



JUDICIARY OF
ENGLAND AND WALES

THE HONOURABLE MR JUSTICE HAYDEN
VICE PRESIDENT OF THE COURT OF PROTECTION

REMOTE ACCESS TO THE COURT OF PROTECTION GUIDANCE

31 MARCH 2020

Foreword

The present viral pandemic presents real and obvious challenges to the effective and fair operation of the Court of Protection. Remote access to the Court has become a necessity and it is the responsibility of all involved to ensure that such hearings continue to provide proper access to justice. These arrangements are driven by the inevitable restrictions on freedom of movement that have been put in place to protect public health. Remote hearings, i.e. by Skype or alternative versions of video link, will sometimes fall short of providing the opportunities that are available in a live hearing in a court room. Recognising this, it is important to keep in focus that the procedure should seek to ensure that those who lack capacity do not become more disadvantaged than their capacitous counterparts. It remains the obligation of all involved and at all stages of the hearing, to continue to evaluate whether fairness to all the parties is being achieved. Fairness cannot be sacrificed to convenience.

Transparency is central to the philosophy of the Court of Protection. Whilst it will be difficult to ensure that a Skype hearing is as accessible to the public as an ‘Open Court’, this does not mean that transparency can become a casualty of our present public health emergency. As will be seen below, provisions have been made for the continued presence of the press. If anything, the present emergency enhances the need for continuing press scrutiny, representing, as it does, the conduit by which we preserve the fundamental right of freedom of expression.

In common with the Family Court this document sets out operational protocols governing remote hearings. Doubtless these will evolve and develop as the Court adapts. I anticipate the protocols will have to be refreshed from time to time.

Upon the issue of an updated version of this document the previous version will no longer be the applicable protocol.

This document has been structured by reference to the model for the Family Court. In developing it we have reviewed the guidance documents for other superior courts of record. Senior Judge Hilder and I have consulted with, the Official Solicitor, the Public Guardian, the Court of Protection Practitioners Association, the COP Bar Association and members of the

HIVE group (a multi-disciplinary think tank that has been established to address and anticipate the impact of COVID-19 on the litigants in the Court of Protection).

This paper should be read with guides that have and continue to be developed for HMCTS staff in relation to remote hearings. These guides can be found at <https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak>

On the 23rd March 2020 after the Prime Minister's address to the nation, the Lord Chief Justice issued directions to the judiciary in respect of hearings in County and Family Courts, the LCJ has stated:

“No hearings which require people to attend are to take place in any County or Family Court until further notice, unless there is a genuine urgency and no remote hearing is possible. All cases currently being heard should be adjourned part heard so that arrangements can be made, where possible, to conduct the hearings remotely”.

The Lord Chief's directions did not address the Court of Protection but it seems to me that exactly the same measures should be extended to it.

Accordingly, no hearings which require people to attend are to take place unless there is a **genuine urgency** and it is **not possible to conduct a remote hearing**.

General

1. This protocol relates to remote hearings only.
2. Remote hearings may be conducted using any of the facilities set out in §14 of the President of the Family Division's Guidance dated 19 March 2020:
 - (a) By way of an email exchange between the court and the parties;
 - (b) By way of telephone using conference calling facilities;
 - (c) By way of the court's video-link system, if available;
 - (d) The use of the Skype for Business App installed on judicial laptops;
 - (e) Any other appropriate means of remote communication, for example BT MeetMe, Zoom or FaceTime.
3. If other effective facilities for the conduct of remote hearings are identified the Court of Protection Rules 2017 [hereinafter 'the Rules'] allow for any means of holding a hearing as directed by the court; there is considerable flexibility.
4. The primary aim is to ensure ongoing access to justice by all parties to cases before the court.
5. The COP can be lawfully constituted with all participants (including the Judge) sitting remotely.
6. **Remote hearings are the default position until further direction.**

7. It is necessary to both ensure safety from infection whilst facilitating a hearing that allows parties to fully participate. The objective should be to make the remote hearing as close as possible to the usual practice in court.
8. Notwithstanding the default position, the court's permission is still required for all or any part of the proceedings to be dealt with by way of remote hearing, and this should be recited and directed in the order: a template order will be circulated.
9. Where the court directs that one of the parties is to host/arrange the hearing that party shall be treated as being authorised to, and entitled to, host the relevant hearing.
10. No application for a remote hearing is required. Where the Rules, under PD 14A, Annex 2, §4, suggests otherwise this will be disapplied as part of the standard preliminary directions given when directing a remote hearing.
11. A telephone or video conference involving only litigants in person is permissible as is a conference with only legal representatives or any combination.
12. Any hearings attended in person will need to be approved by the judge hearing the matter, if necessary, in consultation with the regional lead COP judge. I am available to assist in these discussions.
13. Please note that given the Government's imposition of the 'stay at home' policy from the evening of the 23 March 2020¹ requests for an attended hearing are highly unlikely to be granted unless there is a **genuine urgency** and it is **not possible to conduct a remote hearing**.
14. There may be some cases that will need to be adjourned because (i) a remote hearing is not possible, and (ii) an in-person hearing would not be safe or possible. These should be identified quickly and all participants in the COP are invited to look ahead in their diaries at scheduled cases and audit their viability for settlement of issues or a remote hearing.
15. Where it is possible for directions or an issue to be agreed then this is preferable. If we are able to reduce the number of scheduled hearings it would enable for efficient use of judicial resources.
16. In my earlier guidance, dated the 18 March 2020 I made the following observation:
"There should be an invigorated determination to move forward at directions hearings by agreement wherever possible, but without compromising the interests of the client. Where this is not possible, the parties should seek a telephone or skype hearing, having clearly identified the areas of agreement and disagreement."
17. The question of the management of committal applications will be reviewed urgently.

