

INTRODUCTION

The Covid-19 pandemic creates a number of legal questions requiring answers from all legal fronts, but in particular the area of family law where matters are intimate, personal and touch upon our most private treasures. A global pandemic and its' effects upon us are equally as personal. While news reports tease of an increase in divorce filings due Covid-19, family law attorneys are confronted daily with a number of unusual questions and complex scenarios. A webinar was produced to answer a myriad of these complex fact patterns on August 11, 2020 hosted by the Social Law Library. The seminar featured an experienced group of former and present judges, prominent lawyers, and well-known business experts. The purpose of the event was to provide insight to these truly unprecedented times for those who devote their time to the practice of family law.

GENERAL THEMES

There are three major themes that emerged from the discussion. First, the rule of law still matters and remains paramount in the face of Covid-19. As Chief Justice John Casey wrote in the early days of the current pandemic: "It is times like this, when society faces threats once thought unimaginable, that the rule of law is more important than ever." [Open Letter Regarding Co-parenting During Covid19,](#)

Chief Justice John D. Casey, March 24, 2020 (available at <https://www.mass.gov/doc/open-letter-regarding-co-parenting-during-covid-19-from-chief-justice-john-d-casey/download>). Clients should be informed that courts will continue to enforce existing parenting time schedules. Agreements should be followed despite the interruption due to Covid-19. For example, if school is going remote –the fact that school is not being conducted in-person—should not affect or alter the parties’ current parenting time. To put it another way, parenting time should be consistent with pre-Covid days. Likewise, the consideration of what constitutes an “emergency” remains the same for the Probate Court today as it was in the past.

In addition, it is also incumbent upon members of the family law bar to continue in good faith to resolve issues of conflict but also seek practical and creative solutions. This might be even more true due to the disruptions in the courts. What happens if a parent is a first responder with potential exposure to Covid? Do they lose parenting time? The answer should be to ensure consistent parenting time for the child and agreements should remain in place or altered without major disturbance to parenting time. Advocates should restore calmness to our now even more stressed out clients.

A second and similar theme is that Covid itself should not create a new body of law. In other words, the application of legal principles and precedents should

not be altered by the effect of the pandemic. Questions such as whether property division should now merge rather than survive; whether alimony or child support agreement should be self-modifying; and whether discovery should be delayed were all answered firmly in the negative.

A point was made that courts continued to operate during times of war and global depression. Perhaps, at some point, there will be new legislative mandates, but at the present time we need to continue to follow our statutory requisites and be consistent with how we have approached legal issues in the past. For example, when we draft marital agreements pertaining to property, we look to provide finality and a clear break for our clients. We need to continue to do so.

Further, issues related to children should remain squarely focused upon what is in the best interests of the child. If a parent has lost parenting time due to the pandemic, the inquiry still remains not on the parent per se, but upon what is in the best interest of the children. For example, does it make more sense to have the parent make-up time in shorter blocks of times? It is more complicated than just saying "I lost 3 weeks, and 3 weeks needs to be made up". This may be especially true when children do/or do not go back to school. An examination of who will be home with the children and helping with schoolwork will need to be considered.

A third theme is the use of alternative means of settling matters and manners of practices should be adopted to ensure that cases are moved forward during these strange days. There are many alternatives depending on the situation for practitioners to explore utilizing. First, the use of Rule 78, an obscure but important rule to consider employing to navigate the present environment. Rule 78 states: “*The court... to expedite its business, the court may provide by order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition. The court may require the filing of briefs, in such form and within such time as it may direct.*” Mass. Dom. Rel. P. Rule 78.

It permits judges to hear contested motions based on the written submissions of the parties only thereby avoiding the need for a two-party hearing. Rule 78 can be effective for discovery motions to be heard and disposed in this matter and judges will welcome these submissions in the right circumstances. Practice tips include that you should ensure that everything you want to say to the judge is found within your written submissions. Likewise, you should inquire with your judge whether or not he has reviewed your materials or will do so after the hearing and you should tailor your presentation accordingly.

The family law bar should also consider the use of retired judges to mediate and resolve cases. Binding arbitration by way of a special master appointment

should be considered. With the lack of in-person trials for the foreseeable future, alternative means of resolving or even trying matters should be considered.

The family bar also needs to adapt to new means of hearing matters before the court. Zoom and telephonic hearings are now the new way of attorney life. It is critical for lawyers to adapt to our new means of how business is being conducted. There were many tips provided. For telephonic hearings, you have to be even more prepared than you normally are as submissions are due prior to the hearing and there is no longer time to speak to your client in the hallway. Prepare and provide paperwork early. Consider having a separate line with your client or have texting available to discuss an issue with a client. Remind your client that he or she should not speak unless you advise them to at a hearing.

For Zoom hearings, keep in mind that although not perfect, it will be easier for the judge to read people than a telephonic hearing. You must, therefore, remind your clients that you are still in court and you should inform them to replicate the same appearance that he or she would in a courtroom. Clients should be instructed to not only dress appropriately, but sit in a chair, with proper lights and appropriate decorum. Lawyers should prepare clients in advance as they would if they were heading to the courtroom and be mindful that is harder to control clients when separated by electronic megabytes and remote systems.

But be mindful that clients are afforded rights and those should not be lost due to the pandemic. As an advocate, you must consider that your client retains his or her rights to due process, to confront and cross examine witnesses, and to present evidence. You lose a lot over a Zoom or a telephone hearing. One issue to consider for Zoom is who else is present in the room.

Due process is better ascertained by an in-person evidentiary hearing. We have a duty to continue to safeguard the rights of our clients by balancing the current issues related by the pandemic. Keep in mind that if you are going to do it over zoom there has to be a set process that everyone knows prior to the hearing. Be mindful of what might be lost, as contested hearings should really be conducted in person. If you do not want to have a Zoom trial, you need to object and if you do not object, you may be waiving it. Be ever mindful that as Jefferson put it “the price of liberty is eternal vigilance.”

CONCLUSION

In closing, we are existing and working in strange days that will come to pass. Our advocate role is to continue to press forward on all of our matters on behalf of all of our clients. We must continue to apply and uphold our statutes and precedent pertaining to all of the issues presented by all of our family law clients.

As Supreme Court Justice Robert Jackson once wrote: “Procedural fairness and regularity are of the indispensable essence of liberty.”

But we must also be creative in our approach with a willingness to accept, adapt, and apply our new methods of court appearances to current and differing procedure. It may not be easy, but the personal work that we do is important to the people that we continue to serve, and perhaps even more important now to lead people and assist them on moving forward during these days of the pandemic.

By Matthew P. Barach

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