

What are Family Courts For? Lessons from a Pandemic

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We have a fairly good sense of what family courts *do*, in practical terms, but in this chapter I want to give a little thought to the question of what they are *for* in a more fundamental sense. I will consider what we know about the functions of the court and the professional actors working within it, and draw on some empirical data gathered with Mavis Maclean in 2020 to think about whether the experiences of family justice during the Covid-19 pandemic might tell us something about what the court's purpose is. I suggest that it performs a far broader social function than most other courts do. While the court does, of course, adjudicate on disputes and give decisions, that is only one of its purposes, and the experience of remote court hearings through the pandemic has given us an insight into the importance of what the court does beyond its adjudicative function.

The context of the family courts

Understanding what family courts are for requires a consideration of what family *law* is for, since self-evidently the primary set of legal rules applicable to family court decisions comes from the body of law that we term family law.¹ Many years ago, John Eekelaar identified three functions that family law performs: it facilitates *adjustments* to people's family relationships (with marriage, divorce, adoption, etc); it *protects* vulnerable adults and children within families (with child protection, domestic abuse remedies, etc); and it *supports* families and their familial role in society (such as local authority duties to support children in need or the court's power to order parents to attend parenting courses).² As I have written elsewhere:

The family justice system administers these functions as a forum for enforcing people's rights; protecting them from harassment, bullying and abuse of power within families; and promoting values like welfare, fairness, equality and justice.³

To borrow language from a related context,⁴ these *concepts* appear to be relatively stable in family law, but the *conceptions* of what they mean changes over time, and different actors

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¹ As I have noted with colleagues, while some legal systems may have a clearly delineated body of family law, 'Identifying a corpus of family law for England and Wales is less straightforward' (J Miles, R George and S Harris-Short, *Family Law: Text, Cases, and Materials* (4th edn, OUP, 2019), p 2.

² J Eekelaar, *Family Law and Social Policy* (2nd edn, Weidenfeld and Nicolson, 1984).

³ R George, *Ideas and Debates in Family Law* (Hart Publishing, 2012), p 5.

⁴ D Archard, *Children: Rights and Childhood* (3rd edn, Routledge, 2015), ch 3.

within the system may prefer to prioritise one meaning over another for various reasons. Writing about financial remedies cases, Alison Diduck notes a similar point when she describes ‘judges determine[ing] responsibility for financial and care responsibilities post-divorce ... through a plurality of discourses which jostle for dominance from time to time’.⁵ Frances Olsen’s powerful image of family law as ‘an arena for the ideological struggle’ over the meanings of concepts like ‘family’, ‘mother’, ‘husband’ and so on,⁶ fits clearly within this idea of the battle over the meaning of terms that are, on the surface, often widely accepted.

Diduck’s overall argument, in answering her question ‘What is family law for?’, situates family law’s purpose in the crucial social context in which families operate. She quotes Lady Hale’s reflections on the well-known case of *Radmacher v Granatino*,⁷ who asks:

Do we want to encourage responsible families, in which people are able to compromise their place in the world outside the home for the sake of their partners, their children and their elderly and disabled relatives, and can be properly compensated for this if things go wrong?⁸

Diduck broadens these questions beyond ‘family’ also to include ‘society’, and closes her argument saying this:

What value do we place on those compromises and on that care work, and who is responsible for paying them? Ultimately, answering those questions is what I think family law is for.⁹

There is strong resonance between Diduck’s approach and Jordi Ribot’s description of family law as ‘a set of rules devised to provide individuals with tools to pursue their legitimate claims in family matters and that seeks to render them a fair outcome by defining the parties’ mutual entitlements’.¹⁰

The ways in which family *law* might go about answering these questions are multitude. For instance, law plays an important message-setting function:¹¹ the UK government’s decision to legislate for same-sex marriage in 2013¹² not only impacted the couples who were now

⁵ A Diduck, ‘What Is Family Law For?’ (2011) 64 *Current Legal Problems* 287, 312.

⁶ F Olsen, ‘Children’s Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child’, in P Alston, S Parker and J Seymour (Eds), *Children, Rights and the Law* (Clarendon Press, 1992), 209.

⁷ [2010] UKSC 42.

⁸ B Hale, ‘Equality and Autonomy in Family Law’ (2011) 33 *JSWFL* 3, 3.

⁹ Diduck (note 5), 314.

¹⁰ J Ribot, ‘How Much Family Conduct Do We Need to Regulate through Family Law?’, in M Maclean and J Eekelaar (Eds) *Managing Family in Diverse Societies* (Hart Publishing, 2011).

¹¹ C Sunstein, *How Law Happens* (MIT Press, 2019).

¹² Marriage (Same Sex Couples) Act 2013.

eligible to enter into a marriage (Eekelaar's *adjustments* role for family law), but also indicated more broadly the state's support for same-sex marriages as deserving of equal value and respect as heterosexual relationships. This function is played by all forms of law, including court decisions; but in terms of policy-making, it is only the higher courts that typically have this role of message-setting. For the majority of cases, when considering the role of the family court, this function will not be a primary concern. However, the broader functions of the family justice system are apparent, with 'a growing awareness of the role of a justice system in not only adjudicating individual disputes where there are disagreements about some aspect of family life especially when parents separate, but also in law-based decision making where issues of public concern are becoming more prevalent, including domestic abuse and the protection of children'.¹³

It is within this broad, socially-grounded and often contested context that the family court sits. The family court is part of the broader 'family justice system', a phrase that existed before¹⁴ but was brought to the forefront of thinking about family law in practice by David Norgrove's *Family Justice Review* in 2011. John Eekelaar and Mavis Maclean 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.¹⁵

It is an important part of understanding the role of the family courts to consider the extent to which decisions about family disputes are adjudicated by judges. There is variation between the different strands of work that the family justice system addresses (domestic abuse, financial remedies, public law children, private law children, and so on), but the overarching position is that a relatively small proportion of family disputes go to court at all, and of those

¹³ M Maclean, 'What is a Justice System For? Concluding Observations and Next Steps', in M Maclean, R Treloar and BM Dijksterhuis (Eds) *What is a Family Justice System For?* (Bloomsbury London, in press).

