

Bloomsbury Family Law Conference, 17th November 2020

Keynote Address – some thoughts on family law in 2020

HHJ Edward Hess

1. It is a very great pleasure to be invited to give this keynote address this afternoon to the Bloomsbury Family Law conference. I can see this conference is becoming a firm fixture on the family law calendar and I have seen how much time and effort the organisers have put into making this a really good programme, with so many distinguished speakers and topical subjects in both children and money.
2. And well done to Bloomsbury for pressing on with the conference despite all the difficulties of being online. I sometimes weep when I think of all the nice things which have been cancelled in this grim year. How sad we are not all together in the same room, sharing experiences, knowledge and ideas. I am sure that you all, like me, miss dreadfully the personal connection and social interaction with other like-minded lawyers.
3. I was thinking when looking at your programme how many of your speakers are old friends whose paths I would regularly cross in a normal year in court or at a legal conference or legal dinner or other event, but whom I just haven't seen at all since March, except on screen. Let us hope the wretched Covid will soon be defeated and we can return to better times. But, for the time being, I dare say we are where we are and we have to make the best of it.
4. In the short period of time I have allotted to me billed as a keynote address and I want to express, very briefly, just three (very different) thoughts on family law in 2020, all things close to my heart and all related to my personal experience.
 - The operation of family courts in the remote world
 - Pensions after PAG
 - The bringing to life of the FRCs

The operation of family courts in the remote world

5. Prior to March 2020 very few of us had ever taken part in a remote hearing. We may have had a witness on the rather antiquated and cumbersome court video link, but almost all evidence and submission was done person to person in court.
6. After March we had to change and now almost everything is, for the time being, done remotely. Some lessons have been learned.

7. It is easy to recognise imperfections in remote hearings and they are, of course, sub-optimal; but there is one aspect of them which, for me, we can and should eliminate unless there really is no alternative: the telephone hearing.
8. Many of you will have read the excellent report produced in September 2020 of the Nuffield Family Justice Observatory: '*Remote hearings in the family justice system: reflections and experiences Follow-up consultation*'. It has much really valuable information in it, but you may, like me, have been struck in particular by its comments on telephone hearings.
9. I was most struck by a line in the Executive Summary: "*Telephone hearings continue to be widely used and respondents noted that some parents have to join video hearings by telephone (i.e. through an audio link only). Telephone hearings are being used for final and contested hearings as well as for administrative and direction hearings...It is not always clear why a particular type of technology is being used, although the type of case, the availability of technology and court resources, and the preference and technological capability of the judge appear to be the most common determinants.*"
10. The report went on to comment on how difficult it is for a serious hearing to be conducted by telephone. There is an absence of personal empathy and, in purely practical terms, it is often very difficult to work out who is talking. If it is just two people talking briefly about directions that may be all well and good, but it is clear that the telephone hearing is being used for far more than that, with all the compromises to fairness that this practice involves. For me, we judges owe the court users a duty to do all we can to stop this happening whenever we can.
11. In my DFJ patch in Wiltshire we fairly quickly realised how easy it is to use the 'Teams' technology. Unlike CVP, the judge (provided he or she has the email addresses of the participants) can quickly set up the court hearing without the need of a member of court staff overseeing it and can easily record the hearing and save the recording in an HMCTS shared drive, so the shortage of court resources is not an adequate response. There are few problems with video or audio. Obviously some litigants do not have an IT device with a camera (and they can be dialled in on Teams if this happens), but there are not very many of these and almost everybody can, one way or another, find a way of accessing a device which can respond to a Teams invitation. We have to a great extent eliminated the telephone hearing. If the next Nuffield Report was able to note that across the land the telephone hearing had been largely eliminated, how much better that would be for a fair family justice system.
12. In the FRCs Mostyn J has been leading the way towards the elimination of money hearings being heard by telephone (save in a last resort). He has publicly said that he is keen to hear from anybody on the subject if they feel they have been subjected to a telephone hearing in a money case in inappropriate circumstances. Please do take him up on that if that is your experience.

13. And I believe the President will shortly be saying something on this subject which will, of course, need to be carefully followed.
14. So I will be watching this space with interest over the coming months.

