effect, substantial oral evidence could be heard and adjudicated on and final decisions made in financial cases, but *not* in children and domestic abuse cases. Subsequent guidance (Mostyn and Hess 2020) justified the different approach on the bases that most financial remedy cases do not depend on assessing witness credibility, and even those cases that do are likely short, and the relevant issues can be assessed by remote testimony. Putting it another way, what was special about physical family courts was their inherent suitability to *adjudication*, as settings in which to assess oral evidence and make final decisions in non-financial cases.

The President's rationale for being more hesitant about remote hearings in children and domestic abuse cases became clearer in *Re P* (above), a care case in which the local authority raised allegations of fabricated or induced illness ('FII'). The President came to the 'very clear view' (para 26) that a final rolled-up hearing – in which the family court would determine factual issues and fix the child's final care plan – could not proceed remotely. While the judge may be able to cope with witnesses appearing remotely, the '*more important* [part of the judicial function]' (para 26) (our emphasis) in assessing the parties' demeanour throughout the hearing

could not be performed as well when the parties in attendance were postage stamp images on a computer screen. This comment was made in the specific context of FII allegations, in which the President said assessing the parents' behaviour throughout the hearing is 'a crucial element in the judge's analysis' (para 11). Interestingly, both Mrs Justice Lieven (in *A Local Authority v M and F* [2020] EWHC 1086, para 23) and Mr Justice Williams (in *A Local Authority v Others* [2020] EWHC 1233, para 42) pushed back against witness demeanour, generally speaking, having disproportionate weight in credibility assessments; for them, this feature of face-to-face hearings is presumably less important. The President's second reason for concluding that the hearing could not proceed remotely was due to the mother's impaired ability to follow the extensive oral evidence and give contemporaneous instructions (see also *Re A* (above)). For the President, then, physical family courts are special because they are settings in which parties can more easily follow and understand proceedings (aided by their lawyer face-to-face), give contemporaneous instructions, and have their evidence more effectively assessed.

Further guidance from Mr Justice MacDonald followed swiftly after the President's, in its first of five iterations, on 23 March 2020. Akin to the President, MacDonald J focused on how remote hearings would likely affect the fairness and justice of the process, which he defined primarily in terms of the *adjudicative* process; in the extent to which parties could access, follow and participate *in hearings*. MacDonald J considered what adjustments could be made to enhance the fairness of hearings where litigants lacked physical proximity to their legal representative or other support. Separately, he underlined the importance of maintaining decorum in remote hearings – presumably to maintain the court's moral authority. By implication, and similarly to the President, what was special about physical family courts was the space they provided for litigants to be supported in the flesh by their lawyer or other support; that litigants could, as a result, more easily follow what was going on and give instructions; and they could understand the seriousness of the proceedings because of the 'pomp' and ceremony. Amidst this focus on the fairness and justice *of hearings*, though, there is no discussion in MacDonald J's guidance of how parties should *negotiate* remotely. The most said is that 'the parties are encouraged to undertake pre-hearing discussions where reasonable and possible' (p. 74).

A narrow focus on the family court's adjudicative function is also apparent in the President's 'Road Ahead' of 9 June 2020 (McFarlane 2020b). By this time, it was clear that social distancing restrictions would be in place for many months, and, as such, the President's key message was that final welfare and fact-finding hearings could no longer be adjourned in the hope of a fairer, face-to-face hearing being just around the corner. In justifying this approach, the President appealed to what he considered to be the purpose of the family court: 'Making a timely decision as to the child's further care *is in essence what each case is about*' (p. 3) (our emphasis). Here again the focus on the family court's adjudicative function, in 'making a timely decision' about a child's care. The Road Ahead does not consider how negotiation and compromise are to be achieved in remote hearings. The emphasis is elsewhere, on the need to avoid delay, and to enhance the support for lay parties to participate in remote hearings (pp. 7–8). The President urges thought to be given in all cases to lay parties joining a remote hearing from somewhere other than their own home, for instance in their solicitor's firm or barrister's chambers where they can be supported by a legal representative. This was again a main theme in the

View from the President's Chambers of 18 November 2020 (McFarlane 2020c), reiterated in the President's second Road Ahead in 2021 (McFarlane 2021a, p. 3).

