

In the Midst of this Pandemic, How Will Courts Handle Family Law Matters?

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During this self-isolating period, people with pending family law matters are questioning how their cases are proceeding. Some questions I am receiving are:

- Will I have a trial in my divorce case?
- Will the judge hear my motion for support?
- How much longer do I have to wait to have my case heard?

We are in an unprecedented time, and there are no simple answers to any of these questions. Until the coronavirus hit New Jersey, most lawyers could give approximate timeframes to clients so they would know how long they would be involved in the legal system. Now, with courts operating virtually, a host of trial procedure issues arise that can impact the length of a case and the timing of a resolution.

Are NJ Courts open for family law matters?

NJ Courts are currently closed as a result of the virus, and this change has turned the legal world upside down. Within a matter of a few weeks, the court system had to reorganize itself and begin to provide services remotely - a way of working that the court system had never done before. But what does that change mean to someone going through a divorce?

Recent Case On In-Person Testimony Offers Guidance

On January 23, 2020, the Appellate Division issued an opinion addressing when it would be appropriate for a judge to permit a witness to appear by phone or by video. In *Pathri v. Kakarlamath*, Judge Fisher held that trial testimony could be presented in ways which would not require one's

physical presence in the courthouse. He provided guidelines for a court to use when deciding whether a person must appear for testimony or whether the witness could give testimony via phone or video transmission. The court provided two guidelines for determining the permission.

- the importance of the witness to a proceeding
- the severity of the factual dispute

Within a few weeks' time of the decision being rendered, the court system was forced to work remotely, perhaps casting aside the holdings in Parthi.

Is Phone or Video Testimony Permitted in a Divorce Matter?

In divorce cases, I would venture to say, each litigant thinks the divorce trial and every witness they wish to have testify is important, and the factual disputes which will affect them, potentially for the rest of their lives, are severe. According to Judge Fisher's decision, divorce litigants would meet the two criteria, thus requiring in-person testimony.

Fast forward 60 days, to March 21, 2020. The court system was shut down and unceremoniously thrust into a situation where people could not appear in person. Judges were required to use technology and consider how to manage hearings where litigants, witnesses, and attorneys would not be in the courthouses.

How are Judges Handling Family Law Proceedings Right Now?

Family proceedings (Early Settlement Panels, Motions, and Trials) are going forward via phone or via Zoom. Judges are working from home. Only emergent matters are being held in person and even then, what a litigant or an attorney may believe to be emergent may not be aligned with a judge's belief. A judge may decide to conduct the proceeding, such as a domestic violence trial, by video conference.

Attorneys are adjusting as well. Complaints and motions, previously filed by mail, are now filed electronically. Any mail sent to the courthouse is left in a box at the courthouse door and then held for at least a day to decontaminate it. Mediation is taking place by video conferencing, and the technology allows a way to keep parties separate.

Will Remote Testimony Continue in a Post-Pandemic World?

It is hard to say whether the Parthi case will be relevant, or whether video conferencing becomes the way the court system will work once self-isolating rules are lifted. Most orders coming out of our Supreme Court imply that the remote nature of proceedings is temporary. As we move forward, many restraints are being lifted, forcing proceedings to go forward remotely. Once the judicial staff becomes used to dealing with matters without face to face contact, will there be more pressure for these “remote” protocols to remain in place?

The Pros and Cons of Remote Proceedings

On one hand, conducting court proceedings by video conferencing saves time in commuting and saves fees to the litigant. On the other hand, under circumstances where it is important for a judge to see and hear the testimony of a litigant firsthand to make credibility findings, that may well be lost in video streaming. In addition, a litigant could feel even more ill at ease on a video than in a courtroom setting which could lead a judge to have a perception that might lead to incorrect findings.

How will a court be assured that the Zoom picture or other video conferencing tool (Webex or Microsoft Teams) shows that there is nobody in the room, just out of camera range, coaching the litigant?

Issues with Documents and Cross Examination Will Likely Lengthen the Time Needed to Try a Case Remotely

Another issue which could affect the outcome of a trial held by video conferencing, is testimony about a document, which is a staple in family law matters. An attorney certainly must have prepared ahead of time all documents which will be presented to his or her client when the client is “on the stand.” But, how does an attorney proceed to impeach the adverse client’s credibility by showing a litigant document on cross examination when testimony is taken remotely?

If an attorney has a document which they want to use to impeach a litigant, how will the litigant receive that document?

When trials are conducted in person, the attorney hands the document to the litigant on the stand for them to read and then answer questions posed.

But, if the trial is being conducted remotely, what device will be electronically scanning and sending the document to the person testifying? Are all attorneys going to be required to have scanners in order to try a case remotely? Will judges have scanners in the courtroom or at home? Will the witness be required to have their computer on the “stand” with them? How can one be assured no one is coaching the witness by sending messages on the computer in front of the witness?

In person, an attorney or a judge can see when a witness is reading from notes but that may not be so if the witness is required to use a computer. How will judges view messages or videos on phones presented in a domestic violence trial as evidence, for example? How will they be marked into evidence for preservation for an appeal? The rhythm of cross examination many times is very important to show an adverse litigant’s underlying motives or lay bare the lies, and these efforts may be undercut by conducting a trial remotely.

The Option of Virtual Mediation

These procedural questions indicate that attorneys, judges and litigants will need to navigate a new system that could cause more delays and lengthier trial periods. During this time, it is advisable to consult with your family law attorney about your matter, and discuss the options available for resolution. [Virtual mediation is worth considering as well.](#)