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The shape of family law to come[1]: coming out of the pandemic lockdown

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Introduction

The worldwide pandemic causing varying degrees of lockdown and cessation of public life in the first half of 2020 was an event of global significance, very probably creating more, or more accelerated, changes than at any time in the previous half-century. July 2020 is still too early to forecast reliably what the longer-term consequences will be. But it is opportunity to review how there has already been an impact on the family justice system in England and Wales, looking also at other jurisdictions, and where this may have a change in law and practice. This can only be an initial overview and a work in progress. What remains fundamental is that family justice must continue to serve the best interests of those needing access to justice, children, vulnerable parties and efficient provision of adjudication.

Looking ahead is precarious. Forecasting is risky. In 2008 the author wrote about what might be family law in 2020, then with very imperfect 20-20 vision. He has recently reviewed[3] the forecasts and some were fairly accurate, some possibilities had barely occurred and some curiously were occurring now as a consequence of the lockdown. What might be the corresponding position over the coming years?

Responses on lockdown

Over several previous years, the UK government had indicated there would be huge funding of digitalisation of the justice system. In 2015 it was announced that £500 million would be invested in digital systems[4]. Subsequently it was announced that £700 million would be invested in the modernisation of the courts, although almost certainly being inclusive of the £500 million! Some of this was raised by the closure of local courts with a concentration on regional courts. Undoubtedly the court service worked towards more digitalisation. In August 2018, this firm was the first law firm to issue a divorce petition online. But by early 2020, digitalisation had still not been rolled out to any significant extent in children and financial proceedings. Video hearings were very rare. It was entirely run on paper files with only the most basic initial piloting of electronic bundles in public law proceedings. The court service in the family context and probably across the entire justice system was wholly unequipped and unprepared for the lockdown. Indeed, for a fortnight after it was announced on 23 March 2020 that everyone should work from home where possible, the court service was stoically requiring lawyers and judges to come to court hearings and then surprised when they refused for health and safety reasons. Eventually, but too late, they acknowledged the inevitable.

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1 With suitable acknowledgement to HG Wells who in his far-reaching book written in 1933, The Shape of Things to Come, anticipated a worldwide plague after a worldwide war but pitched it at 1956
2 For details see at the end
3 https://www.iflg.uk.com/blog/2020-vision-revisited-vision-future-family-law
4 See article by the author, "The role, benefits and concerns of digital technology in the family law system": https://www.iflg.uk.com/guidance/role-benefits-and-concerns-digital-technology-family-law-system

The overwhelming characteristic for the family justice system in England and Wales of the lockdown has been that of private initiative by practitioners, including individual initiatives by some judges. This has distinctively meant England has had a quite different experience to many other jurisdictions. It has meant that family justice has continued to operate passably well in the difficult circumstances, particularly initially with urgent hearings and increasingly with general matters continuing to be heard and resolved. It has meant that initiatives have been adopted by practitioners and put into practical usage which will inevitably be part of the family law experience coming out of lockdown. It has mostly been without drive from the court service itself, which has been playing catch up in the perception of many practitioners.

Within days of the lockdown, some practitioners, primarily amongst the family law bar, were putting together methodical proposals for non-face-to-face dealing with cases through out-of-court resolution. This was a mixture of arbitration and early neutral evaluation, the latter being a privileged process and the out-of-court equivalence of the in court financial dispute resolution (FDR) hearing. These would be conducted by zoom, very quickly adopted as the platform of preference by practitioners. Hearings which came out of the court diary because the courts were not physically sitting were dealt with and resolved. England has always had a strong tradition of out-of-court settlement and a variety of forms of ADR. But the lockdown proved it to be hugely important and valuable. Solicitors and barristers simply continued conducting matters from home, often as if relatively little had changed. Statements were prepared, disclosure given, offers made, settlements concluded.