¹ And the coming into force of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (and their Welsh counterpart).

Legislative Framework

18. The Court of Protection can lawfully sit with participants (including judges) sitting remotely.
19. Section 45 Mental Capacity Act 2005 established the Court as a superior court of record. Subsection (3) of the Act provides that the Court “may sit at any place in England and Wales, on any day and at any time.”
20. The overriding objective in the Rules 2017 provides wide-ranging flexibility in how access to justice may be managed in this jurisdiction. Examples are set out below:
 - Rule 1.3(m): active case management includes making use of technology.
 - Rule 2.1: ‘hearing’ includes “a hearing conducted by telephone, video link or any other method permitted or directed by the court.” This is supported by PD 4A;
 - Rule 3.1 (2) (d): the court may “hold a hearing and receive evidence by telephone or any other method of direct oral communication”
 - Rule 4: A hearing, or part thereof, may be held in public or private at the direction of the court and the court may make such orders as to the publication of material from that hearing as the court thinks fit.
 - PD 10B: Addressing urgent applications which provides for the application itself to be made by telephone and hearings conducted by telephone [§12] if practical tape-recorded conference call and a transcript obtained.
 - Rule 14.5: “The court may allow a witness to give evidence through a video link or by other communication technology” supported by PD 14A with annex 2 giving guidance. The annex expressly contemplates a judge sitting at a location other than a court room.

Judicial Access to Audio/Visual Conferencing Platforms

21. There is currently no ‘single’ technology to be used by the judiciary. The court and parties must choose from a selection of possible IT platforms (e.g. Skype for Business, Microsoft Teams, Zoom etc.) At present the judicial open build laptops come with Skype for Business and Microsoft Teams installed.
22. The particular platform must be agreed at the outset of each case. It should be recited and directed in the case management order.
23. Whichever platform is identified for your remote hearing some basic principles will apply. Set out here are guidelines, it is recognised that many of these issues will need to be navigated on a case by case basis:
 - (a) When an advocate or participant is not speaking their microphone should be set to mute. This should be unset when they speak.
 - (b) The judge will set out his or her preference for dealing with interruptions. Some may ask for all video cameras to be off and turned on to indicate that you wish to interject

or contribute a point. Some may wish all video cameras to remain on throughout and allow interruptions through turning off the mute button.

- (c) At the start of each remote hearing the framework and the practicalities of the hearing will be determined.
- (d) Remote hearings are court hearings and the solemnity of the occasion should be observed as closely as it is in a courtroom, with the judge present, notwithstanding the domestic location of some or all of the participants. Please be considerate to the other participants and the judge when setting up your physical environment from which to conduct a remote hearing. Background noises should be reduced to a minimum and avoided where at all possible.
- (e) Advocates and participants should be alone, in a secure room, with the doors closed.
- (f) Testing of the video and audio feed of each party and advocates should take place before the allotted hearing time and before the judge joins the hearing.
- (g) Hearings will start promptly at the scheduled time and the judge will aim to be present from that time. The advocates and parties should be ready and any conferences with clients and meetings between advocates should have already taken place.
- (h) If time is required one advocate should be responsible for maintaining email communication with the judge or his/her clerk so that requests for more time may be addressed quickly.
- (i) Where possible all parties, whether lay or professional and their legal representatives should participate in the remote hearing. The situation for P is set out separately below.

Video/Visual Conferencing

- 24. The detailed procedure for the establishment of video links in the COP, under PD 14A annex 2, regarding video link hearings, is not to be applied to remote hearings. Save for §20 regarding preparation of agreed bundles of documents to which a witness may be referred during their evidence subject to the advice below about electronic bundles.
- 25. The minimum recommended bandwidth for a successful remote video hearing is 1.5 MBPS in both directions.
- 26. The effect of so many people nationally all using the internet at the same time (i.e. not just in the legal profession) is unknown and the effect on remote hearings needs to be monitored.
- 27. All video and audio enabled remote hearings must be recorded. Responsibility for recording and management of the audio recording is addressed below.
- 28. For setting up a hearing on most video platforms the host needs correct email addresses of the participants.
- 29. Skype for Business works on a DOM1 laptop if a represented party sets up the conference and invites the judge in, and for judges to arrange meetings using Microsoft Teams on

DOM1 machines, the current experience of the family judiciary is that Zoom will only work on Open Build machines.