¹⁴ For example, N Lowe and M Murch, 'Children's Participation in the Family Justice System: Translating Principles into Practice' [2001] CFLQ 137. The Family Justice Council ("a non-statutory, advisory body [that] monitors how effectively the system, both as a whole, and through its component parts, delivers the service the Government and the public need. It advises on reforms necessary for continuous improvement.") was established in 2004.

¹⁵ J Eekelaar and M Maclean, *Family Justice: The Work of Family Judges in Uncertain Times* (Hart Publishing, 2013), pp 7-8. There is a strong parallel with other jurisdictions, which also differentiate between the parts of the system that re delivering 'justice' (i.e. the court) and the parts that deal with 'conflict management such as counselling': see, in relation to Denmark, A Kronborg and C Jeppesen de Boer, 'Co-Operation: The Glue that Unites the Danish Family Justice System', in in M Maclean, R Treloar and BM Dijksterhuis (Eds) *What is a Family Justice System For?* (Bloomsbury London, in press)

that do only a relatively small proportion end up with judges imposing decisions following contested hearings. For example, while precise numbers are difficult to assess, data from 2002 and 2007 suggested that something like 11% of separating parents end up getting court orders about their children following a contested hearing; about 7% reported resolving their disputes by formal mediation or lawyer negotiation; about half said they made arrangements privately; and the remaining 30% reported that arrangements were ‘not agreed’.¹⁶ Similarly, in financial remedy cases after divorce, only around one in three divorcing couples gets *any kind of financial order*, and of those who do get an order around 90% are made by consent (either before or during court proceedings).¹⁷

Indeed, while policy-makers tend to focus on (what they often present as being the *problem* of) court-adjudicated disputes, it is not new to note 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’, meaning rules that are ‘considered as binding for family members independently of official law and justice’.¹⁸ These unofficial rules have no set content: some will be broadly shared across a society, some will be reflected by a particular sub-set or group, while others will be personal to the individual or family. To some extent, they are likely to be broadly informed by the law because of the iterative relationship between legal rules and social values, and at least to some extent by what Robert Mnookin and Lewis Kornhauser classically referred to as ‘the shadow of the law’.¹⁹ The closer a dispute gets to formal adjudication by the law, the more accurate a shadow will be cast: courts will (in theory at least) apply the law correctly; lawyers will advise about the law with reasonable accuracy in relation to a particular case; general advice will offer a framework for typical cases, but will become less helpful for non-standard disputes. However, when it comes to issues that are not generally seen as being matters for law at all (such as how a family arranges its finances within a relationship, or how parents divide their responsibilities connected with childcare), the role of the law, as opposed to social and personal values, is far more limited.

Two crucial limitations apply to these comments. The first is that, as feminist scholars and others have long argued,²⁰ while the family is often seen as being firmly within the private sphere, that does not exempt it from legal regulation. As John Rawls says, ‘If the so-called private sphere is a place alleged to be exempt from justice, then there is no such thing.’²¹

¹⁶ Office for National Statistics, *Non-Residential Parental Contact: 2007-2008 Results* (Omnibus Survey No 38, 2008), Table 2.9.

¹⁷ Office for National Statistics, *Divorces in England and Wales 2017* (2018).

¹⁸ M Fuszara and J Kurczewski, ‘Family Matters in the Polish Court: Law and Public Opinion’, in this volume, citing the work of Leon Petrażycki who wrote on this issue as early as 1907.

¹⁹ R Mnookin and L Kornhauser, ‘Bargaining in the Shadow of the Law: The Case of Divorce’ (1979) 88 *Yale Law Journal* 950.

²⁰ See, for example, M Fineman, *The Autonomy Myth* (The New Press, 2004), esp around p 228; N Fraser, ‘Reframing Justice in a Globalising World’ (2005) 36 *New Left Review* 69.

²¹ J Rawls, *Justice as Fairness: A Restatement* (Harvard University Press, 2001), § 50.4. See also discussion in George (note 3), pp 16-21.

Because family law is regulating power between individuals in their personal lives,²² the fact that an event or relationship is taking place within the field of ‘the family’ cannot in itself make it immune from legal regulation. That leads to the second point, which is that, as Eekelaar puts it, ‘the demarcation between proper occasions for legal intervention and non-intervention is *itself a matter of law*’.²³ So while, in theory, there is no area from which the law can be excluded, in practice society does identify areas which are generally not actively regulated by the law; but it is for the law itself to determine where the line between the two falls.

The family court

An understanding of the role of the family court and the actors within it is crucial to considering what we want it to be doing. As Eekelaar and Maclean note, ‘[a]lthough most issues are disposed of elsewhere in the family justice system, the judiciary remains at its core.’²⁴

The centrality of the court to the process is apparent in a number of ways. The most obvious is that, ultimately if no agreement is reached, the judge will impose an outcome to resolve the dispute (though it may be noted that, particularly in children cases, judges are in fact mandated to consider whether their involvement will actually improve matters or not²⁵). But the importance of the court’s role goes far beyond this adjudicative function; indeed, as already observed, ‘[a]djudication is a rare event’, and in general for legal professionals involved a court determination ‘is not a route of choice’.²⁶ But there is a wider application of the adjudicative function, because the general approach of judges in *other* cases can be used by lawyers to steer clients and negotiate a settlement in *this* case.²⁷ I do not suggest that this is in any sense unique to the family law context, but the importance of the borrowed authority of the judge is perhaps of particular importance for family disputes as a tool for reaching informed settlements.