Also, within days, the formulation began on dealing with hearings remotely. Instigated again primarily by a few members of the bar with a few solicitors but then adopted enthusiastically by several entrepreneurial family court judges who immediately switched their hearings from in court to wherever they were working from home. Initial guidance was given in reported cases on the conducting of these hearings including when they were inappropriate. England had about half a dozen cases at a senior level where over the space of about three or four weeks judges worked out which cases could and should go ahead remotely, which most definitely couldn't and where other arrangements had to be made, and which initially should be adjourned. A priority list of the more urgent work was created which broadened, week by week, as the remote working and remote hearings took place across the country.

Also, within days, law firms which had been talking for months or even a couple of years about going paperless, preparing electronic bundles and similar did so within a couple of weeks. Software packages were quickly discussed with a few coming to the fore as particular suitable in the family law context. Paralegals and younger solicitors found the first few weeks of lockdown were spent grappling with and learning how to work with the creation of electronic bundles, significantly accelerating what would have occurred anyway.

Ancillary to this, most practitioners immediately found they did not have the bandwidth to send bundles and again software was quickly honed to find the best processes.

Within a couple of weeks, a High Court judge, Mr Justice McDonald produced a very rudimentary first draft guidance on conducting remote hearings. It was then updated on almost a weekly basis as use of the technology and appropriateness of remote hearings became refined[5]. This was during a period when the country was still in very significant lockdown. But it meant that many courts and judges were able to function. Cases could continue and the amount of the potential backlog reduced. Judges undertook remote hearings, receiving electronic bundles and dealing directly with the advocates.

5 https://www.judiciary.uk/wp-content/uploads/2020/06/The-Remote-Access-Family-Court-Version-5-Final-Version-26.06.2020.pdf

Inevitably there is a backlog, but it was far less than many other countries even though the UK lockdown was longer than most.

After about six weeks, the President of the Family Division, England's most senior family court judge, Sir Andrew McFarland, instigated a public but very fast, 10 days, consultation on experience of lockdown and expectations for the future. By now some stories were in circulation about the bad experiences of some lay parties in respect of remote hearings. No one had ever suggested it was ideal or appropriate across the board. Although the response to the consultation gave significant support for continued use of remote hearings in various forms and other digital technology, the headlines and publicity fixed on a few anecdotal stories of remote hearings going badly wrong. For those including the author who have been keen and argued[6] for years for a greater modernisation and digitalisation of family justice, there seemed in ways to be the resistance taking shape[7]. The future will depend on this balance of forces.

As the week went by, the priority list of a few categories of cases which should be urgently dealt with was broadened. By June, most cases were now fully underway although remotely. In early June the President published a document setting out a so-called roadmap for recovery[8]. It acknowledged that the family courts will not fully return to normal operating until early 2021. There would be a backlog and there would be the need for distinctive provision of court services during the next nine months. Increasingly courts would be returning with face-to-face hearings where safe to do so. Fully remote hearings will continue. But there would be hybrid hearings with perhaps a judge in the court room and others remote but perhaps with lawyers and client together. One of the biggest problems with remote hearings is the ease and ability of the advocate to take instructions from the client during a hearing, with remote hearing judges aware of the importance of giving more frequent breaks for instructions to be taken. By autumn 2020, all family courts will be operating again but with a greatly reduced service and with a number of judges still operating remotely.

Law firms and chambers have had their own distinctive difficulties in recovery. When lockdown partially eased, those outside the big metropolitan centres were able again to travel into work by private transport. But however much measures were put in place within offices, the greater risk was perceived as travelling on public transport, especially in the bigger cities where most commuted by train, bus or tube. For this reason alone, many have put off returning until late summer. Even then it is anticipated many will work in the office on a rota basis, with varying working hours and more working from home.