30. Cloud Video Platform MoJ/HMCTS

- (a) Under the Court reform programme there is a plan to introduce video conferencing software to the courts. Part of the measures include a Cloud Video Platform [CVP]. This will allow access to remote hearings through a cloud and not through the current system of video-link hardware.
- (b) The availability of CVP may be days rather weeks away. Pending CVP being implemented across the Court of Protection the platforms set out herein will need to be accessed for all remote hearings.

31. Skype for Business (SfB)

- (a) It is developed by Microsoft and is offered as part of Office 365 suite which is widely available on many laptops, including judicial laptops. Judges have had training on this platform.
- (b) Anyone, without a SfB account can join a remote hearing on this platform as a guest, simply by clicking on the invitation.
- (c) SfB is compatible with a normal skype account which is helpful for lay parties who may already have an account and be familiar with its workings.
- (d) The best way to use the platform is for the lead legal representative to set up the Skype meeting and invite the judge into the meeting.
- (e) The hearing can be recorded within the platform. Once recorded the recording can be stored in a cloud storage place i.e. OneDrive, Dropbox or iCloud. It may also be stored locally on a computer. There will need to be consideration as to whether it will be the court who will store these, and how, this is being urgently reviewed.
- (f) For multiday hearings it is useful to keep the 'meeting' set up in Outlook 365 open for the duration so that parties can use the same link to join each day.
- (g) Documents and screens can be shared during the hearing perhaps to show witnesses pages of a bundle etc or as an alternative to handing something up to the judge.
- (h) Additional documents can be circulated by email as it is possible to keep Outlook open and running.
- (i) There appears to be no obvious way of avoiding the email of the participants being accessible to other participants, including the judge's email. It matters not who sets up the meeting.
- (j) It has been used successfully in multi-party, multiple days cases with witnesses and experts
- (k) Mostyn J has identified a problem with file corruption in Skype for Business that necessitates that **recording be restarted every 30 minutes** to avoid data corruption. Care must be taken to check that there is a full recording of the hearing.

- (l) Skype for Business lacks a side-meeting function, which is useful during the course of a remote hearing. [A function that would allow an advocate to take confidential instructions from a client whilst a remote hearing is ongoing].
- (m) That said, other means are available such as telephone calls/texts to/from the client in a break/during hearing, whilst muted to other parties, and encrypted messenger apps for live messages to and from clients.
- (n) DOM1 machines interfacing with judicial laptops via SfB has been problematic and the judicial office is investigating this.

32. Microsoft Teams

- (a) Microsoft Teams is built into the judicial laptops.
- (b) Available through Office 365 and provides a facility for video meetings and file storage.
- (c) Multiple teams may be set up thus allowing private meetings with the client and separate team for the advocates and one for the courtroom. It seems that they cannot be used so as to take instructions during an active meeting such as a hearing.
- (d) The participants are specifically invited to each team and so the user can move between the teams to meet and take instructions, negotiate and participate in the hearing. Much like Zoom where there is an interpreter and/or intermediary there may be a team set up for the party who is being provided with that assistance and the relevant professional(s).
- (e) There is a recording function within the platform. The host can record.
- (f) When the judge is the host they control the recording, the other participants having no option to record. If the court or an individual judge wishes to do so, they may set up a hearing using Microsoft Teams, ensure the hearing is recorded and retain control of the recording.

33. **Other platforms (Zoom, Facetime, Lifesize) are not installed on judicial laptops or OPG laptops.** However, some courts have been using these platforms with conspicuous success. A host advocate in the case may set up the hearing and invite the judge to attend. It should be noted that these platforms will not receive the technical support of HMCTS.

34. Zoom

- (a) Zoom allows users to host a video conference with meetings. It allows for the sharing of documents.
- (b) Break-out rooms as part of the meeting are possible. Accordingly, advocates can hold discussions in the absence of the judge under the umbrella of the same meeting with specific participants. Further, advocates can 'leave' the hearing room, take instructions in the 'meeting room' and then re-join the hearing.
- (c) The cheapest version of Zoom that allows up to 100 participants per video conference is £11.99 per month if paid for monthly and the equivalent of £9.99 a month if paid as an annual fee.
- (d) The free 'Basic' version limits the duration of any video conference established by the basic licence holder to 40 minutes, so is not suitable for most video court hearings.

Professional and lay clients can stay in, and re-join, a remote hearing exceeding 40 minutes in length, if it was set up by someone else (who has the full licence).

- (e) Any invitee to a video conference organised on Zoom does not need to pay a fee. This means that were the judge to be invited by one of the parties (the judge having installed on the computer the Zoom software) there would be no cost to the MoJ.
- (f) Zoom can be downloaded by judges for free and will operate on an open build judicial laptop provided that it is the lawyers who set up the Zoom meeting and invite the judge.
- (g) Whilst this solution appears to be possible for Open Build judicial laptops, it will not currently work for DOM1 judicial laptops.
- (h) The web client version works best on the Google Chrome browser which is not on the DOM1 judicial laptops. Tests with Edge and Firefox were unsuccessful.
- (i) Judges with DOM1 machines will need to use SfB or Microsoft Teams at this time.
- (j) I am very much aware that some concerns have been expressed in relation to the security of this platform. For my part I have not seen anything that causes me real concern. However, if that position were to change I would communicate any revised position immediately.

