

Webinar: Access to family justice internationally during the Covid-19 crisis

04 May 2020 – 2-3pm UK time

QUESTIONS FOR EACH JURISDICTION

1. What is your jurisdiction?
2. When did the lockdown start?
3. Were courts affected before/after/same time as schools being shut?
4. What access is there currently to family courts at first instance?
5. What access is there currently to family courts at appeal level?
6. How is this access being provided at each level? In person/phone/video?
7. Which IT is being used?
8. Is live evidence being given remotely?
9. Are courts generally shut in holiday periods? If so, what is the longest period and how are urgent cases usually dealt with?
10. Is it possible to issue a divorce petition?
11. Other relevant issues?

Speakers

Sarah Lucy Cooper - slcooper@thomasmore.co.uk

Barrister, Thomas More Chambers. Sarah is an experienced specialist Family Lawyer with a particular emphasis on international cases. She is a member of the International Committee of Resolution, the International Committee of the Bar Council and founded the British Spanish Law Association. She has written for a variety of publications including International Family Law Journal and Family Law Week and is a regular speaker to English and foreign lawyers. Sarah has also been appointed as a Family Recorder on the South East Circuit and is a Resolution trained mediator.

Stephen Cullen - scullen@milesstockbridge.com

Head of Family Law & Private Clients, Miles & Stockbridge P.C., Washington, D.C. National & international family law practice. English, Italian, French speaker. Admitted to practice in various US jurisdictions, Scotland, England & Wales. Tried Hague cases in 40 states, District of Columbia, Puerto Rico.

Daniela Horvitz - dhorvitz@horvitz.cl

Daniela Horvitz graduated from Universidad de Chile and accepted in the bar as litigator in 1999. She is a member of Chile bar association, since the year 1999; Of the family commission of the Chilean Bar Association, since 2009; Founder and first President of the Family Lawyers Association of Chile (AAF), 2009, and currently vice president; Member UIA (International Union of Lawyers) and Family Commission vice president, since 2011.

Kiran Dhaliwal - dhaliwalkiran@yahoo.com

Kiran Dhaliwal practices in Kuala Lumpur, Malaysia. She has over 25 years of family law litigation experience, is a fellow of IAFL, a mediator and a Collaborative Lawyer.

Lucia Clark - Lucia.Clark@morton-fraser.com

Lucia is a partner at Morton Fraser. She is dual-qualified in Scots/English family law, and frequently acts in international cases.

Isabelle Rein-Lescastereyres - irl@bwg.law

Isabelle Rein Lescastereyres is a partner at BWG, Paris France. She specializes in International family law. She is also a collaborative lawyer and a Resolution mediator.

Beverley Clark - bclark@clarks.co.za

Admitted in 1994, Fellow of IAFL since 2007, I specialise in international cases, Chair of Gauteng Family Law Forum.

Stephen Cullen - USA

What is your jurisdiction?

- a. United States federal district courts and courts of appeal and US Supreme Court.
- b. Various state trial and appellate courts around the USA.

When did the lockdown start?

- a. March 16, 2020

Were courts affected before/after/same time as schools being shut?

- a. Same time

What access is there currently to family courts at first instance?

- a. Extremely limited emergency matters in state courts relating to:
 - i. Guardianships
 - ii. Domestic violence protection orders
 - iii. Firearms removal orders
 - iv. Involuntary commitment orders
 - v. COVID-19 custody & visitation disputes
 - vi. Special Juvenile Immigrant Status cases
 - vii. Uncontested divorces
- b. In federal district courts:
 - i. Hague cases are proceeding

What access is there currently to family courts at appeal level?

- a. Appeals are proceeding on the papers.

How is this access being provided at each level? In person/phone/video?

- a. Telephone hearings at all levels
- b. Video hearings in federal courts

Which IT is being used?

- a. Cisco
- b. Skype

Is live evidence being given remotely?

- a. Yes

Are courts generally shut in holiday periods? If so, what is the longest period and how are urgent cases usually dealt with?

- a. Courts are not shut in holiday periods

Is it possible to issue a divorce petition?

- a. Yes

Other relevant issues?