The senior judiciary's focus on the adjudicative function of the family court at the start of the pandemic is unsurprising. At this early stage, getting all the parties, lawyers and witnesses logged on and able to follow a remote hearing was, in itself, an achievement. This was therefore the priority. The available academic literature on remote hearings had likewise focused on the ability of parties to engage, and of courts to make just decisions (see Byrom 2020). Indeed, Byrom's rapid evidence review (2020) makes recommendations for remote family justice which centre on the family court's adjudicative function. Pre-pandemic it had become an integral part of family court business to consider the impact of case management and welfare decisions on parties' Article 6 and Article 8 ECHR rights. Whether a remote hearing is fair, including the litigants' ability to participate and the judge's ability to properly assess the evidence, is thus an extension of Article 6 reasoning which was already embedded in judicial thinking. Further, shortly before the pandemic the family justice system had reflected on how to improve vulnerable litigants' participation in the family court, which led to Part 3A of the Family Procedure Rules 2010 and Practice Direction 3AA. Effective participation in the court process by litigants was therefore at the forefront of everybody's minds when the pandemic hit. However, it remains notable that the other functions of the family court, principally as a setting for reflection and negotiation, were overlooked. Negotiation and compromise are key functions of the family court, and warranted fuller consideration at an early stage.

The non-adjudicative functions of the family court came to the fore later. In a speech to the Family Law Bar Association conference in October 2021, the President addressed the future of remote hearings. While emphasising that he was not issuing formal guidance, and that individual judges would retain discretion in each case, the President (McFarlane 2021b, p. 3) set out 'to offer a steer and to describe the general direction of travel which courts should expect to follow':

The central theme running through the approach that should apply is that the parties and their lawyers should normally be physically present at court on those occasions when an important decision may be taken.

Clearly, this was a significant change in message from his earlier guidance. Identifying that there were positive aspects of remote hearings, the President went on to identify this negative feature which he considered crucial (McFarlane 2021b, p. 3):

[O]ne clear negative is the absence of that time outside court, in the 45 minutes or so before a hearing, when the presence of 'the court door' and the proximity of the other parties and their lawyers will not infrequently lead to a focussing of issues or even settlement. That time and space simply does not exist before a remote hearing and it is important that this valuable opportunity for advice, negotiation and possible settlement is regained.

For the first time during the pandemic, in this speech the President recognised the significance of the family court's function in encouraging reflection and negotiation. In our experience, pre-court negotiations can and do take place around remote hearings, but it is harder, and more elements need to line up for them to be effective: thought must have been given to communication channels between the lawyers, and between each

lawyer and their client. Official data support the President's sentiment that pre-court negotiation was less productive during the pandemic. Comparing average numbers for 2018–2020 with the numbers for 2021, whereas the average number of *applications* in private children law cases rose by 1.1%, the number of court *disposals* in such cases rose by 8.6% (our calculations from Ministry of Justice 2022). More cases thus appear to have been resolved by judicial determination during the pandemic, rather than by an agreed outcome negotiated by the parties.

The President's October 2021 speech also alluded to some of the family court's other non-adjudicative functions (McFarlane 2021b, p. 3):

More generally, the obvious benefits of an attended, in court, process before a judge or magistrate makes an important decision in a family case do not need to be stated. Remote platforms are good for undertaking transactional communications, but there is more to a Family Court hearing than simply transacting business. Much that goes on has a 'human' perspective, which can often be lost online, but is fully present in a court room.

What does the President mean by the 'human' perspective' of family court hearings, in which more goes on than simply 'transacting business'? We suggest that here the President is alluding to the persuasive and conciliatory functions of the family court. Whereas in other areas of law, it is the ability to make *orders* that differentiates a court from any other venue (Smith 2011), in the family court there is significant emphasis on judges using their authority to encourage parties to work together, to persuade people to do things that go beyond the court's powers to order, and to influence behaviours that are strictly outside the legal arena. These interpersonal dynamics seem to be what the President is alluding to as the 'obvious' benefits of a face-to-face hearing, which resonates with what Martha Cover (quoted in Maclean and George 2021, p. 231) says about the link between face-to-face court interactions and better results in family cases:

[A] huge part of the magic and value we family lawyers do is to be in a room with a person to listen and understand, and give advice on human matters, the family, while looking them in the eye. This empathy is not only therapeutic, it leads to practical results, to better understanding between lawyers and clients, and between lawyer and lawyer.