²² M Henaghan, ‘The Normal Order of Family Law’ (2008) 28 *Oxford Journal of Legal Studies* 165, 166.

²³ J Eekelaar, ‘“Not of the Highest Importance”: Family Justice Under Threat’ [2011] *Journal of Social Welfare and Family Law* 311, 313 (original emphasis).

²⁴ Eekelaar and Maclean (note 15), p 8. Whenever I see the phrase ‘disposed of’, I think of comments of Holman J at a hearing where he observed that he preferred the term ‘determination’ or ‘resolution’, because ‘disposal is what one does with a dead hamster’.

²⁵ Children Act 1989, s 1(5): in considering making orders under the Children Act, the court ‘shall not make the order ... unless it considers that doing so would be better for the child than making no order at all’.

²⁶ M Maclean and J Eekelaar, *Family Law Advocacy: How Barristers Help the Victims of Family Failure* (Hart Publishing, 2009), p 120-1.

²⁷ The Financial Dispute Resolution hearing (FDR) in financial remedy proceedings is a variant of this approach. A judge, who is guaranteed not to be the judge who hears a contested final hearing if one occurs, gives an ‘indication’ of what s/he thinks a fair outcome would be, based on a reading of the papers and short submissions from the parties, which the parties then use to try to negotiate a settlement outside court. For an example, see Maclean and Eekelaar (note 26), pp 59-65.

The significance of the court here is twofold. At an early stage, the experience of what judges in general say and do can be used to advise a client and to negotiate before a case ever gets to court. Family solicitors are very effective in doing this,²⁸ working to reduce the ‘mismatch between the aspirations of the client and the solicitor’s perceptions of what was a realistic outcome’.²⁹ And when a case comes to court, a barrister can add a fresh perspective, additional perceived authority (in particular, greater experience of the judges) and work as a powerful negotiator under significant pressure of time.³⁰

But still, the judge adds something more. In considering a financial remedies matter at the Financial Dispute Resolution stage, Eekelaar and Maclean describe the process for a particular case as being

fast and effective. The judge looked at all the options and came to a clear practical view. An agreement was secured through two short sessions. What did the judge add to what might have been achieved by solicitors or mediators? Perhaps the value of disclosure, dispassionate evaluation, and an opinion backed up by judicial authority and the threat of the alternative, a full and costly final hearing.³¹

In practical terms, Eekelaar and Maclean’s study of family judges identifies three core activities that occupy the judiciary’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).³² While the archetypal image of the judge is as umpire or adjudicator, their study suggests that this kind of activity occupies only about half (46.9%) of family judges’ time, with the remaining time divided more or less evenly between management (29.8%) and help (23.2%).³³

Lessons from the pandemic

I have spent some time setting out the role of family law and of the family court (and the professionals who work within it) in pre-pandemic times as a context for thinking about what lessons we can learn about the role of the court from the response of the family justice system

²⁸ See generally J Eekelaar, M Maclean and S Beinart, *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, 2000); M Murch, *Justice and Welfare in Divorce* (Sweet and Maxwell, 1980); G Davis, *Partisans and Mediators: Resolution of Divorce* (OUP, 1988).

²⁹ Eekelaar and Maclean (note 15), p 29.

³⁰ Maclean and Eekelaar (note 26), p 119.

³¹ Eekelaar and Maclean (note 15), p 117.

³² *Ibid.*, pp 80-1.

³³ *Ibid.*, p 82. There is apparent variation between levels of judge (p 104), which may reflect varied types of case coming before them, though there is increasingly little delineation of work by *type* of case as opposed to the *complexity* of the issues within the case.

to the pandemic. It is difficult to think of any area of professional or personal life untouched by the pandemic and the regulations and restrictions that flowed from it after (in the UK) March 2020, and in general it is not my ambition to comment on whether the family justice system responded well or badly. Rather, I want to think about what we might learn from the way that things were done about my underlying question: what are family courts for?

In thinking about these issues, I draw on parts of a short article published with Mavis Maclean when we set out an initial analysis of our empirical data collected from practitioners in summer 2020,³⁴ which I detail further below. Before turning to our interview data, though, I consider some of the publicly available sources of guidance to give an insight into the thinking around remote versus in-person hearings.

After a somewhat slow initial response, which Maclean and I characterise as being akin to the five stages of grief and with ‘denial’ remaining in place rather longer than might have been expected,³⁵ the family justice system moved rapidly to remote hearings.³⁶ While there was (outside the High Court) an initial focus on telephone hearings, there was early pressure to move to video hearings where possible, with the Court of Appeal noting quickly that ‘there is a qualitative difference between a remote hearing conducted over the telephone and one undertaken via a video platform’.³⁷ Lower court judges were given strong encouragement to see remote hearings as both possible and acceptable. Judges were told that they should expect that ‘hearings will be conducted remotely in this way as a matter of routine practice’,³⁸ and a letter from the lead judges about the approach to financial remedy cases stated specifically that ‘the court should start from the position that a remote hearing is likely to be consistent with the interests of justice’.³⁹

This position held consistently through the summer of 2020. A small number of cases then began to return to court, usually for what became termed *hybrid* hearings, where part of the hearing or some of the participants attended remotely while others were physically present in the court. While there was variation, public law children cases tended to have priority for physical court space, partly because the lay clients involved often had less access to suitable technology to participate in a remote hearing, and partly because their oral evidence was often crucial to the outcome of life-changing decisions for them and their children.

It was not until autumn 2021, over 18 months after the start of the pandemic, that significant steps were taken to start returning cases to court as a matter of course – and even then, the

³⁴ M Maclean and R George, ‘Family Practice During Covid and Access to Justice’ [2021] *Family Law* 226.

³⁵ *Ibid.*, 226.