35. Facetime

This is only available on Apple products running Mac OS X 10.6.6. or later. Apple products are not widely available to the judiciary or to all members of the legal profession.

36. Lifesize

- (a) Lifesize is a communications platform that allows high definition video-conferencing and a cloud-based video collaboration.
- (b) It is understood to be secure and can be set to record proceedings.
- (c) As with Zoom, if a judge is invited to participate in a 'Lifesize' meeting there is no charge to the MoJ.

Audio/Telephone

37. Telephone hearings are remote hearings.

38. Telephone conferencing and BT MeetMe is available at 1022 Court and Tribunal centres nationally. There are three other approved providers: Legal Connect, Kidatu and Arkadin. LegalConnect 0800 953 0405; Email: support@legalconnect.co.uk, Kidatu 0800 279 4595; Email: info@kidatu.co.uk, Arkadin 0800 279 5596; Email: legalevents@arkadin.co.uk.

39. The court will arrange the call and dial out to all parties on telephone numbers provided. HMCTs pay the costs of the call.

40. The high demand for these services in recent days has identified that the providers may not have availability to meet the demand of largely all hearings across the jurisdictions being heard remotely. Requests for additional BT MeetMe accounts have been made, to enable one account per court room for every site. Local site DSOs will start to see these requests being fulfilled. The Digital Support Officers (DSOs) can all access these

accounts on their work iPhones, so even DSOs who are self-isolating (and not unwell) should be able to provide support from home. Sites that do not have a BT MeetMe account should email DSOenquiries@justice.gov.uk.

41. There is a facility to record with the providers. The provider will send to the court an audio file via email after the hearing which is stored on the court system.
42. Please bear in mind that the platforms charge a call rate per minute, which varies between providers; the costs may place family members and P at a substantial disadvantage as a long call may be prohibitively expensive. The needs of all users must be considered when a platform for a remote hearing is decided upon.
43. When considering an audio rather than audio visual platform account must be taken of the needs of participants with hearing impediments or living with deafness including whether they to lip read and/or will be assisted by a BSL interpreter.
44. Where one or more of the parties is represented, responsibility for making the arrangements for the remote hearing will fall on either the applicant or the first represented party. If no party is legally represented, the court office will contact the parties to explain that the hearing will be held by telephone conference and will send them instructions on how this is to be achieved.
45. Where one party is unable to attend a remote hearing by way of an electronic communication platform (for example, where they do not have access to the relevant technology or have a very poor Internet connection) but can attend by telephone, the remote hearing will be held by telephone conference call, to be arranged by the applicant (or first represented party) or by the court where no party is represented.
46. The lead party must provide to all of the other parties the details required to attend the remote hearing as soon as they are available, in any event, no later than 24 hours before the hearing is scheduled to begin.
47. In many cases, it may be necessary for the lead party to set up the remote hearing with a view to inviting the judge to join.
48. Rather than all cases being listed to commence at 10.30am, where there is more than one remote hearing in the court list, the court will be required to list hearings at a specified time.
49. All telephone hearings must be recorded.

Security

50. The primary concern about using 'off the shelf' audio/visual platforms like SfB or Zoom for hearings has been the security of the link as identified by the family guidance

“unauthorised recordings being made by a litigant or as a result of malicious third party hacking”.

51. It is this primary security risk to which section 55 and schedule 25 of the Coronavirus Act is aimed. These make it an offence (a) to record a live link or make an image or a sound taken from a live link or transmit material gained through participation in a live link (b) to record a broadcast from a court directed for the purposes of enabling the public to see and hear proceedings. This schedule will make it an offence to use material even if one obtains it outside of the case i.e. through hacking the link. This has a deterrent effect and is a necessary step to ensure that the potential for insecurity in the platforms is not exploited.
52. The Court of Protection is **not**, as yet, encompassed by this schedule or the offences it creates. Nonetheless the prohibitions in section 55 and schedule 25 of the Coronavirus Act will now be included in every standard order, accompanied by a penal notice and punishable by contempt proceedings. It may be convenient to note here that the penalty for contempt includes a sentence of imprisonment of up to two years or fine of up to level 5. I will invite all judges to announce this prohibition at the start of any remote hearing.
53. The security of the platform identified for the remote hearing must be assured.

Transparency

54. The culture of the COP is one of transparency, and I am determined to maintain this insofar as possible.
55. At present, the CoP sits in public for most attended hearings. PD 4C applied to “attended hearings” which are defined at paragraph 2.2 as hearings “where one or more of the parties have been invited to attend the court for the determination of the application.” Attended hearings can be remote hearings for these purposes.
56. However, during the outbreak the COP will only very rarely hold physical hearings in a courtroom, for the vast majority of cases there will be no public gallery open for attendance. In any event physical attendance by the public to watch a court hearing is not a necessary excursion for purposes of the Coronavirus Regulations now in force.
57. The essential tenets of Practice Direction 4C are therefore unworkable at present and it is to be disapplied in cases where a remote hearing is ordered. In established applications moving to a remote hearing any transparency order will need to be discharged and specific directions made. I am satisfied that, to the extent that discharging the order in such a case engages the rights of the press under Article 10 ECHR, any interference with those rights is justified by reference to Article 10(2), having regard in particular to the public health situation which has arisen, and also the detailed steps set out below designed to ensure that the consequences on the rights of people generally and the press in particular under Article 10 are minimised.