- a. Hague cases are proceeding at the usual speed
- b. US Supreme Court moving to telephone oral argument
- c. Federal system was fully on-line before pandemic
- d. State court system has most problems for courts that had not converted to on-line by time of outbreak of pandemic
- e. Notarizing documents being allowed remotely

Daniela Horvitz – Chile

What is your jurisdiction?

Chile.

First, I would like to give some clues about Chilean legal system for a better understanding of the current situation.

Chile has a civil code legal system; it's a very legalistic system. Lawyers are not agents of the court, institutions like depositions, disclosures or affidavits don't exist, family proceedings are mostly oral and family courts deal with every matter involving children (like protective measures, adoptions, custody, relocations, visitation rights and child support) and also alimony, divorce and economical compensation.

When did the lockdown start?

We have not had a complete lockdown in the city and we still don't. Lockdowns have been focused on some neighbourhoods (dynamic lockdowns) but the "Exceptional constitutional state of catastrophe" was declared on March 18th and will last until the 18th of July, but it could be renewed.

Were courts affected before/after/same time as schools being shut?

Schools were closed on March 15th (consider that in Chile summer holidays are January and February and the academic year begins the first week of March)

When we realized that cases were spreading in Santiago (started in private schools because of people that just arrived from holiday trips abroad, mainly in Europe), family lawyers association first, and then the bar association, asked the supreme court and lawmakers to declare courts' holiday.

Each court was taking its own preventive measures (and was quite chaotic).

It was a very uncertain period until April 2nd. Legal holiday was never declared, but on April 2nd a law was issued that, mainly, suspended the lapse of obligations and gave to the supreme court powers to suspend proceedings and postpone hearings in every court around the country, and also authorized courts to take hearings by remote systems.

That sounds quite modern and hard to implement in a short period of time, even more for a third world country, but it was not a big surprise for us, since December 2015 we have an electronical proceedings law. So even before Covid19 we had almost 90% paperless courts, everything is filed by internet, lawyers signature is electronic and last year, even the supreme court has been handling remote hearings when lawyers (parties) are not from Santiago (the capital).

So, in Chile courts never closed.

On April 8th the supreme court gave more specific instructions to each courts.

Regarding family courts, basically the rules are:

- hearings can be postponed
- mandatory mediation is not required during this period
- hearings will be conducted by remote systems if due process rights are sufficiently guaranteed.
- urgent cases must have hearings
- domestic violence reports or claims can be received even by phone

What access is there currently to family courts at first instance?

Mostly by internet (judiciary power web page), but for emergencies people still can go to the court, where they implement shifts with clerks, technical assistants and judges. Family courts in Santiago are accepting reports or claims even by phone when they are about domestic violence.

What access is there currently to family courts at appeal level?

Before the law, judges were at the court and lawyers had the option to go there or access by remote mode. After the law, appeal courts (divided by courtrooms, each with 3 judges) are working half of them with judges personally at the court and half of them by remote access as well. Lawyers must "attend" by remote systems, and when lawyers go to the court, they are not placed in the same room with judges. Supreme court works in the same way, but each courtroom has 5 judges.

How is this access being provided at each level? In person/phone/video?

It depends on the matter; the 3 ways are being used. For violence it can be even by phone, for regular family court procedures it is by video

Which IT is being used?

Family courts are using Webex and Zoom. Appeal courts (Santiago) Webex and Supreme court Zoom. That could change because is not something official.

Is live evidence being given remotely?

In family courts this is beginning to be implemented but just for easy cases, as mutual agreement divorce. precisely the limit that the covid19 law imposes for remote hearings is the respect to due process constitutional right.

In my opinion when trying to question witnesses and experts, it is difficult to guarantee respect for due process.

Are courts generally shut in holiday periods? If so, what is the longest period and how are urgent cases usually dealt with?

In Chile we don't have "courts holidays".

Chilean courts (all of them) work all year round.

Is it possible to issue a divorce petition?

Yes, you can file every kind of case.

Other relevant issues?

Most of the hearings have been postponed excepting the urgent ones, such as domestic violence, protective measures, permissions to leave the country and others.

We are facing 3 big problems: visitation rights (we don't call them visitation anymore, we call it "direct and regular relationship"), childsupport payment and domestic violence.