³⁶ For some early thoughts on these challenges, see R Taylor, ‘A Week Is a Long Time in a Pandemic’ (27 March 2020): www.familylaw.co.uk/news_and_comment/a-week-is-a-long-time-in-a-pandemic.

³⁷ *Re B (Remote Hearing: Interim Care Order)* [2020] EWCA Civ 584, para 35.

³⁸ *A Clinical Commissioning Group v AF* [2020] EWCOP 16, para 7.

³⁹ N Mostyn and E Hess, ‘Financial Remedy Courts’ (15 April 2020): <https://www.judiciary.uk/wp-content/uploads/2020/04/letter-from-Mostyn-J-and-HHJ-Hess-150420-1-1.pdf>.

plan did not come to fruition as intended as further waves of the pandemic took hold. In a speech to the Family Law Bar Association conference in Manchester in October 2021, the President of the Family Division addressed the future of remote hearings. While emphasising that he was not issuing formal guidance, and that individual judges would retain discretion in relation to each case, Sir Andrew McFarlane set to ‘to offer a steer and to describe the general direction of travel which courts should expect to follow’.⁴⁰

In expanding on this ‘steer’, the President explained:

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.⁴¹

Identifying that there were positive aspects of remote hearings, the President went on to identify this negative feature, which he considered crucial:

one 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.⁴²

While there is much about this with which I agree, I question whether it is universally the case that those pre-court negotiations cannot happen with a remote hearing. Offering some anecdotal experience, my view is that where the parties are both represented and where thought has been given to effective systems of communication between the lawyers and between each lawyer and their client, the time before a remote hearing can be used in some cases in much the way that the President describes. I do not disagree, though, that it is harder, and that more elements need to line up to make this pre-hearing time effective for a remote hearing.

A further difficulty identified by the President was of ‘at least some lay parties afford[ing] less respect to the court process, and the outcome of it’ compared to an in-person hearing.⁴³ The final point in this section of the President’s message is worth considering in detail:

⁴⁰ A McFarlane, ‘Interesting Times’ (16 October 2021), p 3 (original emphasis): <https://www.judiciary.uk/wp-content/uploads/2021/10/FLBA-Manchester-final.pdf>

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

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.⁴⁴

This is a key issue for my consideration. What are these ‘obvious’ benefits which ‘do not need to be stated’? The President alludes here to some greater power of the court beyond its actual legal decision-making powers: it is not just the orders that the court makes that are important. This is, in some ways, a curiosity of the family court. As a general proposition, the very thing that makes a court a special place (distinct from a mediator’s conference room, a lawyer’s office, or any other private venue) is precisely that the court can and does make *orders*, which tell the parties what they may or must do (or not do).⁴⁵ The court tells people to do things (or refrain from doing things) in a way that has the force of law, and is backed if necessary by the potential for legal sanctions. But as we have seen from Eekelaar and Maclean’s work, ‘[a]djudication is a rare event’ in the family court,⁴⁶ as opposed to other means by which the initial dispute gets resolved. And so it is this ‘other’ function of the family court that has this almost mystical quality, which we are asked to accept as being ‘obvious’. It may be that this is much the same thing that Martha Cover refers to when she notes that:

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. It facilitates better sharing of information and offers the opportunity to learn more about the clients and the other side which can enable on the spot sharing of information to take place at what used to be known as the door of the court.⁴⁷

There are interesting links to be drawn here with a body of work on legal geographies, which think amongst other things about the relationship between law and the physical and emotional spaces in which law exists. Three aspects of this work are of particular relevance to my analysis in this chapter.

⁴⁴ Ibid.

⁴⁵ See generally S Smith, ‘Why Courts Make Orders (And What This Tells Us About Damages)’ (2011) 64 *Current Legal Problems* 51.

⁴⁶ Maclean and Eekelaar (note 26), p 120.

⁴⁷ Personal communication, quoted with permission in Maclean and George (note 34), 231.

The first is in relation to the physical spaces of the courtroom and the requirement (outside the pandemic) for a litigant physically to attend the court; as Gill and Hynes put it, ‘courts claim, sometimes violently [e.g. with a bench warrant physically enforcing attendance at court], jurisdiction over the corporeal realm’.⁴⁸ But in thinking about their focus on ‘courtwatching’ (generally, as a member of the public or the media in observing cases), Gill and Hynes draw a distinction between being physically in court and observing via a live or recorded videolink:

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. Intimate and embodied approaches to courtwatching help to reclaim and hold accountable the corporeal power that courts claim.⁴⁹

While court observation by the media or legal bloggers is part of the family court of England and Wales, this idea of a courtwatcher and its role in justice is not as central to my thesis as the related questions of justice system users. Yet the same argument may apply; that there is value to the judges, lawyers, social workers and litigants sharing the same physical space.

Second, and more generally, there is the role of court ‘materiality’ to the delivery of justice, highlighting the link between the physical space and the symbolic function of law.⁵⁰ As Rowden 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.⁵¹

Rowden’s work considers specifically the difference between physical, in-person hearings and remote, video-link hearings, drawing on empirical work in Australia with stakeholders experienced with both. She 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

⁴⁸ N Gill and J Hynes, ‘Courtwatching; Visibility, Publicness, Witnessing, and Embodiment in Legal Activism’ (2020) *Practising Legal Geography* 569, 573.

⁴⁹ Ibid.

⁵⁰ E Rowden, ‘Distributed Courts and legitimacy: What Do We Lose When We Lose the Courthouse?’ (2018) 14 *Law Culture and the Humanities* 263.