58. The powers of the court are to permit both public and private hearings, or parts thereof. The court will make the most appropriate order for the case before it.

59. In each case active consideration must be given as to whether any part of any remote hearing can facilitate the attendance of the public, if so Practice Direction 4C may be applied and the transparency order reissued. In the updated guidance by HMCTS “Telephone and video link hearings during the coronavirus outbreak” under the headings ‘open justice’ and ‘Media access to proceedings’ there are commendable suggestions as to how to provide the public with access to the work of the court <https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak>.

60. Where the attendance of the press can be accommodated in the remote hearing (whether or not it is a case that was originally proceeding under the provisions of Practice Direction 4C) this should be an available facility for them. There have been 2 successful hearings in the COP where the press were observers on a SfB link and able to report accordingly. The HIVE group will need to address the question of how the content of upcoming cases is communicated to the press, so that the public interest is served by their attendance.

61. The COP list is published daily at COURTEL:

<https://www.justice.gov.uk/courts/court-lists>

To ensure continued transparency of COP the fact that a hearing is to be a remote hearing and, where possible, the technological method to be employed, ought to be shown in the cause list or the lists in the Court of Protection i.e. ‘being heard remotely’ or for a reserved judgement “handing down judgement by email”.

62. I highlight the suggestion in the Family Court protocol, made by MacDonald J that “it would also be of assistance if a method of communicating this information to the press and legal bloggers could be arrived at, for example by using the CopyDirect service or routing the information via the Press Association using highcourt@pa.media in advance of a hearing, which would ensure all of PA’s High Court team are notified of the arrangements” [§5.19 of the Family Court Guidance on Remote Hearings as amended].

63. The Rules permit the judge to make public such information before the court, documents, judgments etc as s/he things fit. Greater use of published judgments is a means by which the public may be able to access the court during this time.

64. The Coronavirus Act allows the listed courts to direct public broadcasts of the hearings or part thereof (or record a hearing for the purposes of public broadcast after the fact): Section 55, Schedule 25, paragraph 1, amending s.85A Courts Act 2003. This provision is not extended to the Court of Protection and inevitably therefore public access by way of either live or retrospective broadcast is restricted. Live broadcasting of court proceedings may only be authorised by statute. It may well be possible for a judge to order the release of a recording at some point after the hearing has concluded. The more ambitious objective of

the Court of Protection is for it to be included within the scope and ambit of the Coronavirus Act.

Transcription/recording of the Hearing

65. All remote hearings must be recorded. No party may record the hearing without the permission of the court. The responsibility for arranging the recording will be addressed on a case by case basis.
66. Responsibility for recording the hearing will fall on the party or court that has organised the remote hearing. At the conclusion of the hearing (or at such points during the hearing as is necessary) the recording of the hearing will be uploaded to cloud based storage provision.
67. Subject to court direction and the host of the hearing being a legal representative, where not the judge, s/he may record the hearing. Immediately following the hearing, the host must provide to the judge a link to the recording.
68. The judge will settle arrangements for how the recorded files are to be transmitted and stored centrally by the court. There is more work to be done before a definitive position is settled upon as to the mechanism of transmission and the ultimate storage of the recordings.

GDPR

69. It appears that the Information Commissioners Office is content that Skype for Business, LifeSize and Zoom² are GDPR compliant. The position with respect to Microsoft Teams will need to be clarified. The Information Commissioner's Office has indicated that reasonable allowances are going to be made during this period of national emergency (see <https://ico.org.uk/about-the-ico/news-and-events/icos-blog-on-its-information-rights-work/>).

Attendance of P at the remote hearing

70. Here 'attendance' means participation in the remote hearing by listening and/or viewing the hearing through live link/ video conferencing platform or on a telephone or by other remote means.
71. Where P lacks the capacity to conduct the proceedings and is represented by a litigation friend or by Rule 1.2 representative there is no necessity for the attendance of P at the remote hearing. The question of P's attendance is first a matter for P's legal representatives and/or litigation friend. It must be borne in mind that the country is operating at a time of crisis and resources are being prioritised and stretched.

² For Zoom only where the host has indicated that they accept the terms and conditions specifically in relation to GDPR. In order to set up a meeting they have to tick the requisite box.