But what about the predicted surge of new work once lockdown eased? In the early days of lockdown in the UK, stories started coming out of China of a huge surge of new family law work once lockdown eased. So far, they have proved as unreliable as other information from that direction. It is of course still early days and the opportunity for reliable sharing has not yet occurred. But general perception is that children work has mostly held steady, with some increase in work due to unreasonable contact refusals and with some distinctive child abduction cases. Within the financial realm, soon after lockdown a number of parties, individually or together, took the decision to put negotiations on hold. They were worried about future income, property prices, value of investments, business opportunities and generally future plans. If they were within the same house, they realistically did not want to face lockdown whilst arguing over financial settlement. So lawyers noticed a number of cases being put temporarily on hold. In any event, with a number of cases being adjourned for several months, there

6 https://www.iflg.uk.com/guidance/role-benefits-and-concerns-digital-technology-family-law-system
7 See article by Stuart Clark: the rapid consultation on remote hearings in the family justice system: a missed opportunity for long-term changes? https://www.iflg.uk.com/blog/rapid-consultation-remote-hearings-family-justice-system-missed-opportunity-long-term-changes
8 https://www.judiciary.uk/announcements/the-family-court-and-covid-19-the-road-ahead/

was no need for any activity although many then used out-of-court ADR. However a good number of parties well advanced in the financial negotiations took a decision to get on and bring about a conclusion. So this work continued. New instructions were received, including a number where the parties were still living in a household together in lockdown. As the weeks became months, some of those who had put off negotiating and advancing financial resolution did so, probably when the economic impact of the pandemic became a little clearer.

But with lockdown easing, the general experience, certainly outside the more over enthusing law firm press releases, was that there were more instructions but very probably only those which would have been received anyway for the March-June period. There were also undoubtedly some new cases where lockdown had accelerated the relationship breakdown. But by mid July 2020, news of a huge surge seemed greatly exaggerated.

To zoom or not to zoom

Across the world, there has been a major division between practitioners and court services on preferred video platform. Although few had used zoom before lockdown, mostly using Skype or teams, zoom quickly became the preferred choice. Far easier and quicker to set up. The ability to see all participants. Recordable. Easy for lay parties. For most family law cases, issues of security were not the primary or any concern.

Sadly the court services have seen it very differently. One by one worldwide they have imposed anything but zoom. One leading jurisdiction compelled the use of Teams because, anecdotally, they had a contract with Microsoft. Some ran scared of potential breaches of security even though zoom was sufficient for fairly high-level political discussions! For some time in England, the court service even strongly recommended the use of telephone hearings. Apart from a short 15-minute single dispute issue hearing, it is thoroughly un-workable and unsatisfactory. The guidance produced by the judiciary allowed a so-called smorgasbord approach. Judges could decide themselves on the platform used in consultation with the advocates. Most chose zoom. Slowly and surely the court service tried to take back control. It was then said the smorgasbord of available choice of video platforms should only be considered if there were very good reasons! The fact that it would produce a far better, more satisfactory hearing did not always seem to be that reason. Skype hearings were preferred by the court service, even though this meant setting it up by a member of the court staff who was not always available, not always technologically aware and it would create long delays before the hearing started and therefore was often very inefficient. In the meantime, arbitrations, mediations, early neutral evaluation and other forms of lawyer communications were by zoom. Some judges continued to use zoom on the basis it would produce a far more satisfactory hearing including for the parties.

England started to develop its own video platform known as CVP, cloud video platform[9]. It's based on Skype and Teams but with improvements. It's certainly not zoom but it's closer. It is being rolled out from early July and judges have had preliminary training. It will be a matter to see how it works with a hope that it works well. Any system must be accessible to lay parties without the need of significant bandwidth or downloaded software. But many judges also want to see the parties and not just the advocates. One of the biggest problems with the Skype and teams platforms is the limited number of pictures on screen at any one time. Many judges have felt unhappy about conducting cases where they can only see the advocates and the parties are a mere avatar at the bottom of the screen. It must

9 https://www.gov.uk/government/news/new-video-tech-to-increase-remote-hearings-in-civil-and-family-courts

be hoped that the service is a good one if it is going to be made compulsory. In the meantime a number of other jurisdictions are being required to work on far more basic video platforms.