⁵¹ Ibid, 275.

community members, being absent for those at the remote end of the videolink.⁵²

Other studies suggest practical differences from changes to the physical layout of a court, or a move to an online court. For example, Tait et al found that mock jurors were less likely to convict when the defendant was online or physically seated next to their lawyers than when they were in a traditional dock.⁵³ Rawden notes that the videolink 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.’⁵⁴

However, Rawden questions whether the removal of the physical court space may go beyond the potential for the individual to feel (or be) disconnected from the process, and rather go to the very legitimacy of the legal process: ‘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’.⁵⁵ Whether these are the ‘obvious’ benefits of in-person family court hearings to which the President alludes or not, I cannot say; but it may be worth noting that while the physical spaces of courtrooms ‘might promote respectful interaction and due diligence, they might equally intimidate’.⁵⁶ Indeed, in the family court context, that intimidation is widely true, and probably not unintentional, given the need for the court to have its authority respected.

Finally, there is consideration within this literature about the importance of face-to-face communication. This links back to Rawden’s point about the ‘completeness’ of the physical experience versus a videolink; Hynes and Gill quote Federman in noting that ‘Under ‘high stakes’ conditions in particular, such as asylum hearings, this lack of completeness reduces trust and mutual understanding’.⁵⁷ The focus here is on court hearings, but the point has a wider resonance when all the participants are not only remote from the court, but also from one another. The lawyer’s ability to communicate fully with their client is as crucial as the client’s ability to communicate fully with the court (the *lawyer’s* ability to communicate effectively with the court in a remote setting being, perhaps, yet another layer that might have been rather more taken for granted in the understandable focus on litigants).

Returning to the President’s October 2021 speech, Sir Andrew attempted to identify those cases which might fall within his category of ‘hearings where an important decision in the case may be taken’. The challenge is that, although there are occasionally purely procedural

⁵² Ibid, 276.

⁵³ D Tait et al, *Towards a Distributed Courtroom* (2017), online at https://courtofthefuture.org/wp-content/uploads/2017/07/170710_TowardsADistributedCourtroom_Compressed.pdf.

⁵⁴ Rawden (note 50), 273 (original emphasis).

⁵⁵ Rawden (note 50), 278.

⁵⁶ J Hynes, N Gill and J Tomlinson, ‘In Defence of Hearings? Emerging Geographies of Publicness, Materiality, Access and Communication in Court Hearings’ (2020) 14 *Geography Compass* e12499, p 5.

⁵⁷ Ibid, p 7 (internal quotations removed), quoting M Federman, ‘On the Media Effects of Immigration and Refugee Board Hearings Via Videoconference’ (2005) 19 *Journal of Refugee Studies* 433.

hearings in the family court, or hearings addressing a discrete issue,⁵⁸ a great many decisions that are important *to the lay clients* may happen at hearings that appear, from a purely technical assessment, not to be all that important. Contact arrangements are often discussed as a collateral issue at a children hearing where changes to contact are not explicitly ‘on the table’ for a decision, for example. The hearing might well be categorised as one where no ‘important decision’ is likely to be taken, but if the parties are in attendance there may yet be an agreement or even an order from the judge about this issue; in the scheme of the overall case this *may* not be an important decision, but to the family members it may feel very different.

Family legal professionals’ experiences of remote working

Maclean and I spoke to 26 legal professionals in the summer of 2020, between May and September. The sample included 10 barristers, 10 solicitors and 6 judges / magistrates, and I record my thanks to them for taking the time to share their experiences. In writing about their experiences, I refer to the barristers as B1, etc; the solicitors as S1, etc; and the judges and magistrates together as J1, etc. This was not a representative sample, but rather an indicative selection of practitioners; while they were mostly based in and around London, their practices varied and covered a wider range of areas. As well as not being representative in terms of the individuals involved, the study was also a time-limited snapshot of what these lawyers and judges were thinking at the time we spoke to them. The system of remote hearings has, in general, become far smoother since then, and so to the extent that the experiences of our participants might reflect ‘teething problems’ I have endeavoured to account for that. Nonetheless, it is important to note that practitioners’ experiences further into the course of the pandemic may well have been markedly different in some ways. This particular context is important to bear in mind when considering some of the comments made, though much of what we were told appears to have ongoing relevance at time of writing in April 2022.

Even at the stage when our interviews took place, practitioners were reporting a variety of experiences. Several participants criticised the proliferation of guidance documents (which were generally thought to be ‘unhelpful’ and ‘show[ed] the lack of real understanding of what the lower levels of bench and practitioners were dealing with’ (J2)),⁵⁹ but conversely one barrister talked of being ‘uncomfortable with the ad hoc nature of decision-making about in-person hearings’ (B7), where clearer guidance might have helped. At that stage of the pandemic, the only cases that were likely to get an in-person hearing (most likely hybrid) were public law children cases. One of our judges noted that ‘private law has been very poorly served. ... The triage system always means that private law takes a back seat and that has a huge impact on those families and children’ (J2). As one of our barristers commented

⁵⁸ Hearings to consider whether an expert should be appointed could be an example.

⁵⁹ See also L Reed, ‘Meta-Guidance for (Family) Lawyers’ (24 March 2020): <http://www.pinktape.co.uk/rants/meta-guidance-for-family-lawyers/> (issuing tongue-in-cheek ‘guidance [that] should not be read in conjunction with any other guidance and is of indeterminate status’ on how to approach all the other guidance being issued at the start of the pandemic).

when thinking about allocation of physical court space for hybrid hearings, ‘Private law is remote or nothing, never mind fairness’ (B7).

Our participants identified a number of aspects of the changes imposed by the pandemic that might have been seen as positive for them as legal professionals,⁶⁰ but my concern in this chapter is with the functioning of the family court and the perspective of litigants (in so far as it was reported by participants in this study). It was clear, though, that at least some of our participants were giving deep, almost existential thought to their professional lives: ‘I think the whole thing poses a lot of really interesting questions about the pointlessness of a lot of things we do, travel, wasted time, the inefficiency of the court process’ (S4). Leaving these aside for the most part, I have endeavoured to analyse the comments of study participants in broadly chronological order of how a case progresses.

