



THE IMPACT OF COVID-19 ON THE FAMILY COURT AND JUDICIAL ENCOURAGEMENT FOR ALTERNATIVE METHODS OF DISPUTE RESOLUTION

The ability of the courts to deal with all aspects of family-related matters has been severely impacted by the current restrictions and lockdown. It is vital that those already in court proceedings are aware of this, but also, as we expect that it will take time before the courts are able to operate as normal that those considering starting family law proceedings are aware.

Her Majesty's Courts & Tribunals Service (HMCTS) run the courts and have issued a summary of how they intend to prioritise cases in the family division in the current crisis, which has been approved by the most senior judge in the family division. The family division manages all cases relating to divorce and the consequent financial issues, as well as all applications relating to children. Some areas are affected more than others. Broadly, matters have been categorised as

- (i) "work that must be done"
- (ii) "work that will be done" and
- (iii) "work that we will do our best to do"

The guidance is evolving as HMCTS and the judiciary learn from their early experiences in the lockdown and may change in the coming weeks. It is therefore vital that anyone currently in court proceedings should make their own enquiries.

DIVORCE

The HMCTS guidance categorises divorce as "work that we will do our best to do", the least urgent of the three categories outlined. Our recent experience has shown that divorce proceedings instigated through the online portal have been issued and progressed since lockdown. Existing divorce proceedings are also being progressed, however, with the reduction of available judges and significant practical difficulties for administrative staff working remotely on these sensitive matters, it can be assumed that divorce cases will be severely delayed.

FINANCIAL MATTERS ON DIVORCE

The HMCTS guidance classes financial matters as “work that we will do our best to do”. It is possible that new applications for financial relief on divorce will not be issued at the present time, or will only be issued and listed for a hearing after a significant delay.

Where there are urgent financial issues to address, an application may be possible but legal advice should be sought. Urgent matters may include the need for interim maintenance, enforcement of an existing order or an order freezing assets. There is detailed guidance from HMCTS on how such applications should be made in the current circumstances.

For those already in financial proceedings, further guidance is given below.

CHILDREN PROCEEDINGS

HMCTS guidance acknowledges the need to prioritise matters in relation to children and as such has categorised most applications as “work that will be done”. Some matters, including care cases, child abduction cases and other urgent children applications have received the higher categorisation of “work that must be done”.

For the less urgent cases, the administration of new cases is severely affected and there are difficulties in facilitating court hearings. It is therefore anticipated that even where new cases are issued by the court, it will be some time before a hearing can take place. The court’s ability to make a final decision may be restricted, given the need to hear oral evidence from the parents and perhaps third parties.

Before considering making any applications to court, parents are strongly encouraged to consider alternative methods of dispute resolution. It would also be wise to seek legal advice as there is specific guidance on how to begin child related court proceedings in the current circumstances.

WHAT DOES THE GUIDANCE SAY IF I ALREADY HAVE A HEARING DATE IN THE FAMILY COURT?

Existing court hearings should be dealt with by either telephone or video link, where possible. Remotely conducted hearings will not be appropriate in all situations. Although the Lord Chief Justice has given guidance on where hearings can and cannot proceed by telephone or video link, decisions are being left to individual judges: it was felt that a national policy would do more harm than good. Where a hearing requires oral evidence to be given it is unlikely that it will be appropriate for this to be done via video link or telephone. This is especially the case for final hearings in both children and financial matters.

For other types of hearings, for example directions hearings or Financial Dispute Resolution hearings, it may be possible for the hearing to go ahead remotely. Even if all parties agree to a case proceeding on this basis, it is still at the discretion of the judge or magistrates. Where possible, in advance of an existing hearing, the parties should try and agree matters, especially where the subject of the hearing is to seek direction on the progression of a case.

Practical difficulties have arisen over the last few weeks. Remote hearings take longer to set up and conduct. It has been hard to provide the necessary documents needed electronically. Some judges are not prepared to hear certain cases remotely, but others are. Consequently many cases have been removed from the court’s diary, without the prospect of being re-listed in the foreseeable future. This is understandably frustrating for those who may already have waited some time for their case to be heard and are now facing an additional and unquantified delay. The courts are urging people to look at alternative methods of resolving their disputes. It has been suggested by some judges that where parties do not do so, they may be asked to justify that failure when the matter has to return to court.

If an agreement cannot be reached then it is imperative that those with an upcoming hearing contact the court to ascertain if it will still go ahead, and if so by what means. The court guidance is that where a hearing is to take place via video it is the responsibility of the court to arrange this, however in practice this is most likely better done by the parties who can then share the details with the judge.

ALTERNATIVES

In light of the above, all of those currently in proceedings or considering the same, should carefully review alternative methods for documenting and/or resolving their family dispute. Some possibilities are outlined below;

- Separation agreements – for those wishing to regulate the terms of their separation on an interim basis with a view to finalising these in due course.
- Parenting agreements – these can be helpful documents for ensuring clarity in co-parenting and in setting out the time a child will spend with each parent.
- Mediation – professional mediators are able to conduct sessions via video link to facilitate discussions between separated couples. If an agreement on financial matters is reached, this can be turned into a binding court order that will need to be sent to the court to be endorsed. Mediation can also be used to discuss parenting matters and a parenting agreement drawn up.
- Solicitor led negotiation – solicitors are able to work remotely and consultations can take place via video link. Thereafter discussions can be led by the respective lawyers with a view to drawing up a binding final agreement.
- Arbitration – parties can engage in a process similar to the court process but are able to appoint their own ‘private judge’ to make a decision which is binding on them. Arbitration can take place via video link and is often suitable for more complex cases where the parties need representation by a barrister. This process can also work well in resolving discreet issues that may be holding up a wider resolution of matters. Arbitration can cover both financial and children matters (although these are often dealt with separately).
- Hybrid mediation/arbitration – new client led processes are emerging that can be tailored to suit certain cases. It may be possible for example for parties to enter into mediation in the hope of reaching an agreement themselves but also to have retained an arbitrator in the background to make a decision on any outstanding issues.

Before entering into any of the above legal advice should be sought. A solicitor will be able to advise you on the best process based for you, taking into account the circumstances of your situation, and the assets and issues involved.

CONCLUSION

It is clear from the HMCTS guidance, and our team’s recent practical experience, that divorce, financial matters and private children matters are not the courts’ current priorities. We don’t know how long this uncertainty will last and we must also face the fact that when restrictions are lifted, there will be a backlog and a legacy of delay. Whilst ultimately the courts are still available to assist, it would rarely seem the best current course of action - the above alternatives should all be carefully considered.

If you would like any further advice please do not hesitate to contact one of the Family Team. We are working remotely and can conduct hearings and meetings via video link. We are also in close communication with barristers’ chambers, and are monitoring all updates from HMCTS and the judiciary on current guidance, priorities and best practice.

KEY CONTACTS

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