Children

From the outset there was an awareness that urgent steps were most needed in children cases. Some of these were in the context also of domestic violence proceedings, the other top priority for the justice system in the early weeks of lockdown. General perception is that it has worked okay, in the particular circumstances. Like many other jurisdictions, it was made clear from the outset by judicial pronouncements that lockdown was not an excuse for preventing parental contact. Stories started circulating immediately of one parent, either in reality or as an excuse, denying contact because of potential risk to the child coming into contact with the other parent from another household, even perhaps if the other parent was living alone. Government ministers were wheeled out onto breakfast television to make it very clear that lockdown did not mean no contact. Undoubtedly denied contact has happened, perhaps a lot, but there has been every judicial encouragement that it should not.

England is probably the world's centre for international families. So child abduction work has also been one of the priorities. In a leading decision in a case in which this firm acted for the father whose child was abducted, a mother took the children soon after lockdown to a Greek island alleging it was a safer place than England but was told to return the child immediately[10]. This was not a good defence. As England had no border controls until, perversely, near the end of the lockdown, there was no reason for a nonreturn. Many countries did impose entry restrictions but the majority had exemptions for children returning as a consequence of international court orders. Quarantine on arrival was also no defence to a legitimate return obligation. Undoubtedly one of the biggest casualties of the lockdown has been the parents who live in another country to the child and the other parent. They have in almost all circumstances been prevented from any face-to-face contact over several months by various quarantine or travel restrictions. It has been hugely frustrating and upsetting. There has already been discussion between specialist international children lawyers about appropriate make up contact, to make sure that if not the exact time is restored but that the parent has good time with the child once entry restrictions are eased.

Who is doing the work?

In 2017 the partners of this practice had a total of three away days, which some might regard as excessive. In practice they had become a reading club of works produced by Prof Richard Susskin on the likely future of the legal profession worldwide. How could the work be best undertaken and by whom at what level? How should the firm prepare best for the future?

It became very clear that with the anticipation of far more digitalisation, a different level of lawyer would be needed to undertake this work. It would require expertise and experience but not necessarily warrant any significant level of professional qualification. It would in some ways be inputting work. It would be assembling electronic bundles. It would be completing online Form E disclosure documentation, divorces and other forms. So the firm moved towards greater usage of paralegals. The lockdown showed this importance. Paralegals or junior solicitors became vitally important to make sure the work continued including fully liaising with the court service and the other legal professionals in the team.

10 See article by Lina Khanom https://www.iflg.uk.com/blog/child-abduction-during-coronavirus-pandemic

They are a vital member of the family law team and vital for the future. It seems inevitable that there will be far greater requirement for digitally aware paralegals in family law work in the future.

As much of the work was now standardised and digitalised, there was far less relatively routine legal work. Instead clients needed very good advice, good representation and a good leading of the case including working with counsel and experts. The developments of the last couple of years and developments going forward highlights the need for good quality and experienced lawyers doing client work.

At the bar, there has for some time been a very high level of digital and technical expertise by some barristers. Although law firms have had the benefit of office backup, many barristers have had to go alone. This is one reason why they were at the fore in the initial developments. Even more than on the solicitors' side of the profession, the digitally alert and accomplished barristers will distinctly have a premium.

For some years some at the bar have made themselves available to receive instructions under the direct access scheme i.e. bypassing solicitors. But the digitalisation of the work, enabling it to be done sometimes by lay parties themselves and the technical ability of some barristers in this area, coupled with the genuine inability of some to afford the so-called full-service legal representation has meant and will increasingly mean more direct access barrister advocacy. This in itself will be a challenge for law firms who are already being often asked for so-called bundled services in which the lawyers do some work from time to time, clients do other work or act in person for periods and then go back to the lawyer for particular pieces of work or hearings. These bundled services will become increasingly the norm for many law firms.