- most of visitation regimes have been suspended and replaced by videos or phone calls
- because of the economic crisis and the fact that arrests are not taking place against the debtors, the default percent on childsupport payment has increased considerably
- domestic violence rates are increasing every week and removing the offender from the house is much more complicated under these circumstances

Kiran Dhaliwal – Malaysia

What is your jurisdiction?

Malaysia.

When did the lockdown start?

Malaysia had imposed a Movement Control Order ('MCO') commencing from 18th March 2020, initially until 31st March 2020 (1st Phase). This was later extended:

- 1st April 2020 to 14th April 2020 (2nd phase of MCO)
- 15th April 2020 to 28th April 2020 (3rd phase of MCO); and
- most recently 29th April 2020 to 12th May 2020 (4th phase of MCO).

For context, the lockdown in Malaysia has been extensive, all government and private offices closing and only essential services, which include food and grocery related services as well as medical and health services, are operating. The mantra is to stay home, only going out for essential services.

There is strict enforcement of the MCO with police roadblocks (assisted by the military) and patrols to ensure compliance. While initially a breach of the MCO could still be compoundable and a fine paid, since 15.4.2020 all breaches of the MCO will be arrested, held in remand and referred to the Courts.

Were courts affected before/after/same time as schools being shut?

The MCO was effective nationwide from 18th March 2020, including closure of the Courts. This included the Family Court. This was at the same time schools were closed.

What access is there currently to family courts at first instance?

In Malaysia, most family matters are filed in the High Court at first instance. Since the commencement of the MCO, the Court buildings are closed, however Registrars and Judges are working from home. Although, the buildings are closed, the following are still allowed:-

- a) the e-filing of cause papers and documents.
- b) e-reviews (which are case managements for directions in relation to the conduct of a case). However, the Family Court had not commenced e-reviews before the MCO and it is not available.
- c) urgent matters with a certificate of urgency can be conducted through online Hearing either by using the e-review system, by the exchange of emails or via video conference, but only with the consent of all parties, including the Court.

Now, in the 4th phase of the MCO (29.4.2020 to 12.5.2020), additional specific on-line hearings allowed in the High Court commencing 4.5.2020. In the Family Court, these would primarily be:-

- a) uncontested interlocutory applications including to amend, extend time, for ex-parte Ad Interim Injunctions, setting aside, leave to execute judgments, recording Consent Orders, exemptions for the referral to the Marriage Tribunal (a statutory pre-requisite to the filing of a Divorce Petition);
- b) limited contested interlocutory applications where there are only a few and brief issues;
- c) Appeal to Judge in Chambers from the Registrar.
- d) Decisions after trial can be delivered online; and
- e) Mediation, either on the initiative of the Court or on application of either party.

What access is there currently to family courts at appeal level?

In Malaysia, appeals in family proceedings heard in the High Court are made to the Court of Appeal, there being no separate Family Court of Appeal. Thereafter, an appeal can lie to the Federal Court, but only with leave. We have no statistics of how many appeals have been filed specifically in family matters during the MCO.

E-Filing has been possible throughout the period of the MCO and therefore appeals can be initiated by the filing of a Notice of Appeal. The Appellate Courts have also commenced hearing matters online, with the first online hearing being broadcast live on 23.4.2020.

The Chief Justice of Malaysia had issued a Press Release dated 17.4.2020 setting out statistics of the numbers of cases that had been dealt with from the commencement of the MCO on 18.3.2020 as at 15.4.2020. I have summarised these at Appendix A.

How is this access being provided at each level? In person/phone/video?

Case management: The Family Division had not implemented e-review or e-case management before the commencement of the MCO, and it is therefore not available. All case managements are postponed till after the MCO is lifted.

On-line Hearings had, in the first three phases of the MCO, at the choice of the Judge, been done through Skype and e-mail hearings.

Which IT is being used?

With the most recent direction as set out in the Bar Council Circular No. 124/2020 dated 24.4.2020, the Court has stated that commencing 4.5.2020, they will conduct online hearings by Video Conference using either Skype or Skype for Business. The Courts have said they will not use Zoom.

Is live evidence being given remotely?

