



JUDICIARY OF
ENGLAND AND WALES

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

Additional Guidance for Judges and Practitioners arising from Covid-19

1. On 13th March 2020, I issued guidance relating to the question of judges and legal advisors visiting P. I found it necessary to go beyond the existing Public Health England (PHE) Guidance in relation to Covid-19 and signalled that visits to P should only be made where that is assessed as **absolutely necessary**. Additionally, I emphasised the importance of creative use of technology: facetime; skype/business skype conferencing; and telephone conferencing, etc. I was unambiguous in advising that visits to care homes are to be strongly discouraged. This Guidance has been widely publicised, with the assistance of the Judicial Office, and has been made available both to the Court of Protection Bar Association and the Court of Protection Practitioners Association. It is also published on the Judicial Office website.
2. Following the announcement on Monday, the landscape has plainly changed and judges and practitioners have been seeking guidance across a wide range of issues. I am responding to these key requests in this second guidance document. It is important to emphasise that events have changed very quickly and will continue to do so. Inevitably, it may be necessary to review the position and I intend to provide regular updates.
3. The most pressing issue is attendance at court. The Court of Protection's procedures are set down in a number of Practice Directions, these are to be found on www.gov.uk. The Practice Direction (PD) relating to attended hearings is PD 4A (<https://www.judiciary.uk/wp-content/uploads/2015/06/pd-4a-hearings-reporting-restrictions.pdf>). It is plain from this PD that the Court is, under its own rules, able to direct the scope and ambit of the hearing. This has already led to earlier guidance making specific provision for telephone hearings. At the centre of all proceedings in the Court of Protection are vulnerable individuals in respect of whom questions of capacity require to be evaluated, across a wide sphere of decision taking. It is self-evident and intrinsic to the philosophy of the Mental Capacity Act 2005 (MCA) that all measures should be taken which enable P's voice effectively to be heard. For the foreseeable future, this range of creative options has to be in the forefront of the thoughts of judges and practitioners.
4. In the Central Registry and First Avenue House (FAH), two of our eight court officers are symptomatic and self-isolating. Until two days ago, they were both working. Manifestly, this creates real issues which, for the present, I can do no more than monitor. But it is self-evident that this is the infrastructure of the Court without which it will not be able to function at all. Additionally, the Court of Protection (London) operates through 'resident' and 'visiting' judges. Two of the visiting judges, for different reasons, consider that they should not sit at present. I respect and accept

their decisions. Also, a meeting of the Court User Group, which is a very extensive organisation, was due to take place on 28th April 2020 (at which some 50 people were to attend) so has now been cancelled.

5. I have set out the above because it illustrates simply and graphically that the Court of Protection is facing very considerable challenges. This Court is charged with responsibility for a cohort of people who are in the eye of the storm. I anticipate that, in order properly to protect them, there will be a number of issues which will require urgent resolution and in circumstances where a range of P's fundamental rights and freedoms risk being compromised. In light of the updated government advice from PHE, it is likely that, for the foreseeable future, some hearings will need to be adjourned or to take place remotely. For this reason, as well as many practical ones, the approach for the time being will be:
 - i) Hearings with time estimates of 2 hours or less will be conducted by telephone. The applicant should make the necessary arrangements as set out in COPGN5;
 - ii) Hearings with time estimate of more than 2 hours will, in principle, proceed unless and until further guidance or specific application in the case (which will be decided by the judge hearing the case);
 - iii) It is likely that there will be an increase in the number of hearings being conducted remotely either in whole or in part.
 - iv) Where hearings are to be conducted by telephone or by skype, the court listings will be published in advance as usual and any updated guidance will be made public. (For the avoidance of doubt, this guidance and its predecessor last week are both in the public domain).
6. This position will be reviewed as and when circumstances develop. I am also confident that there will be many cases in which practitioners will be able to agree Directions Orders, at interim stages, without live hearings being required.
7. It is useful to highlight some of the difficult questions that have been identified:
 - How should we proceed in relation to documents that can only be signed personally by the appointed Deputy, where that is an individual who is self-isolating or working from home in accordance with Government guidance?
 - *Suggested solution: Rule 5.1, PD 5A and PD 5B make relevant provisions. The High Court and Possession Claims Online already accept electronic signatures. I consider that the Court of Protection could do the same, at least until further notice. Additionally, where documents are e-mailed, a photograph of the signature – such as could be taken on commonly available smart phones and devices – could be attached.*
 - The MCA and Codes of Practice require P to be personally notified of various matters (see Part 7 of the Rules). How can this be substituted in circumstances where P is, for example, in a care home which is effectively “locked down”?
 - *Suggested solution: It does not have to be the applicant who gives such notification. Arrangements may be made by the applicant for notification by “an agent duly appointed by the applicant” (rule 7.2(1)(c)), such as a member of staff at the care home). Alternatively, a COP9 application to dispense with notification requirements may be appropriate.*