In addition to who will be doing the work, there is the ancillary element of where the work will be undertaken. This is a far broader topic than just family law. However it seems almost inevitable that there will hereafter be far more opportunities for remote working for some lawyers. It will produce a saving of commuting time and allow, for some, far more concentration on casework. The costs of office space will reduce. It will improve work life balance. But it will also have adverse consequences. The personal burden of doing family law on practitioners is high, and perhaps more than most other areas of law given the nature of the emotions being regularly dealt with. There is recent and justified awareness of well-being. Family lawyers work closely with the therapeutic professions and learn from each other about the importance of sharing with others the burdens clients place and which practitioners take as part of the job. It can be very hard at times. Working alone is not only difficult but can be risky in family law for the well-being of the practitioner. It's also an area where the broad range of outcomes possible in any case can often only be known from discussion between experienced practitioners in a law firm, or Chambers, about the way forward, the best approach to adopt, developments from case law, reported cases which may have been forgotten and similar. This is far less easy when working from home entirely or from time to time. Clients instruct a law firm and expect their lawyer in that firm to have the knowledge and experience of all colleagues which comes from sharing. Moreover lawyers learn from other lawyers. Many lawyers actually sat in the office of a more senior lawyer during their formative years. Mentoring is best on an ongoing basis rather than from time to time. It may well be that more senior lawyers can themselves well work better from home but the younger lawyers risk losing the benefit of the day-to-day working alongside the senior lawyers. This will in turn impact on the quality and experience of the next generation. Working at home is fine but will have wider disadvantages which must be faced.

There is no doubt whatsoever that experiences of the lockdown, and consequential reforms, will have a major impact on the way in which family law professionals work, where they work, who is required to do the work and the patterns of provision of client services.

The law itself

Where might family law be going? Children law worldwide will maintain the top priority to the best interests of the child, with national differences about how the voice of the child can best and appropriately be heard. It is within financial outcomes that nations are much more divided and where debate about reform lies. In part for the wider picture this is because the financial outcomes on divorce have an ability to inform and influence attitudes and commitments to marriage. In part finance law is more susceptible to a digital methodology. Within civil law countries, the division of the marital community of property is already dealt with by separate lawyers on a purportedly mutual and uncontentious basis. Maintenance, separate needs-based provision, is often relatively meagre element in the overall settlement. It is within the common-law world that most litigation in respect of financial arrangements happen, particularly where there is generous rearrangements of the overall assets to provide for a fairer outcome, reflecting gender equality, marital roles and needs based on the standard of the relationship. In these jurisdictions as well, the costs are invariably much higher, linked to strenuous disclosure obligations and investigations. Where might change happen and what might be any impact of the lockdown?

The author and others have argued for many years for fettered discretion coupled with a starting point of a formulaic approach or at least guided by expectations and presumptions regarding marital and nonmarital capital and provenance[11]. With the development and application of artificial intelligence in all walks of life, it must be accessible within family law, particularly financial arrangements. Thus far nothing has happened. Indeed within England there has been two schools of thought amongst the higher judiciary. One has supported a close alignment to the provenance of assets, marital or nonmarital, with a review thereafter of needs as justifying a reason to depart from equal sharing of the marital assets. But the other approach, seemingly in the ascendancy, is a far more discretionary based, intuitive rather than forensic, tailor-made to particular circumstances, without too close adherence to provenance, the marital or the nonmarital[12]. But the former approach gives some opportunity for the application of a digital process; if not to produce the ultimate settlement outcome, it can certainly assist the parties towards that outcome.

The lockdown has highlighted the untapped benefits of digitalisation and use of technology in family justice yet highlighted its restrictions and boundaries. With the government having committed to a review of financial provision law[13], adapting and reviewing the law to accommodate digital processes should be part of the consideration. It's likely to find considerable acceptability amongst many of the public who now expect their lives to be through software or apps even if under the surface they are complicated aspects of law. Far more must be done to make family justice more digitally accessible. There is a lot which can be learnt from countries such as South Korea.

11 https://www.iflg.uk.com/guidance/role-benefits-and-concerns-digital-technology-family-law-system
12 The former has described the latter as lawless science!
13 announced in the House of Commons by the government in the context of the reform of divorce law, June 2020

Brexit[14]

At 11 p.m. on 31 January 2020 the UK left the EU. But for family lawyers it meant nothing because EU family laws continue throughout the transition period until possibly 31 December 2020 when they would come to an end. It was expected that the spring and summer would have the country focused on the UK EU negotiations. Instead the UK, the EU and the rest of the world was otherwise distracted. It was expected then that the transition period would be extended beyond December consequential upon the lockdown and difficulties of direct communications. However this is not so.