The President was not the only senior judge reflecting on the broader implications of taking family court hearings online as the pandemic progressed. On 16 May 2022, HHJ Roberts (2022), the Designated Family Judge for the Central Family Court, issued new guidance stating:

We are generally returning to pre-Covid arrangements, primarily to increase the numbers of cases we can list *and to enable us to bring about more agreements and settlements* (our emphasis).

Returning to face-to-face hearings was seen as essential by HHJ Roberts to increase the opportunities for and effectiveness of negotiation in the family court process; a function of the family court that was sufficiently important to justify a change in practice. A similar conclusion was reached by many practitioners and judges in the Financial Remedies Court. HHJ Farquhar consulted with 215 judges and 896 lawyers about the future of remote hearings in financial remedies cases. When asked whether remote Court FDRs had a higher or lower settlement rate than face-to-face FDRs, almost 55% of judges thought that remote FDRs had a lower chance of settling, compared with 37% of lawyers;

52% of lawyers and 40% of judges thought settlement rates were about the same (Farquhar 2021, para 4.16). The Farquhar report ultimately recommended that First Appointments, directions hearings and evidence from experts or persons overseas should take place remotely by default, but that all other hearings, including FDRs and final hearings, should be face-to-face by default (see para 4.10 for the identified pros and cons of remote hearings). In reaching the latter recommendation, the report singles out ‘the role that actually attending a Court hearing in a Court building plays in the understanding and acceptance of the serious nature of the proceedings’ (para 4.39.1). Appreciating the serious nature of proceedings is important for the family court to perform both its adjudicative and non-adjudicative functions: it encourages litigants to engage with the process, to work towards settlement, and to accept and implement court orders (without need for enforcement proceedings).

To conclude this section, what the senior judiciary implied was special about physical family courts evolved during the pandemic: while initially the focus was on adjudication, later the family court’s non-adjudicative functions came to the fore. One obvious lesson from the pandemic is therefore that when issuing guidance, policymakers must remember the family court’s non-adjudicative functions, as well as its role in adjudication. Focusing only on adjudication takes an unduly narrow view of what the family court is for: it is a space for resolving family disputes, through reflection, compromise and conciliation, as well as by assessing credibility and making judicial decisions.

Family justice professionals’ experiences of remote hearings in 2020

In this final section, using empirical data collected by Maclean and George in 2020, we explore other professionals’ experiences of virtual family justice during the early stages of the pandemic, and reflect on what they tell us about the family court’s ability to function online.

Maclean and George spoke to 26 legal professionals between May and September 2020. Their sample included 10 barristers, 10 solicitors and 6 judges/magistrates, and we record our thanks to them for taking the time to share their experiences. We refer to the barristers as B1, etc; the solicitors as S1, etc; and the judges and magistrates together as J1, etc. This was an indicative selection of practitioners, rather than a representative sample; and while most were based in and around London, their practices varied and covered a wide range of family law areas. The study was a time-limited snapshot of what these lawyers and judges were thinking at the time, and in our experience the system of remote hearings has become far smoother since then. To the extent the experiences of our participants might reflect ‘teething problems’, we have endeavoured to account for that. Practitioners’ experiences further into the pandemic might also have been different to what they reported to us in May-September 2020. Nonetheless, much of what we were told has ongoing relevance. Maclean and George’s interviews were bookended by two rapid consultations carried out by the Nuffield Family Justice Observatory (‘NFJO’) in March and September 2020 at the request of the President (Ryan *et al.* 2020a, 2020b). We refer to the NFJO research to set Maclean and George’s interview data in its broader context.

First, barrister participants reported struggling to get a proper feel for their cases when they were unable to talk to their clients face-to-face. Barristers often meet