- In relation to property and affairs applications for the appointment of a professional Deputy (who has filed a COP4 and has P11, as all solicitors do), would it be possible to issue emergency interim orders (e.g. from 6 to 12 months) to enable financial management work to be undertaken pending the Court’s determination of appointment on a long-term basis?
 - *Suggested solution: This question seems to be directed to how the court will consider applications which lack the usual requirements of capacity evidence and notice requirements. Interim orders of short duration would indeed be possible but the Court would still need to be satisfied for the purposes of section 48 MCA that there is “reason to believe” that P lacks capacity, and the range of authorities will be more limited. If applicants really are not able to meet the usual requirements by other means, it would be helpful if they specifically identify any issues which really need to be addressed on an interim basis.*
 - Would it be possible to use digital signatures for COP3 orders? (See (i)).
 - Will the Court accept electronic signatures on court documents? (See (i)).
 - Will the Court accept orders issued by e-mail?
 - *Suggested solution: Rule 6.3(4) allows the Court to direct that service may be effected by non-standard means. With the Office of the Official Solicitor now working remotely, a template order has been agreed to provide for service of the OS by electronic means. Wider issue of orders by e-mail will have to be further considered, but the attendant security risks, especially in property and affairs, should not be minimised.*
 - Will the Court accept electronic bundles?
 - *Suggested solution: Regrettably the Court does not have the computer hardware or software to operate electronic bundles. The Court can, however, accept scanned documents by e-mail. It would be helpful if each document is separately scanned, as super-large files slow down the system. (In Tier 3 cases, both in London and regionally, electronic bundles are likely to be acceptable).*
 - Can capacity assessments be undertaken by video when it is established that P is happy to do so and can be “seen” alone?
 - *Suggested solution: In principle, yes. The assessor will need to make clear exactly what the basis of the assessment is (i.e. video access, review of records, interviews with others, etc.) Whether such evidence is sufficient will then be determined on a case by case basis. It is noted that GPs are rapidly gaining expertise in conducting consultations by video and may readily adopt similar practices for assessments. Careful consideration will need to be given to P being adequately supported, for example by being accompanied by a “trusted person.” These considerations could and should be addressed when the video arrangements are settled. It should always be borne in mind that the arrangements made should be those which, having regard to the circumstances, are most likely to assist P in achieving capacity.*
8. It is instructive to set some of these sample questions out because each, in my view, generates a chain of thought in which some practical and pragmatic solutions can readily be envisaged, as I hope the suggested solutions illustrate. I propose, therefore, to establish a **Core Working Group (Covid-19)**, looking at ongoing interim solutions focusing on helping the Court to operate efficiently in the course of the present health crisis. I contemplate a small group which will include judges and representatives of the profession.

9. For the time being, there are some key messages:

- i) In the present circumstances, the broad approach is that hearings of less than 2 hours' time estimate will proceed by telephone, to be arranged by the applicant; hearings of longer time estimate will aim to proceed, subject to any application in the particular case. This approach will be reviewed frequently;
- ii) All practitioners must consider the range of options open by use of skype, telephone cons, etc;
- iii) 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;
- iv) The pressure on court staff is barely sustainable and every sensible effort to alleviate it should be seen as a professional imperative. I cannot emphasise sufficiently that, however committed and creative the judges and lawyers may be, the viability of the Court at FAH depends on the availability of a very small team of administrative support;
- v) The Court is presently only able to use skype in limited circumstances but this is being considered further. Separate practical guidance will be issued shortly for use of skype/business skype in the Court where possible. There is already a simple user guide on the Judicial Intranet (under the Practical Matters tab, select Coronavirus (Covid-19) and scroll down)) and tutorial videos on youtube.
 - <https://www.youtube.com/watch?v=2WUe59-aWI8&feature=youtu.be>
 - <https://www.youtube.com/watch?v=9MpqcXAdx0k&feature=youtu.be>
 - <https://www.youtube.com/watch?v=qQpQEDYskrc&feature=youtu.be>
 - https://www.youtube.com/watch?v=H8xbgad2q_Q&feature=youtu.be

10. It is clear from some of the emails I have looked at that the pandemic is causing great personal as well as professional anxiety. It is essential that you all keep yourselves as safe and as healthy as you possibly can. I have already had occasion to commend the work and commitment of the Court of Protection judiciary and practitioners in the past. The constructive and compassionate response to this very challenging situation by the judges, and the practitioners, has been immensely inspiring both to me, Sir Andrew McFarlane (P) and, I know, to the Lord Chief Justice.

11. That I was able to issue the guidance last week, in such a timely way, was entirely due to swift and direct contact to me by a number of judges. I hope it does not need to be said that I am happy to assist you personally with some of the difficult practical decisions that you will all have to take in the months ahead.

18th March 2020