While there are facilities available for video link evidence in some Courts, these are not available currently as the Court buildings are closed. Currently, no live evidence is being tendered. Matters that are proceeding are by way of affidavit evidence.

Are courts generally shut in holiday periods? If so, what is the longest period and how are urgent cases usually dealt with?

Court Vacation is for a period of 2 weeks, once a year. There will be Duty Judges who would remain available for urgent matters.

Is it possible to issue a divorce petition?

Yes, a Divorce Petition can be issued as the e-filing system continues to operate. However, there is an issue with the Affidavit verifying the Petition as in Malaysia, this is done before a Commissioner for Oaths, who during the MCO are not allowed to operate.

In practice, where there is urgency, the Court has allowed the use of affidavits signed by the deponent via an electronic signature, with an undertaking to have the same affidavit properly affirmed before the Commissioners for Oaths after the MCO is lifted.

It remains questionable if the Court will accept a Divorce Petition filed without a properly attested Affidavit, unless it can be shown there was urgency to the filing of the Petition.

Other relevant issues?

Similar to other jurisdictions, Malaysia has seen an increase in the number of domestic violence cases during the MCO, with people being forced into close proximity and confined together.

The restrictive terms of the MCO have also caused issues with the compliance of access (contact) Orders, the MCO being used as an excuse to deny access.

Lucia Clark - Scotland

What is your jurisdiction?

Scotland. We are a small country, with a population around 5.5 million. Important to note that although Scotland is part of the United Kingdom, along with England, Wales and NI, our legal and judicial system is entirely separate to that in England. Scots law has a very different historical basis than English law, dating back to when we were two entirely separate countries - despite the union of the crowns, the legal systems continued on a separate basis. So for anyone outside the UK, don't assume that what applies for the legal system in England is the same in Scotland - it probably isn't. Specifically, there are some aspects of family law that are quite different in Scotland compared to England.

In terms of our court system, we have an equivalent of the high court, called the Court of Session, based in Edinburgh (the capital). We then have lower courts, called Sheriff Courts, spread throughout the country. Family cases are dealt with at both levels. Divorce cases in the Court of Session are more complex or involve more assets. Some cases, such as child abductions, are only dealt with at Court of Session.

When did the lockdown start?

Lockdown started across the UK as a whole on 23 March, and is continuing at the moment. There has been some indication from the Scottish First Minister, Nicola Sturgeon, that Scotland might have a slightly different timeline or method for coming out of lockdown compared to the rest of the UK.

Were courts affected before/after/same time as schools being shut?

From mid-March, so before lockdown, courts started minimising unnecessary in-person hearings. But the real change happened after lockdown, with a guidance note issued on 25 March.

Sheriff (lower) courts - work was consolidated into 10 "Hub" Sheriff Courts - others have closed. For the period at the start of the lockdown, all civil court business was adjourned or continued administratively except for emergency civil applications.

Court of Session - similar situation for the period at the start of the lockdown - the Court was dealing only with "urgent" matters.

What access is there currently to family courts at first instance?

Things have progressed since that initial guidance at the end of March. Guidance from the Courts has been issued for limited periods, and we have just had new guidance issued, with effect from 1 May.

Urgent work

First, the family courts are continuing to do what has been termed "urgent and necessary" work. That includes: child abduction cases; protective orders such as for domestic violence; and cases relating to the care and protection of children, which includes orders relating to a parent's contact with their child. It doesn't include divorce - unless you can successfully argue that this falls into the "catch all" category of "other urgent matters on cause shown".

In terms of putting in urgent court applications, in normal times, we submit signed principal documents to the court, including principal marriage and birth certificates for divorce and child cases. A new Act of Parliament has enabled electronic signatures to be accepted on court documents, and we are now submitting all documents for both new and current actions by email - we are asked not to submit any hard copies.

Non-urgent work

In terms of non-urgent work, it's in a state of development and things are also being dealt with a bit differently at the lower and higher first instance courts.

Court of Session (our high court equivalent):

- Most procedural hearings are now continuing, usually by teleconference, and with docs lodged in an electronic form.
- Non-urgent work was starting to be processed from 21 April (working through the backlog from March first).
- All substantive hearings where witnesses are required are still adjourned for the time being.