Starting with the process of getting to know a client and the taking of instructions, the lawyers’ ability to engage meaningfully with their own clients was an issue frequently raised. For solicitors, there were some positive aspects identified.⁶¹ These included more flexible working hours allowing client to talk to their lawyers at times that suited their schedule (S1; S8); the potential for a remote hearing to be safer and less intimidating for litigants making domestic abuse allegations (S6); and clients who were abroad being able to attend hearings just as well as those local to the court (S4). However, most participants thought that most aspects of remote work (particularly with less well-off clients who were less likely to have multiple devices and good internet connections) were significantly inferior. This was apparent for the solicitors’ ability to take instructions (‘it’s hard to go through evidence even if the client has a good laptop’: S4).

Similar concerns were seen for barristers, who felt 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) and gain a deeper understanding of the client’s position. 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). Another (B10) reported a case where she had attended a remote Financial Dispute Resolution hearing and agreed various directions when the case was clearly not going to settle, but only found out after the hearing had ended that her client was pregnant – information that would have been readily apparent to her had they been in attendance together, and which might have been significant to the ‘fair’ outcome of the case had the hearing succeeded in resolving the financial dispute between the former spouses.

⁶⁰ These are set out elsewhere: see Maclean and George (note 34) and R George, ‘Legal Professionals and the Family Justice System’, in J Scherpe and S Gilmore (Eds) *Family Matters: Essays in Honour of John Eekelaar* (Intersentia, in press).

⁶¹ See also M Ryan et al, *Remote Hearings in the Family Court Post Pandemic* (Nuffield Family Justice Observatory, 2021), p 3.

Along with the challenge of representing their clients effectively, lawyers were also worried that other aspects of their role were being lost. ‘We’re not therapists, but you are in a therapeutic role [and we] need to recognise that’ (B6). Another barrister, who appeared not to miss this part of the job from a personal perspective, described a significant change of online hearings being not having ‘the emotionally draining hours in the corridor with the client’ (B8). But the flip side, as he went on to say, was that ‘from the client’s perspective, I think it’s not very satisfactory for the same reasons it’s made my life better’ (B8).

As noted, one of the key roles of the barrister before the pandemic was in taking instructions and negotiating outside court, asking for more time when necessary. As one barrister told us, ‘discussion outside court is the biggest challenge’ of pandemic working (B3),⁶² with the flexible space to do that part of the job 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)⁶³

Another lawyer, referring to her care work in particular, commented that ‘my clients already feel excluded from society, [and] remote [hearings] make it worse’ (B2); another described clients as being ‘disengaged’ by the remote hearing process, especially for phone hearings (B4).⁶⁴ One of our solicitors contrasted remote hearings (‘the clients were bypassed’) with the experience of a client who had attended to give evidence in person: ‘this mum *knew* she was heard by the judge’ (S3). But there is a danger of focusing only on hearings where evidence was heard: ‘Even in case management hearings, the parents need to be able to say things’ (S9). The strong echoes of these comments in other research is important to highlight; Mary Ryan and colleagues quote one mother in their study as saying ‘I couldn’t talk to anyone during the hearing so I didn’t feel like a participant so much as a spectator’ (though this person also identified some benefits from a remote hearing, including both logistics and not having to see an abusive ex-partner).⁶⁵

⁶² Note the similar findings from research by the Magistrates’ Association, noting their participants’ view that in the criminal courts ‘prior communication [i.e. before the hearing started] was often less than adequate’: *Magistrates’ Courts and Covid-19: Magistrates’ Experiences in Criminal Courts During the Pandemic* (Magistrates Association, 2022), p 9.

⁶³ Similarly, S3 reported having to make last-minute changes to counsel instructed in a care case because the court listed it as attended only when the barrister was shielding: ‘the client had known the barrister a long time, [and the change was] at a week’s notice – it’s not justice’. And likewise S4: ‘and the new barrister had a totally different take on it!’

⁶⁴ A connected concern for some was that the accidental insight into the lawyer’s home life might undermine the connection between them and their client, especially where they come from very different backgrounds: ‘I worry for lay clients, staring at barristers in fancy houses with pictures of their kids on the walls’ (B5). The danger of undermining a relationship that might already have fragile foundations due to the inability to engage in the usual rapport-building was a serious one.

⁶⁵ M Ryan et al, *Remote Hearings in the Family Court Post Pandemic* (Nuffield Family Justice Observatory, 2021), p 13.

Lawyers commented that there were cases where they were not expecting to negotiate (an application for a non-molestation order, for example), and these could be done reasonably effectively online; but these cases were not the typical approach. As one of our barristers noted, it was usually ‘better to negotiate [because] they have to live with the consequences’ (B2). Similarly, a solicitor told us when asked whether the pandemic had led to more cases negotiating before starting proceedings, 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). These comments were echoed by judicial participants, who noted for example that in a care case:

if we’d been there [in person] 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)

These lost opportunities to help with the case can be seen alongside judges’ views that they were disconnected from the litigants before them. Two judges highlighted this point: for one, whereas for an in-person hearing ‘I can see the frowns, the anger, when things are brewing, and all of that is completely lost on the telephone’ (J2); for the other, ‘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).

At the same time, some lawyer felt that the absence of the physical court changed the way their clients behaved.⁶⁶ There was a clear sense that the seriousness of the occasion was often missing, with lawyers reporting clients (or others involved in their cases) appearing on video link in their pyjamas or otherwise not presenting as they would if they had to physically appear at court.⁶⁷ There was also a sense that parties were not as engaged in terms of being prepared to negotiate: ‘Clients need the pressure of being in court. At home, they don’t take it seriously. They need the urgency’ (B2). Another similarly commented that ‘actually being

⁶⁶ The lawyers’ behaviour changed too! ‘At the kitchen table there is less urgency – you can be half watching tv, taking instructions in pyjamas’ (S1). ‘I would quite often have my leggings on, and then with a jacket and top. They [clients] don’t know that but it’s the reality’ (B9).