72. Residential care settings, care provider agencies and clinical staff may be reduced in capacity by illness and/or measures designed to protect them and the functions that they provide. Before those caring for P are troubled to make arrangements for P's attendance at a remote hearing, consideration must be given by those acting for P, as to whether there is any other way in which P can be involved in the process. By way of example a telephone call to his/her solicitor before or after the hearing or having their views set out in an email to be shown to the court. Physical letters or pictures from P should not be sent to the court or to the Judge, to avoid the risk of virus transmission; where created by P a photograph of them may be taken and sent to the judge. Consideration can be given to whether a recording of the remote hearing can be made available to P to view after it has taken place.
73. Imaginative ideas are welcome to ensure that P participates in their proceedings where they are able to so do safely and proportionately. The Rules provide for the court to take information from P by any means that it considers appropriate [r14.2 (e)] and there are a wide range of flexible methods of engaging P [see rules 1.2(2)(e) and PD1A].
74. This national situation has accelerated our reliance on audio and visual conferencing platforms and technologies. Where judicial meetings with P are **necessary** for a determination of the issues then remote conferencing technology to facilitate that meeting is the only likely mechanism. This meeting should be recorded and made available to the other parties.
75. Perhaps not now, but as we emerge back into physically attended hearings, it will be necessary for the momentum not to be lost and for parties to be imaginative about bringing P into the process through these mediums in the future e.g. the viewing of a recording of a conversation with P and his/her legal representative rather than attendance notes and witness statements.
76. The HIVE group will give further consideration as to the issue of P's attendance at remote hearings in their meetings.

Litigants in Person

77. Where no party is represented the court will set up the remote hearing.
78. Some video conferencing platforms do not require the recipient of the invitation to have the software on their device to participate fully. However, all of the video/audio platforms contemplated in this document require access to internet through a data package on a mobile device or and/or Wi-Fi or LAN.
79. Where litigants in person lack access to communication platforms then telephone conferencing is likely to be the preferred platform.
80. In any case where there is a litigant in person a copy of this protocol will be sent to that litigant by email, the responsibility for doing so will fall to the applicant or first represented party. When this document is sent to the litigant in person their attention should be drawn to paragraph 23 above.

81. Judges and advocates must be alert to the potential for litigants in person to be left behind in a discourse which may be less apparent to the judge on a remote link than if they were physically present with the litigant in court. At the start of a remote hearing a mechanism by which a litigant in person may indicate to the judge a lack of understanding or need to interrupt ought to be agreed upon and explained
82. HMCTS has issued guidance to its staff to help with the process of accessing a hearing in this context and it can be found here: <https://intranet.justice.gov.uk/about-hmcts/operations-directorate/business-continuity/covid-19/guidance-on-using-telephony-and-video-technology-during-the-coronavirus-outbreak/>

Witness Evidence

83. Where a remote hearing will involve oral witness evidence, the parties should endeavour to agree in advance a list of documents to which the witness is likely to be referred. An electronic bundle of the relevant documents should be prepared in advance, which the lead party should send to the witness.
84. Some of the platforms referred to above (SfB, Microsoft Teams, Zoom) have a document and screen sharing mechanism during the remote hearing. This may obviate the need for electronic bundles to be sent to non-professional witnesses.
85. There may be an increased need for the judge to administer the oath or take the affirmation from witnesses. Mostyn J uses a short form by addressing the witness thus: ‘do you swear or affirm to tell the truth, the whole truth and nothing but the truth?’
86. There is no requirement to touch any Holy Book at a remote hearing.
87. The witness is to be alone, in a secure room with the doors closed. The witness is to ensure that there will be no interruptions or distractions for the duration of their appearance at the remote hearing.
88. The witness should have recently re-read all affidavits or statements or reports made by him or her in the proceedings and have a copy of those documents with them.

Electronic Bundles

89. Physical bundles may not be regarded as safe for public health and in any event are not now capable of being provided or conveyed in compliance with the restrictions imposed on the physical movement of people.
90. The only apparent impediment to electronic bundles is paragraph 5 in PD 4B to the Rules. The template orders will disapply this paragraph until further notified. For the avoidance of doubt the provisions for lodging of the physical bundle at the addresses set out in paragraphs 7 & 8 will also be disappplied.

91. For the time being and as a temporary measure, electronic bundles will be accepted as the default position for remote hearings. I note that in the Family Court the President has issued a blanket approval to DFJs to approve the use of E-bundles in all remote hearings. The logic of that position is redundant of any coherent alternative argument and should be applied with equal rigour to the lead judges of the Court of Protection.
92. The parties must agree, and the lead party must prepare and send to the court, an electronic bundle of documents for each remote hearing. The electronic bundle must be prepared by somebody with adequate knowledge of the case.
93. The following requirements must be followed:
 - a. PDF format is to be used;
 - b. All documents are to be contained, if possible, within one single PDF file and with pagination;
 - c. Electronic bundles should contain only documents and authorities that are essential to the issues required to be decided at the remote hearing;
 - d. The electronic bundle must be filed with the court by email;
 - e. All position statements/skeleton arguments should also be separately filed by email in a Microsoft word format.

Where it is practical the Court's preference is for the following:

- f. Pagination be computer generated within the PDF, not hand-written;
- g. Each section of the bundle, and each individual document referenced in the index, should be separately bookmarked;
- h. The PDF file be searchable;
- i. The index should be hyperlinked to the documents.