clients for the first time at court one hour before the hearing, particularly if the client is legally aided when, certainly in private children and domestic abuse injunction cases, there is no public funding for an earlier client conference. In these cases, pre-hearing conferences are the first opportunity for barristers to hear about the case *from the client*, over and above what was included in their brief. As one barrister put it, ‘Before [the pandemic] we could speak to the client [directly, which allowed us to give] the judge a sense of the dynamic of the case – on paper, you can’t pick up where to put the emphasis’ (B7). Respondents to the NFJO’s May 2020 consultation similarly reported issues in giving and receiving instructions prior to hearings, with one barrister commenting that ‘Clients struggle to digest difficult advice and to give instructions on the phone’ (Ryan *et al.* 2020a, pp. 22–23). Remote hearings were therefore making it more difficult for barristers to understand what *really* mattered to their clients, inevitably affecting their ability to give advice, ‘fearlessly promote’ their best interests (Bar Standards Board, Code of Conduct, CD2; rC15) and work towards settlement. This reflects the experience of solicitors, who found it more difficult to build rapport with and take initial instructions from clients whom they met for the first time online (George 2023). Physical family courts are thus important spaces for face-to-face conversations between barristers and their clients, which enable barristers to get a better feel for their cases and, on that basis, more effectively advocate and negotiate.

Barristers worried that they could not adequately empathise with or support their clients remotely. One commented that ‘We’re not therapists, but you are in a therapeutic role [and we] need to recognise that’ (B6). Another said:

Normally you’d know from body language and stuff how [the client] felt, what was going on for them emotionally, whereas now [I’m left] relying entirely on what they say or the questions you can ask, without being able to see what they’re saying with their bodies. (B10)

The NFJO (Ryan *et al.* 2020b, p. 19) put it this way:

A strong theme in responses to this survey, as with the earlier survey, is that family justice is not simply administrative adjudication but is dealing with personal and often painful matters, which require an empathetic and humane approach.

Showing clients empathy is inherently important, as B6 suggests; family court proceedings are stressful, and through active listening and words of comfort (but also realism) barristers can make hearings more manageable for clients. Empathy can also make for a more productive hearing. It can lead to potentially significant information being shared between lawyers and parties (see Martha Cover’s comments, quoted earlier) and make barrister-client conversations more productive. It is not just judges/magistrates who perform a *persuasive* function; similarly to solicitors (Eekelaar and Maclean 2013, p. 29), barristers try to reduce the mismatch between clients’ aspirations for their case and what is a realistic outcome. This requires clients to trust their barrister – they are being asked to reconsider what might be an entrenched position on an issue as important as how much time they spend with their child. Clients may, however, have less trust in barristers they have not met face-to-face; in remote hearings, barrister participants reported feeling unable to undertake the rapid rapport-building that is their stock-in-trade to develop a relationship (‘there’s a huge amount of trust built just in a handshake’:

B10). The quasi-therapist role of barristers therefore seems to be diminished in remote hearings, and, we suggest, with it some of their persuasive function.

Participants had concerns about the effect on their clients of having life-changing decisions made remotely (see also Rowden 2018, p. 275) which was especially true of care cases. According to one barrister, the process of watching a child be removed at a remote hearing was ‘harrowing’, with the client ‘all alone in her flat, and her solicitor can’t help either’ (B5). This sentiment was shared by solicitors and judges:

There’s a real sense of sadness in seeing a mother on her own in her flat, of watching her hear me say that I’m making a placement order or removing the child to the care of the local authority. . . . I can’t imagine how difficult that must be for clients, when normally [their lawyer] would spend time with them after the hearing and talk to them, and so might the social worker and the guardian. (J1)

. . . the huge horror of a major decision about a child being made on a tiny screen: there’s something messed up about a child being removed on a box on a screen. (S4)

These comments echo those of respondents to the NFJO’s consultation on the future of remote hearings in the family court post-pandemic (Ryan *et al.* 2021, p. 13) and McFarlane P’s (2020b, 2020c, 2021a), insistence that, wherever possible, lay clients should not attend a final welfare hearing remotely at home without their lawyer. Indeed, there is a broad consensus across the family justice system (Ryan *et al.* 2021, pp. 24, 26–28), post-pandemic, that such decisions should not be made unless the lay party is physically present with their legal team – who can provide moral support, and help the client give their best evidence – and preferably only if they can look the judge/magistrates in the eye. Otherwise, what McFarlane P called the ‘human perspective’ of the court process is lost. By providing a setting for face-to-face adjudication, in which lay clients, lawyers and the judge are all present, physical family courts thus seem to confer moral legitimacy on the family court process (see also Rowden 2018; Eagly 2015).