Sheriff Court (our lower courts):

- Guidance of 1 May says "a return to business as usual is not viable in the near future".
- But an application process has been put in place to enable non-urgent family work to be dealt with "where the court is satisfied that there is good reason why the action should be re-started and that the action can be progressed remotely without recourse to a hearing which requires the leading of evidence."

What access is there currently to family courts at appeal level?

Things have progressed faster at appeal level. Our civil appeal court, which is the Inner House of the Court of Session, is now sitting as an on-line court to hear civil appeals. Papers are to be lodged electronically, with digital signatures. Procedural and substantive appeal hearings are taking place, either by way of written submissions or (where necessary) video conference. The IT system being used by the court is WebEx.

How is this access being provided at each level? In person/phone/video?

See above.

Which IT is being used?

See above.

Is live evidence being given remotely?

See above.

Are courts generally shut in holiday periods? If so, what is the longest period and how are urgent cases usually dealt with?

We don't have a lengthy vacation period anymore.

Is it possible to issue a divorce petition?

See above.

Other relevant issues?

One issue to note is that the Scottish court has issued a very similar guidance note on contact to that issued by English court. This applies to what is to happen to children of separated parents who would normally move between households, either for contact or shared residence. That is stated by UK Govt to be an exception to the "stay at home" rules. However, guidance note both from English and Scottish court really then gives discretion to the parents - emphasises that this doesn't mean children have to move, just that they can.

Also note that the situation in general is having a significant impact on not just clients, but also the legal profession. Law Society of Scotland has said that almost a quarter of Scottish lawyers in private practice have been put on furlough, and 90% of law firms have a reduced turnover.

Isabelle Rein-Lescastereyres – France

When did the lockdown start?

France

When did the lockdown start?

17th March.

Were courts affected before/after/same time as schools being shut?

Same time. Schools and courts shut on 16th March.

What access is there currently to family courts at first instance?

What access is there currently to family courts at appeal level?

Same for both.

- All procedures were suspended until mid April
- Impossible to file. Even if e-filing is supposed to be the norm since January 2020, it is not working yet in most jurisdiction. Exp. Paris.
- **Very few exceptions** for extremely urgent matters (in family law):
 - International child abduction, and
 - Protection orders for domestic violence.

No "money" cases, not even maintenance readjustments based on the crisis.

- Some courts have been functional enough to render decisions remotely but not all of them. In badly affected areas such as Paris the clerks are home with no remote access. It may be that judges have drafted their decisions but they have not yet been made available to the lawyers nor the parties.
- For all other non very urgent cases: here is still scarce information as of now, and always on a case-by-case basis.

How is this access being provided at each level?

- The emergency cases above still happen in person for all practical matters, with social distancing, masks, etc.

Depending on the court, filing happens by email or registered letter with acknowledgement of receipt, and sometime in paper version directly at the court.

An order dated March 25, 2020 n° 2020-304 provides that, if the parties are represented by a lawyer, the judge may choose to process via videoconference, phone calls, etc.

But none of this has been happening at all for family matters.

Decisions are sent to the parties and lawyers by all means, but usually by electronic means.

- As for all the other cases, they are being postponed at least until after lockdown and, mostly courts are dealing with the backlog by asking lawyers (when there are lawyers) to renounce hearings and agree to have the case ruled upon based on the written submissions and written evidence.

Which IT is being used?

For written communication:

- RPVA (IT system of the Court): because clerk could not access it remotely, in some jurisdictions it worked between lawyers but not with the courts

- Emails
- Soon???: secure platforms

For oral communication:

- Video conferencing software apps

Is live evidence being given remotely?

Not applicable in France.

Are courts generally shut in holiday periods? If so, what is the longest period and how are urgent cases usually dealt with?

During holidays periods, the courts remain open, on a more limited number of staff basis. Judges deal only with emergency cases but the notion of emergency is broader than now. This goes on for about 6 weeks in the summer

Other relevant issues?

✓ **At the present time**

- Extension of delays
Protection orders that expire during the state of health emergency are systematically extended until the expiration of two months after the end of the said period.
- Encourages the use of DR

✓ **In the future**

- We will face congestion after the courts' recovery, which implies that lawyers will have to renounce having a proper hearing... unless it is in the best interest of their client to delay.
- This crisis highlights the lacks in modernization of communication tools despite legislation to this effect and will probably speed up the process.
- Those delays might result in a postponement of the upcoming reform of divorce proceedings (September 21, 2020).