⁶⁷ Again, the link to the findings of the Magistrates’ Association (note 62), p 9 is notable: ‘defendants and witnesses who attended hearings on video or on the phone took the process less seriously than those who attended in person. This was particularly the case for those who attended from home or from elsewhere in the community. ... Parties could not properly see or sense the serious atmosphere in the real courtroom. Magistrates felt remote links were responsible for undermining respect for the court and that this was a major downside to their use. They feared that if parties did not take the court process seriously, trust in the justice system would be gradually eroded.’ Our participants did not have quite the range of experiences reported by Magistrates, which included ‘appearing while in the bath, being half naked, smoking and treating the process like social media’ (ibid, p 26), but there were still significant concerns from some of our participants.

physically present at court, there's a lot more impetus to try and find an agreed way forwards' (B10).⁶⁸

In comments that link strongly to Rawden's research, several of our participants commented about the court's authority in a remote hearing as compared to an in-person one, with 'a danger than the whole process is undermined' (J3):

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. ... Judges appear much more human when they're at home, and part of the justice system is making them seem more judge-like, which is part of the point of the pomp. It feels less formal [at a remote hearing]. (B8).

The combination of the physical space of the court building (with the layout of the court, the crest, the formal attire and so on), the ceremony of the hearing (which varies between different levels of court, but often involves things like the judge and lawyers bowing at the start and end of each session of the hearing; everyone standing for the judge's arrival and departure; court staff with gowns escorting people in and out), and the 'sense of occasion' (since for most people, attending court is a very unusual activity, and usually one associated with respect and deference) marks out the in-person hearing from a remote one, especially one done by telephone.

Several of our participants commented that they had done cases where it was clear that the judge was at home: with one, 'you could hear the washing machine!'; and with 'another judge, she was at home and first the doorbell rang, and then the house phone rang' (B9). In another case we were told about, the judge's dog walked in midway through the hearing (B5). This, of course, was in the early days of the pandemic; even by the time we were completing our empirical work in later summer 2020, judges were conducting virtually all their hearings

⁶⁸ See similarly comments from legal professionals quoted in M Ryan et al (note 61), p 20.

from the court building.⁶⁹ Clearly, though, these kinds of domestic intrusions will have further removed the gravitas of the occasion, reflecting what another barrister observed was ‘something very significant and very powerful [being] lost from not having the judge there looking you in the eye’ (B10). The remote nature of hearings was thought by most of our participants to ‘downplay the seriousness of things’ (S1), to be ‘more conversational’ (S5) and ‘less deferential’ (S9) than an attended hearing. As one judge noted as more or less the first thing she said in our interview, ‘I think the biggest struggle is probably people understanding it’s still a hearing even though it’s on the telephone’ (J2).⁷⁰

The link between these concerns and the sometimes traumatic outcomes of family court cases was apparent in a number of participants’ comments about the effect on their clients (and themselves) of having sometimes life-changing decisions made remotely.⁷¹ This was especially apparent for care cases. 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), as these quotations show:

For a vulnerable client to hear a final decision about their child on a small screen, when they’re likely to have poor technology at home, is not acceptable. (S3)

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)

⁶⁹ That said, staff being in the court building is not a guarantee of anything. I enjoyed the experience in April 2022 of attending a remote hearing which was introduced by a member of court staff announcing to the parties in a solemn tone ‘you should be in a quiet, private place’, while a colleague could be heard having a loud conversation with someone else in the background, which rather undermined the seriousness of the warning.

⁷⁰ Similar concerns can arise when non-court buildings are used as the physical base for a hearing. Family barrister Joseph Switalski commented on Twitter on 4 May 2022 about the challenges of court hearings in a hotel as a temporary site: ‘Did a hearing at the Family Court sitting in Medway (the Holiday Inn). Difficult to see how litigants are supposed to respect anything about the way the system treats them when they’re making life changing decisions a table away from a full English [breakfast]...’.

⁷¹ See also M Ryan (note 61), p 13.

The loss of opportunities to support parents, to empathise with their experiences and just to be physically with them so they knew that someone cared was a recurring theme.⁷²

Even when hearings had less dramatic endings than the removal of a child from their parent's care, lawyers in our study were concerned about the lack of opportunity to understand how their clients were feeling, to know whether they had followed what had happened, and in some cases even to say good bye. 'Normally you'd know from body language and stuff how they 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). These concerns linked to the emphatic remarks of one of our judges, who said: '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).

These findings can be linked to other studies, in particular the various waves of rapid research conducted by the Nuffield Family Justice Observatory during the course of the pandemic. A clear majority of the parents who were court users during the pandemic and who participated in that study (83%; N=174) 'indicated that they had concerns about how their case was dealt with'.⁷³

Discussion and conclusions

In trying to think about what the family court is for, I have endeavoured in this chapter to consider the variety of ways that the physical and metaphysical spaces of the family court interact with court users. The family court is a place where decisions are made by judges, but that is a remarkably small part of the function of the court. The space that the court offers for negotiation, compromise, advice and support, conducted under the supervision (active or otherwise) of the judge but often involving the judge's adjudicative powers only in the most abstract ways, is at least as important as judicial decision-making itself.

The pandemic has offered an opportunity to consider some aspects of the court's role in isolation, to try to understand more fully what the functions of the family court are. As a general proposition, participants in our research did not think that the *outcomes* of contested decision-making by judges was different when hearings took place remotely: the same order would have been made if the case had been contested at an in-person hearing. But while that is comforting to an extent, there are at least three reasons to think that it is far from telling the whole story.

The first reason is that we cannot tell from the qualitative data in this study how cases progressed, but official data give the impression that more cases ended with a final order being made by the court during the pandemic. A particular example is that (comparing

⁷² See similarly Rawden (note 50), 275, who comments that the in-person court offers a space to 'convey respect, provide social structure and underline the importance of participants' concerns'.