Lawyers also questioned the legitimacy of remote hearings on the basis that lay clients were less able to participate. One contrasted remote hearings (‘the clients were bypassed’) with the experience of a client who had attended to give evidence face-to-face: ‘this mum *knew* she was heard by the judge’ (S3). Another described clients as being ‘disengaged’ by the remote hearing process, especially for phone hearings (B4). Similarly, Ryan *et al.* quote one mother as saying ‘I couldn’t talk to anyone during the hearing so I didn’t feel like a participant so much as a spectator’ (2021, p. 13). Remote hearings are therefore at greater risk of being, or being experienced by participants as, unfair. This risk is particularly acute when lay parties are illiterate (MacDonald 2020, p. 38) which may affect a substantial proportion of family court users: according to the House of Commons Justice Committee (2019, p. 14), 15% of the UK population is functionally illiterate. As Byrom (2020, p. 3) points out, it will be particularly difficult for illiterate lay clients to give contemporaneous instructions during a remote hearing, when the principal means of doing so is via an instant messaging service. Lay clients who feel they were able to participate meaningfully in the court process and were heard by the judge may also be more likely to accept court decisions. This is vital to preserving the family court’s moral authority. How parties feel about their family court cases, what might be termed their affective element, may be connected with Sen’s (2009) idea of a ‘comprehensive outcome’, which takes into account both the process by which the decision was reached and

the eventual decision in substantive terms. The senior judiciary was thus rightly concerned at the start of the pandemic with the ability of lay clients to effectively participate remotely (McFarlane 2020a; MacDonald 2020), given that physical family courts seem better suited to effective participation by lay clients in family court hearings.

Participants frequently commented that remote hearings were undermining the respect lay clients had for the family court. The absence of the physical court setting changed how lay clients behaved, with lawyers reporting that clients (or others involved in their cases) appeared on video link in their pyjamas or otherwise not presenting as they would if they had to physically appear at court. The remote nature of hearings was thought by most participants to ‘downplay the seriousness of things’ (S1), to be ‘more conversational’ (S5) and ‘less deferential’ (S9) than an attended hearing. The Magistrates’ Association (2022, p. 9) raised similar concerns: ‘Magistrates felt remote links were responsible for undermining respect for the court and that this was a major downside to their use’ (see also Ryan *et al.* 2020b, p. 2). In comments reflecting Rowden’s concerns that ‘those appearing remotely may fail to perceive the court ... as legitimate and authoritative’ (2018, p. 278), several participants agreed that the court’s authority more broadly was undermined online:

for some [litigants] there’s no sense that [a remote hearing] is a court hearing, there’s no concept of it – for them, they’re on a telephone call and that’s what they understand it to be. Whereas when they come to court, there’s a building, a physical space, a sense of occasion – not a good one, but a sense that something is happening and we’re going to see a judge. (J2)

Often [litigants] are given an outcome that they don’t want – may hate or may not mind, but it’s unlikely to be exactly what they want – but them sitting in a court and having the judge come in and people bowing and all the stuff that goes on, helps them buy into and have confidence in the justice system and the decisions it makes. But when it’s on the phone and you just hear voices, I think it’s hard to have confidence in that process. (B8)

Pomp and ceremony, as well as entering the ‘out of the everyday’ setting of an official court building (Rowden 2018, p. 275), therefore seem important contributions of physical family courts in maintaining the family court’s moral authority. The lack of these features in remote hearings explains why MacDonald (2020) was keen to stress that the solemnity of hearings must be maintained online.

Another prevalent theme among participants was the function of the family court as a space for negotiation and compromise. One of the key roles of barristers is to take instructions and negotiate outside court, asking for more time when necessary. But as one barrister said, ‘discussion outside court is the biggest challenge’ of pandemic working (B3) (see also McFarlane 2021b; Magistrates’ Association 2022). The flexible space to do that part of the job is largely gone with remote court hearings:

In remote hearings if the starting time is 10, you have to be there logged on. Before, there was fluidity, you could ask for more time and maybe resolve issues. Now, going into court with half instructions, it’s not the gold standard of fairness to parents. (B7)

For this barrister in the study, less fluidity around the start time of remote hearings as opposed to face-to-face hearings was leading to fewer issues being resolved. This inevitably leads to judges needing to determine more issues, increasing the length of hearings and thus reducing the number of cases that can be heard. The difficulty of

narrowing issues and reaching settlement when working remotely is perhaps one reason why the number of hearings in the family court declined between December 2020 and May 2021 (HMCTS 2021b; see Figure 2), as fewer cases settled at court and hearings took longer. HHJ Roberts (2022) seemed to think so; in directing that all hearings in the Central Family Court should return to face-to-face, she hoped to increase settlement and list more cases.