Use of Interpreters and Intermediaries

94. Simultaneous translation during a remote hearing for litigants who require an interpreter is a necessary component of a fair hearing.
95. A court-appointed interpreter for the purposes of translation for someone giving evidence is less of a complication as the interpreter will participate in the video and audio hearing and speak at normal volume which will be recorded. Likewise for the witnesses evidence given in the participant's first language.
96. When a party is not giving evidence but has an interpreter to assist with their understanding of the rest of the hearing they should have the sound from their location on mute; thus it is possible for the interpreter to be a participant in the remote hearing and at the same time on a separate audio channel (either through the software or by telephone) translating the evidence/submissions/judgment to the litigant. Both the litigant and the interpreter should be on mute to the main hearing to prevent any interruption.
97. A similar structure may work for the intermediary support; although consultation with the intermediary services is urgently required as it is unclear as to the state of readiness to

support a litigant's communication remotely. That having been said, the recent paper from Communicort contains some helpful suggestions for managing remote hearings with intermediaries:

<https://www.dropbox.com/s/aqwmeiu3utse9zq/File%2027032020%2C%2013%2043%2034.pdf?dl=0>

98. I recognise that there are potential impediments to an intermediary effectively supporting a litigant's understanding and communication when they are not in physical proximity to each other; subtle facial and emotional cues signalling a lack of understanding, increasing distress or fatigue may not be picked up on early enough on remote video and audio feeds. That having been said the vulnerabilities of a litigant ought not to become an impediment to them to receiving a swift determination of their case, particularly so where imaginative considerations can be applied.

Orders and Service

99. Work is ongoing to identify a way forward in respect of the sealing of court orders from remote hearings. Electronic seals are available and utilised in the COP for welfare orders. It requires to be emphasised that some of those orders relate to end of life decisions and probably include the most important orders that any court can make. Additionally both the Supreme court and the Court of Appeal deploy electronic seals.
100. Deputyship orders undoubtedly have their own complexity to date the banks and other agencies e.g. HMRC, DWP, insurance companies, for entirely understandable reasons, have insisted upon documents with embossed seals. It is difficult to see how that can now be reconcilable with the public health protection set out variously within this guidance. Moreover, it requires a degree of human agency which is no longer compatible with the preventative health measures set out in the Coronavirus Act. Plainly there will need to be discussions with the banks at a high level in order to address any concerns they may have. The Hive Group has nominated Senior Judge Hilder to survey the practical solutions. Alex Ruck-Keene, Kate Edwards and I will assist her. I recognise the challenge this represents but I am also highly alert to the anxiety and stress that will be caused to P and their family members by delay in accessing funds. In simple and unambiguous terms this may be funding of telephones, internet packages that may be integral to any communication with the outside in the present circumstances.
101. I must be realistic given the demands upon the court which is operating a skeleton staff orders will not be sealed in a timely way.
102. Rule 5.1(1)(c) requires sealing of orders or otherwise authenticating it with the stamp of the court, however the powers of the court allow for the court to disapply any rule to further the overriding objective [rule 3.3].
103. For welfare orders there is no apparent impediment to them taking effect forthwith although unsealed. If an electronic seal is available, then no difficulty arises. Where there is not an electronic seal available a form of words may be expressed in the order to indicate that it takes effect although unsealed. Advocates must ensure that this issue is addressed at every remote hearing with the Judge.

104. Where the court is to serve a document it is for the court to determine the method of service that is to be used [rule 6.2(3)] and there is flexibility to serve by nonphysical methods (post or personal service) provided by (4). It seems likely that the public health imperatives of the Covid-19 outbreak will amount to ‘good reason’ to serve documents by non-physical means such as email.

Legal aid funding

105. Some hearings will be capable of being resolved by agreed directions and an email exchange with the judge, who may approve the order. I recognise that extensive work may have had to go into the preparation of those hearings in order for the issues to narrow, including by advocates preparing position statements/notes to focus issues or hold advocate meetings.

106. I am clear that where, as I am encouraging them to do, parties agree the terms of an order the court has the ability to direct that the remote hearing be by way of email exchange with the judge, who will then consider approval of that draft order. The Rules provide for a wide definition of ‘hearing’ and this approach accords with the President’s guidance to the Family Court, as set out above.

107. The work undertaken for the remote hearing whether by audio, video link or email exchange, including the negotiation, ought to be remunerated as closely to the position had it been an attended hearing. It is not a sensible use of the limited court resources for other forms of remote hearings to take place so that advocates, who have worked hard to bring about a resolution in advance of a hearing, are properly remunerated for this valuable assistance to the court. I recognise that there will need to be direct engagement with the LAA to process this issue and I will allocate a practitioner member of the HIVE to undertake that task.

108. Further, in order to facilitate the prompt start time for any remote hearing, and ensure proper payment for the work done by advocates/legal representatives, the template directions directing a remote hearing may include a direction for the advocates and the parties to attend on the remote hearing platform one hour before the hearing.

109. On the 25th March 2020 the LAA issued updated guidance <https://www.gov.uk/guidance/coronavirus-covid-19-legal-aid-agency-contingency-response>

110. As I hope is evident from the above the central principle to be applied is proportionality. This may sometimes mean that the full rigour of tight procedural compliance may have to give way to practicality and pragmatism in order to find a route to a decision which requires to be taken and may not be delayed.