⁷³ M Ryan et al (note 61), p 3.

average numbers for 2018-20 with the situation in 2021) whereas the number of *applications* in private law children cases rose only 1.1 per cent, the number of court *disposals* rose 8.6 per cent,⁷⁴ suggesting that proportionately more cases were resolved by judicial determination. If true, that in itself is a change and, given the court's strong focus on helping parties to reach their own decisions where possible, may in fact mean different outcomes for some families as the judicially-imposed outcome may not be the same as would have been reached by agreement. If this is correct, it would fit with the concerns of participants in this research, that it is harder to resolve cases by negotiation with remote hearings and that this is particularly true when a case involves a litigant in person.⁷⁵

Second, I would ask whether the formal outcome of a family court decision is as straightforward as it may at first appear. The lay parties have to live with the decisions that are taken about their family life, and so the chances of those decisions being internalised and accepted may be higher if the parties feel that they were able to participate meaningfully in the process and felt heard by the judge. In this context, how parties *feel* about their cases is a significant part of how the outcome should be measured. This affective element of family court outcomes may be connected with Sen's 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.⁷⁶

Finally, a more overarching reason why consistency in court decision-making is not as comforting as it may at first appear is simply that judicially-imposed outcomes represent a minority of cases that enter the family justice system. As noted earlier, research on the working of the family justice system before the pandemic makes clear that '[a]djudication is a rare event', and one avoided by legal advisers where possible.⁷⁷

I do not want to suggest undue criticism of the way that the family court responded to the pandemic. The move from a system that had virtually no capacity for remote hearings to one that was operating remarkably smoothly by video links and telephone hearings within a matter of weeks was nothing short of extraordinary, and the enormous effort of all those involved achieved something that few would have imagined possible. There is no doubt that the system did indeed 'make the best of what we've got' (S3); cases were triaged effectively, and essential decisions were made in as timely a manner as could have been hoped for under the circumstances.

⁷⁴ My calculations from Ministry of Justice, *Family Court Statistics Quarterly: October to December 2021* (8 April 2022), online at <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-october-to-december-2021> (Table 1).

⁷⁵ Inevitably, the lawyers in our study had no experience of cases where both parties in private law proceedings were unrepresented; the judges did, but this was not a feature of their cases that was particularly commented on.

⁷⁶ A Sen, *The Idea of Justice* (Harvard University Press, 2009); see discussion in Eekelaar and Maclean (note 15), p 17.

⁷⁷ Maclean and Eekelaar (note 26), p 120-1.

All that said, though, stepping back from the immediacy of the pandemic response, it is possible to say that there is something substantial lost when hearings do not take place in person. Most participants in this research were clear that there were some hearings that were suitable for remote hearings, but relatively speaking those cases will be few in number. The reason is that any hearing where the purpose of the hearing is, or might be, for the parties to negotiate and seek to compromise simply works better when the parties are at court with all the pressures and peculiarities that the court building provides. As Sir Andrew McFarlane said, ‘there is more to a Family Court hearing than simply transacting business’,⁷⁸ particularly if the business of the court is thought to be imposing decisions.

Even beyond those cases where negotiation is so central, though, there are reasons why the remote family court misses essential aspects of the physical court. The court’s authority and the seriousness of the occasion are, to a significant extent, wrapped up in its physicality and in its rituals. The ‘obvious’ benefits of an in-person hearing to which the President refers⁷⁹ are complex and hard to disentangle from one another, but clearly involve elements that are personal to the individuals whose case is being resolved (their ability to negotiate, feel heard, obtain full advice and representation, understand what has happened, and so on) as well as more systemic, societal aspects (the authority of the court, respect for its decisions and the court officers making them, and so on).

The family court is about relationships in the sense that this is its subject-matter, but it is also about relationships in the sense that the court process itself works because of the relationships that are managed and moulded by it. As I have written elsewhere, ‘Family law and family justice are inherently relational, both in terms of the issues at stake but also in terms of the way that those issues are resolved, and a remote family justice system will struggle to capture that essential relational dimension.’⁸⁰ I quoted earlier from Martha Cover who wrote of ‘the magic’ of what family lawyers do, and participants in this research similarly talked about the quasi-therapeutic role that they often undertook and the struggle to do that effectively at a remote hearing; but the court itself has an element of this ‘magic’ to it.

I am not trying to be unduly sycophantic about the court – it has major problems and is massively under-resourced.⁸¹ It is also not the place for the majority of families after separation; but for the minority of families that do need it, it is essential. And while it is difficult to pinpoint what exactly it is about the in-person court hearing that adds the ‘magic’

⁷⁸ McFarlane (note 40), p 3.

⁷⁹ Ibid.

⁸⁰ George (note 60).

⁸¹ As just one measure, the latest data on case ‘timeliness’ (as the Ministry of Justice calls it) show how deep the problems are: in 2021, the median duration of public law children cases was 40.0 weeks, while for private law children cases it was 33.6 weeks: Ministry of Justice (note 74), Tables 8 and 9. Cafcass has introduced a prioritisation protocol which allows up to 26 weeks between a court order and the filing of a s 7 welfare report in private children proceedings in areas where the protocol is engaged (13 areas at time of writing, including Greater Manchester and Birmingham): *Cafcass Prioritisation Protocol* (first published 16 July 2021, updated 8 April 2022): online at <https://www.cafcass.gov.uk/download/14877/>

to the experience, beyond what is generally achievable at a remote hearing, it is clear that something important is lost when the parties and their advocates do not attend in person. I close by endorsing the words of one of the judges in our study: '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). Remote hearings were an essential short-term measure, and will continue to have a place for a minority of hearings in future, but they are not a substitute for attended hearings in the vast majority of cases.