There was also a feeling among participants that parties were not as prepared to negotiate in remote hearings: ‘Clients need the pressure of being in court. At home, they don’t take it seriously. They need the urgency’ (B2). Another commented that ‘actually being physically present at court, there’s a lot more impetus to try and find an agreed way forwards’ (B10). It is not just the logistical challenges, then, of engaging in inter-party discussions and negotiation remotely, but whether lay clients understand and accept the seriousness of remote proceedings (see Farquhar 2021, para 4.39.1). For instance, one participant said, ‘the advantage of court is *attending* – 90% will get sorted outside the court, but with [remote hearings] there is no opportunity to have that kind of conversation’ (S1).

Finally, judicial participants thought that their ability to read the room and therefore ‘help’ the parties (see earlier discussion: Eekelaar and Maclean 2013) was impaired in remote hearings. This links to our earlier discussion of the conciliatory and persuasive functions of the family court. For one judge, whereas in a face-to-face hearing ‘I can see the frowns, the anger, when things are brewing, and all of that is completely lost on the telephone’ (J2). Another judge commented that, ‘When people are physically present, it’s much easier for the judge to address people directly or make a comment or catch someone’s eye, to make a comment or encourage someone to settle, or to read a situation’ (J3). These comments capture the humanness of the family court process, and the ability of judges to invoke the family court’s moral authority to achieve some end, such as better cooperation between the parties. As Rowden (2018, p. 273) notes, a video link replicates only the *sight* and *sound* of a person; ‘A whole, warm-blooded, “live” person is reduced to an audio and visual feed. The rest of the sensory field is denied’. Outside physical family courts, perhaps judges are therefore less able to know how best to invoke their moral authority to help resolve family disputes; in other words, when to be persuasive, when to be hard-line, and when to avoid doing either, for fear of further entrenching the parties’ positions.

The professionals that Maclean and George interviewed between May and September 2020 therefore had significant concerns about the impact of remote working on the ability of the family court to perform its various functions remotely. As one judge emphatically put it: ‘I would be concerned if it was felt that this, where we are now, is okay in terms of a way of working and a way of the family justice system working’ (J3). As a general proposition, participants did not think that the *outcomes* of contested decision-making by judges were different when hearings took place remotely: in other words, the same order would have been made if the case had been contested at an in-person hearing. However, this may not be as straightforward as it seems. As noted earlier, official data suggests that during the pandemic more family cases ended with a judicial *decision* being made, rather than a mutually agreed settlement; a significant difference from the perspective of lay clients.

Do we need physical family courts?

Stepping back, after the unintended experiment with a remote family court during the pandemic, it seems that much can be lost when family court hearings are taken into a virtual world. Lay clients are often less able to engage in and follow the family court process, and are less well supported when they attend court remotely independently of their legal team. The family court can be experienced as commanding less respect and wielding less moral authority when it is a virtual emanation rather than an embodied, in-court experience, and work towards settlement can be less effective. Physical family courts create a space for parties *to be in* to seek final resolution of their family law disputes; a physical space in which, we suggest, the family court's functions – in encouraging reflection, negotiation, conciliation *and* adjudication – are more effectively performed. Contrary to government rhetoric (Ministry of Justice 2023, p. 7), 'families reaching an agreement themselves' is not necessarily a different thing from going to court. Sometimes the authority of the court is needed to bring about an appetite for settlement, which can then be reached, with minds focused, *at* the family court.

While legal advice can still be given remotely – and instructions taken, negotiations had, evidence weighed, and decisions made – part of the 'magic' is lost when physical proximity to one's lawyer, the 'other side', and the ultimate decision-maker is not part of the process. Face-to-face hearings keep interpersonal, human interactions at the core of the court process, which after all is primarily concerned with interpersonal relationships and their consequences, in the interests of children, human welfare and fairness. In doing so, physical family courts maintain the legitimacy of the court process, by making plain the moral authority of the family court to intrude into family life. Physical family courts are therefore an essential part of the family justice system.