**IN THE COURT OF PROTECTION
SITTING AT
IN THE MATTER OF THE MENTAL CAPACITY ACT 2005
IN THE MATTER OF _____**

Case No:

BETWEEN:

[INSERT NAME]

Applicant

and

(1) [insert P's name]

[(acting by his/her litigation friend, XXX)]

(2) [insert name]

Respondents

IMPORTANT WARNING

ANY PERSON OR BODY WHO KNOWS OF THIS ORDER AND DOES ANYTHING TO BREACH PARAGRAPHS [3 AND/OR 4 *INSERT NUMBERS*] MAY BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE THEIR ASSETS SEIZED.

IF YOU ARE SERVED WITH THIS ORDER YOU SHOULD READ IT EXTREMELY CAREFULLY. YOU HAVE THE RIGHT TO ASK THE COURT TO VARY OR DISCHARGE THIS ORDER.

BEFORE _____ SITTING AT _____ ON _____.

UPON the Court determining that in the exceptional circumstances of the current national public health emergency this case is suitable for hearing remotely ('remote hearing') by means of [video link]/[Skype]/[telephone]/[other].

AND UPON the parties and the court having identified and settled on the following communications platform to be used to conduct remote hearings in this case _____.

AND UPON ongoing consideration being given in this case to the means by which any remote hearing or part thereof can be accessible to the public, with the court's permission, publications of judgments, making transcripts or recordings of the hearing available for reading or listening at the request of third parties or the press or legal bloggers.

BY ITS OWN MOTION / BY CONSENT

IT IS ORDERED THAT:

1. All hearings in this matter shall take place in private and by way of remote hearing pursuant to Court of Protection Rules 2017 r 3.1(2)(d) unless the court directs otherwise.
2. The parties and their representatives shall attend all hearings by way of [video link]/[Skype]/[telephone]/[other].
3. It is forbidden for any person to make, or attempt to make—

- (a) an unauthorised recording, or
 - (b) an unauthorised transmission,of an image or sound which is being transmitted through a live video link or transmitted through a live audio link in this case.
- 4. It is forbidden for any person to make, or attempt to make—
 - (a) an unauthorised recording, or
 - (b) an unauthorised transmission,of an image of, or sound made by, any person (whether P or another person) while that person is participating in court proceedings through a live video link or a live audio link in this case.
- 5. [If relevant] The transparency order made on the [insert date] is hereby discharged.
- 6. Practice Direction 4C is disapplied.
- 7. On the court list for the next hearing the words “to be heard remotely” will be endorsed next to this case.
- 8. Accredited members of the press and legal bloggers may seek to attend the remote hearing by putting in a request to this court confirming the email address of the relevant journalist or legal blogger who is to be joined to the platform and the name of their employer (if any). If such permission is granted the disapplications at §§5 and 6 above will require to be revisited at the commencement of any remote hearing attended by the press or a legal blogger.
- 9. Any other person may apply for permission to attend the remote hearing in the same fashion as an accredited member of the press or legal blogger, also giving an explanation as to why they wish to attend. In such an event §§5 and 6 above will require to be revisited in any order which permits such attendance.
- 10. No unauthorised person may be present at this hearing. When asked, each legal representative must be able to confirm that no unauthorised person is in attendance or able to listen to the hearing.
- 11. This matter shall be listed for a remote hearing on _____ at _____ before _____ sitting at _____ with a time estimate of _____.
- 12. The legal representatives and the parties shall attend the remote hearing or otherwise meet remotely no less than 1 hour before it due to commence to ensure that each advocate has full instructions and issues have been refined by negotiation for a prompt start.
- 13. The parties shall arrange and attend remotely an Advocates Meeting no less than 48 hours before the hearing listed above.
- 14. The [applicant / respondent] shall be responsible for arranging with the Judge’s clerk (via _____) the necessary facilities to conduct a remote hearing, allowing enough time for any necessary testing to take place. This will include provision to the court of the necessary contact details for the parties and their representatives where these are needed to facilitate the remote hearing.
- 15. Where the parties reach a consensus as to the form of order for the hearing and all parties confirm the same in writing then:
 - (a) the form of remote hearing may be substituted to take place, in whole or in part, by way of email exchange with the judge.
 - (b) Where this occurs on the day of, or a working day before, the remote the judge must have approved the order prior to cancellation of the arranged platform for the remote hearing.
- 16. The [applicant / respondent] must confirm the details of the arrangements for the hearing to the other parties by no later than 24 hours prior to the remote hearing taking place.

17. Paragraphs 5, 7 and 8 of Practice Direction 4B is disapplied in this case until further order the following consequential provisions shall apply in respect of the filing of the bundle for the remote hearing:
- a. The applicant shall file an electronic bundle by email no less than 48 hours before the hearing save for an urgent hearing;
 - b. PDF format is to be used;
 - c. All documents are to be contained, if possible, within one single PDF file and with pagination;
 - d. Electronic bundles should contain only documents and authorities that are **essential** to the remote hearing;
 - e. Save for the paragraphs disapplied above and where otherwise varied by this direction the bundle must comply with PD 4B;
 - f. All position statements/skeleton arguments should also be separately filed by email in a Microsoft word format.
18. [Further Directions].

Dated _____ 2020