Pensions after PAG

15. I hope the money practitioners among you will, when you have a case involving pensions, still have firmly in your mind the report of PAG published in 2019 which should have persuasive effect and should not be forgotten in these Covid times.
16. The lessons of PAG are sometimes very detailed, but some of them are very important and applicable in many, many standard cases up and down the country.
17. With a degree of immodesty, and lest it should be lost in the fog of Covid lockdown, I want to recommend a reading of the decision that I made in *W v H (divorce financial remedies)* [2020] EWFC B10.
18. The facts of this case gave me the opportunity to consider the principles of PAG in the context of a real case and enabled me to emphasise a number of important PAG based principles:-
- Never ignore or relegate the importance of pensions in a money case.
 - Always give serious thought to the true value of pensions – often the CE figure will be less important than the income producing qualities of a pension.
 - In many cases the achievement of fairness and equality will follow from the production by a PODE of equal income calculations and the disaggregated division of pensions rather than using of set off with all the valuation unfairnesses that can produce.
 - The old-style discounting out of pre-marital pension accrual on a straight-line basis is very often a flawed process to be carried out rarely and with great caution and hardly ever in needs cases (which are of course the majority).

The bringing to life of the FRCs

19. You will all be aware, I hope, of the growing presence of the FRCs in the family law landscape.
20. The FRCs only came into existence in early 2018 at the instigation of James Munby, then President. The first zone was established in the West Midlands in early 2018. Since Andrew McFarlane became President in July 2018 he has been very supportive and gave us the challenge of establish a nationwide structure of FCR zones by the end of 2020. I am pleased to say that, despite the complications of Covid, this has been achieved and there are now zones, hub courts and FRC Lead Judges and approved lists of FRC Judges at all levels across the country as follows:-

Zone	Hub Court	Lead Judge
London	Central Family Court	HHJ Martin O'Dwyer
West Midlands	Birmingham	HHJ Robin Rowland
East Midlands	Nottingham	HHJ Mark Rogers
South East Wales	Newport	HHJ Jonathan Furness QC
Mid and West Wales	Swansea	DJ Susan Bennett
Cheshire and Merseyside	Liverpool	HHJ Andrew Greensmith
Humberside & South Yorkshire	Sheffield	HHJ Gordon Shelton
Cleveland, Newcastle & Durham	Newcastle Upon Tyne	DJ Nicola Shaw
North & West Yorkshire	Leeds	DJ Helen Wood
Kent, Surrey & Sussex	Medway	HHJ Stuart Farquhar
Greater Manchester	Manchester	HHJ Mark Haigh
Norfolk, Essex & Suffolk and Bedfordshire, Cambridgeshire & Hertfordshire	Peterborough	HHJ Liza Gordon-Saker
Thames Valley	Oxford	HHJ Joanna Vincent
Bristol, Gloucestershire, Wiltshire, BANES & North Somerset	Bristol	HHJ Stephanie Cope
Dorset & Hampshire	Bournemouth	DJ John Bridger
Devon, Cornwall and South Somerset	Plymouth	HHJ Paul Mitchell
North Wales	Wrexham	DJ Bethan Japheth
Lancashire & Cumbria	Preston	DJ Susan Brown

21. It is early days for the operation of the FRCs, but the aims include:-

- Only FRC Judges should be doing FRC cases
- Allocation, in particular complex cases should be dealt with by CJs or experienced DJs
- Better communication between FRC Judges to promote better consistency
- A bespoke judicial training system
- Greater efficiency, e.g. in technology
- Ability to promote money-case specific projects, e.g. private FDRs
- Bespoke website presence

22. I want to mention what I think is one very significant change which, I think, is working well and transforms one area of practice. You will, we hope, be aware by now of the significant change in the system of approving financial remedies consent orders where no contested proceedings have taken place. These consent orders will, following the introduction of an FPR Practice Direction in August 2020, almost all now go via the Digital Consent Order system with the orders being approved by FRC Judges logging on remotely on to the digital platform. With effect from 16 November 2020, yesterday, these will have moved administratively to a zonal base. As the consent orders have moved onto the digital platform from the RDCs we have generally maintained very quick turnaround times for these consent orders (typically 5 to 10 days) in comparison with 3 to 6 months at the RDCs
23. I do not underestimate the difficulty of creating and developing a new structure at a time when Covid and resource shortages dominate, but we have achieved a lot in a very short space of time. There is much more to be achieved, but I hope it is a project that any money practitioner here welcomes as a big move towards the proper recognition of the world of financial remedies as a specialist and important part of the family law system.

HHJ Edward Hess
November 2020