Perhaps, though, not every family court hearing has to take place face-to-face. The Farquhar report (2021) recommends that, in financial remedy proceedings, by default directions hearings and the taking of evidence from overseas and expert witnesses should be conducted remotely. HHJ Farquhar (2021, p. 44) suggests that this approach furthers the Overriding Objective by saving expense (travelling to court, lawyers waiting around at court), freeing up conference rooms, saving everyone's time (including judicial time) and improving the wellbeing of lawyers and lay clients. The Farquhar report also suggests that an important factor in whether a hearing should take place remotely is lay clients' personal preferences. It is interesting that 55% of lawyers who responded to HHJ Farquhar's consultation thought their lay clients had positive or very positive experiences of remote financial remedy hearings, and only 14% reported negative or very negative client experiences (2021, para 4.14). Lawyers reported that remote hearings were less stressful for lay clients, allowing them to feel relaxed in their home environment without having to see their ex-partner face-to-face. Lay clients were 'better able to instruct throughout the hearing, by text', as long as they were well looked after by their legal team. And as one lawyer put it, 'Most are so familiar with home schooling/zoom social lives/working from home that it is not daunting' (para 4.14.1).

We note that these lay clients' experiences are not representative of lay clients in the family court as a whole. These were reports by lawyers of their clients' experiences – who were therefore *represented* litigants – in financial remedy proceedings where the vast majority of work is privately funded. In other

words, they were lay clients who could afford a barrister to represent them, who, we suggest, will generally speaking have a different socio-economic background to other family court users: they will have jobs in which, especially post-pandemic, they are used to conducting and appearing in meetings online; and they will likely have a private space at home where they can attend a family court hearing remotely. These lay clients, privately funding and therefore not reliant on legal aid, could likely also afford barrister-client conferences well before the day of the hearing – they could afford to be ‘well looked after’, as one barrister put it (para 4.14.1). This all stands in marked contrast to the experiences especially of public children law clients, as reported by Maclean and George’s participants. Physical family courts therefore have a role in furthering *social* justice; they ensure that less privileged family court users can still benefit from all the functions of the family court, when their home and social circumstances do not enable them to do so remotely.

A majority of respondents to the NFJO’s consultation on the future of remote hearings also supported case management hearings and FHDRAs and DRAs in private children proceedings being conducted remotely – subject to the needs of particular clients (Ryan *et al.* 2021, p. 3). For instance, fully remote hearings are unlikely to be suitable if a lay client needs the support of an intermediary, and litigants in person face particular challenges, not having the benefit of a lawyer to guide them through the process.

However, drawing on our experience as barristers in the family court and the experience of the study participants reported here, we would sound a note of caution about hearings, which are not purely directions hearings, being heard remotely. While some hearings, such as First Appointments in financial remedy cases, focus on giving or agreeing case management directions, in most cases the family court is expected to function as a setting for moral support, conciliation, reflection and negotiation – as well as adjudication. Hence the name of the first hearing in private children cases: ‘First Hearing and *Dispute Resolution Appointment*’. It is noteworthy that most family justice professionals who responded to the NFJO’s 2021 consultation and who did not support FHDRAs and DRAs being conducted remotely cited the difficulty of encouraging settlement in such cases (Ryan *et al.* 2021, pp. 20–21, 23). The same is likely to be true of Case Management Hearings and shorter (ICO, EPO) hearings in public children cases, and FDRs and final hearings in financial remedy proceedings. In the majority of family cases, therefore, the multi-functional family court loses a significant part of its value when hearings take place remotely. The family court’s non-adjudicative functions, which are vital to the overall effectiveness of the court as a mechanism for resolving family disputes, are performed more effectively face-to-face in physical court rooms. As one judge noted of a care case:

if we’d been there [face-to-face] I could have [for example] told the guardian to go and knock some sense into the social worker, or got the guardian to get the grandmother in and see if she’s worth talking to. A first ICO can turn a case, so losing those personal discussions about the merits of a placement and contact is a disadvantage. (J1)

Note

1. We have excluded the weeks of 31.5.2020, 27.12.2020, 3.1.2021, 10.1.2021 and 4.4.2021 from [Figure 1](#); these are statistical anomalies caused by holiday court closures and low data reporting rates.

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Both authors are barristers practising in England and Wales.

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