In March 2019 when there was the imminent prospect of no deal, the government had rushed through secondary legislation to cover the position. This included certain transitional arrangements, what would happen about proceedings already underway at the point of departure. They were problematical, had vague elements and were likely to encourage lots of proceedings to be instigated and finalised before departure date. This was encouraged by the EU which indicated that obtaining an order in the UK would not be sufficient before departure date unless it was also registered in the applicable EU country, which was likely to take some time. There was anxiety about a surge of work coming to the family courts.

Fortunately in the Withdraw Agreement 2019[15], the position is now much more straightforward. Where there are proceedings instigated before the departure date, 31 December 2020, then EU laws will continue to apply to jurisdiction, forum, recognition and enforcement. So a divorce underway will have the final decree recognised across the EU. Maintenance arrears from a maintenance, needs-based, order before 31 December 2020 can be enforced under EU law. There will be no need for rushing to court to get conclusion of cases.

This is highly beneficial. To have a large surge of work, the need to get cases concluded and final orders made, before the end of December 2020 on top of the inevitable backlog caused by the lockdown would have been a huge problem for the justice system. Certainly practitioners must issue before the end of the year, and some might think it appropriate to serve, but that should be sufficient.

The UK has benefited from EU family laws but also have had serious difficulties especially with the EU dominated civil law agenda which the EU has tried many times to impose on the UK common-law and traditional family law approaches. Instead, freed from these tensions yet the UK and the EU representing such a high percentage of the independently mobile international family community, there are many opportunities for the UK and the EU to work together collaboratively for the benefit of family law internationally and international families around the world. This has been specifically explored by the author, to encourage debate on what can and should be done[16].

14 for more, see book to be published October 2020 by LEXIS-NEXIS by the author: “Family law leaves the EU, a summary guide for practitioners” https://www.lexisnexis.co.uk/store/categories/legal/welfare-family-law-books-34/family-law-leaves-the-eu-a-summary-guide-for-practitioners-skuuksku9781784734756FLLEU85541/details

15 Art 67 WA 2019

16 https://www.iflg.uk.com/blog/uk-and-eu-co-working-benefit-family-law-community-new-hope

Conclusion

The pandemic has been a worldwide disaster and catastrophe. Aside from the appalling loss of life, public and private life has dramatically changed. In some countries including the UK there will not be a quick recovery to pre-lockdown life. The most direct consequences will continue well into 2021 and probably beyond. But it is the indirect consequences which will be longer lasting and are the subject of this analysis. How can the ways in which the family justice systems, particularly initiatives and entrepreneurial approaches, be taken further forward? There is much reference to the lockdown having accelerated in a few months what would have happened in a few years. What is this? How will practice feel different? How will services be differently provided? How will lawyers' dealings with the courts be different? How will judges conduct their hearings differently. What law opportunities for change might be possible. This note can only be very provisional, very first draft thoughts. But undoubtedly huge changes will occur. For some this will be scary. For some it will be exciting. Throughout it all, family lawyers will continue to concentrate on looking after the best interests of their clients, of children and producing a fair, accessible and just process of family law resolution.

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About Us

The International Family Law Group LLP is a specialist law firm based in Covent Garden, London. Our legal team includes specialist accredited English lawyers, mediators, collaborative lawyers, arbitrators, and Australian lawyers. We look after the interests of families and children, with a specific focus on international families. A key area of our work is recognition of foreign marriages and divorces and the financial consequences of relationship breakdown. We are committed to the use of digital innovations for the benefit of clients and resolution on international family law cases. We have outstanding links with law firms and specialist family layers within Europe and worldwide. Our website is full of helpful information including a 24-hour abduction and emergency line at www.iflg.uk.com. We are described in Legal 500 2019 as*: 'the go to firm for cases with an international element'.*

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