Beverley Clark – South Africa

What is your jurisdiction?

South Africa. Gauteng Province specifically.

When did the lockdown start?

27 March 2020.

Were courts affected before/after/same time as schools being shut?

Same time.

What access is there currently to family courts at first instance?

- 4.1. Access to family courts at first instance is being severely curtailed by the lockdown, as the courts are postponing almost everything other than urgent and unopposed hearings in family matters, and only a very limited amount of family law new process is allowed to be issued.
- 4.2. Our lower courts are often used by in-person litigants for eg. Domestic violence and maintenance cases, and many such litigants do not have access to technology for remote hearings etc, so they are being severely affected by the lockdown.
- 4.3. The lockdown is impacting family law access negatively.
- 4.4. High Court: This is based on the Gauteng Province Position.

EACH HIGH COURT DIVISION HAS ITS OWN DIRECTIVES.

- 4.4.1 Matters that are already pending: The court will endeavour to hear these remotely, insofar possible, in particular the on paper applications. Trials will most likely be allocated new dates if it's not possible to proceed remotely, and when there is oral evidence, generally litigants would not wish to proceed on video. There are various directives that govern this process.
- 4.4.2 New process: Generally speaking, it appears that only urgent applications and claims that may be prescribed are being issued in the Gauteng High Court right now.

What access is there currently to family courts at appeal level?

- 5.1. Very limited for new appeals.
- 5.2. Generally speaking, appeals will be dealt with remotely by video hearing, insofar possible.

How is this access being provided at each level? In person/phone/video?

- 6.1. This seems to be a case by case basis right now at the discretion of the presiding Judge or Magistrate (lower courts). There are lists of contact details and emails which have been circulated.
- 6.2. Where possible, by email, CaseLines (in Gauteng) and video conferencing, but that is not possible in the Mag Court yet from my understanding - they don't have the facilities for video hearings.
- 6.3. My understanding is that some in-person contact at court is allowed, eg, applications for interim protection orders.

Which IT is being used?

- 7.1. Primarily Zoom for hearings. Some judges use Microsoft Teams.
- 7.2. In Gauteng, for the High Court, we use the CaseLines system for all filing of process, but this was only introduced in January this year and is not nationally rolled out yet. We also have various email addresses we can use.
- 7.3. The lower courts seem only to use email and phone calls at this stage.

Is live evidence being given remotely?

Yes, in some cases, usually only with the consent of the litigants.

Are courts generally shut in holiday periods? If so, what is the longest period and how are urgent cases usually dealt with?

Our courts have two long recess periods a year, and two shorter ones. The longest is December/January for six weeks, but urgent cases, unopposed divorces, maintenance matters (including interim maintenance pending divorce) are still heard, and Children's Courts and Domestic Violence Courts remain open.

Is it possible to issue a divorce petition?

Not at this stage, but this may change from tomorrow – we await new directives.

Other relevant issues?

SA moves tomorrow to a slightly lighter lockdown. We are presently on Level 5 and will tomorrow move to Level 4. This may change some of the above, but we await the Minister's new directives.

Appendix A

- (i) **At the Federal Court:-**
 - (a) Case management by way of e-review – 378 cases
 - (b) Case management by way of e-mail – 25 cases

- (ii) **At the Court of Appeal:-**
 - (a) Case management by way of e-review – 1,813 cases

- (iii) **At the High Court:-**
 - (a) Civil case management by way of e-review – 4,093 cases
 - (b) Civil case management and hearing (uncontested matters) by way of e-mail – 2,549 cases
 - (c) Certificate of Urgency by way of e-review – 75 cases
 - (d) Certificate of Urgency by way of video conferencing – 12 cases
 - (e) Criminal case management by way of e-review – 370 cases

- (iv) For the **Subordinate Courts**, 2,509 cases have been heard by way of e-review, 27 cases by email exchanges and 7 cases by video conferencing.

- (v) 111,183 documents have been filed and processed by way of e-filing.