

COVID-19

The Future of a Virtual Courthouse

Editor's Note: The New York State Courts' response to the coronavirus pandemic is continually evolving. For the latest developments, visit the NCBA website, www.nassaubar.org. Our website also hosts recordings of "virtual town hall" meetings held during the crisis by various Administrative Judges with our members.

You are sitting in Court on Wednesday waiting for your case to be called and remember that your daughter asked you to cook her favorite meal on Friday night. You pull out your phone—Instacart or Peapod will do your grocery shopping for you and deliver it right to your door—and return to scrolling through the latest headlines. At the end of your conference, each attorney consults an electronic calendar to choose a new date. Although you thought the 28th was free, you see that your calendar was updated remotely upon receiving a fax scheduling a Preliminary Conference on another matter, so you choose another date.

As you get into your car, you pull up an app and tap in a quick coffee order for pick-up on your way back to the office.

When you arrive home that night after a busy day, your sneezing son informs you that his allergy prescription ran out so you pull up the virtual urgent care webpage and schedule a video visit with a medical provider.

Not long after you log out—paying the co-pay electronically, of course—your phone receives a notification from the pharmacy indicating that your son's prescription is ready and your doorbell rings with your Grubhub food delivery.

You ask Siri to send a text to your spouse asking them to pick up the prescription on the way home.

As we start the third decade of the 21st century, technology is ubiquitous in our daily lives.

Expanding Virtual Access to the Courthouse

In May 2017, we published an article detailing the expansion of electronic filing for Temporary Orders of Protection in the Family Court through the "Remote Access Temporary Order of Protection Project." This was a pilot program designed pursuant to Family Court Act § 153-c, which allows petitions for temporary orders of protection to be filed by electronic means and permits litigants to appear and orders to be issued ex parte by audio-visual means. Over the past three years, use of remote access for temporary orders of protection has seen a slow and steady increase, allowing victims of domestic violence to access the judicial system from nursing homes, advocacy group offices, domestic violence shelters, and police precincts.

We concluded the May 2017 article by leaving the reader to contemplate some rhetorical questions: will litigants eventually be able to use videoconferencing for all emergency applications in Family Court? Will the ability to use virtual filing lead to an influx of petitions, further burdening Family Court dockets that are already strained? Will videoconferencing be used as a sword instead of a shield? The recent COVID-19 pandemic has forced our hand to seriously and more expeditiously consider the answers to those questions. New York State courts are implementing remote access protocols by the day in response to the continuing statewide business restrictions.

On March 31, 2020, Nassau County Administrative Judge Norman St. George issued an Administrative Order and accompanying Memorandum implementing Chief Judge Janet DiFiore's plan to dramatically decrease courthouse traffic by creating completely virtual courthouses using videoconferencing via the "Skype for Business" applica-

tion. While the virtual courthouse is in session, only a Clerk is physically present in each Court to handle all the paperwork and oversee the virtual process. The Clerk forwards a Skype link to everyone involved in a proceeding (including the litigants, Judge, Court staff, and interpreter, if necessary) so they may participate from either their home or office computer or by telephone. At the conclusion of each proceeding, the Judge directs the Clerk regarding the completion of necessary paperwork, including issuing orders.

On April 13, 2020, remote access protocols in the Courts expanded to address non-essential pending cases. Chief Administrative Judge Lawrence K. Marks released a memo detailing a Court's authority to hold conferences in order to address, inter alia, discovery disputes and decide motions.

Virtual Access in the Post-Pandemic Era

Certainly, virtual court appearances and proceedings save time (for both attorney and litigants), reduce security risks, and eliminate litigants' anxiety over the loss of time from work and the need for childcare. In this day and age, many people use smartphones, tablets, and other remote technology tools in their everyday lives, minimizing the Court's concern that a litigant may be unable to appear virtually. As Administrative Judge St. George noted in his March 31, 2020 Memorandum, the technology is "familiar..., simple and straightforward."

However, we need to consider the potential downside. Virtual appearances may reduce opportunities for early settlement; the common practice of hallway negotiations will disappear and as result likely increase the number of trials and lengthen the time to resolve cases. Also, remote access may also lessen the impact of the "intimidation factor." Will a payor spouse be less inclined to abide by a court order if he or she does not need to face and explain why support payments for example have stopped to that person in the black robe? Will an unintended consequence of making the Court more easily accessible lessen a litigant's respect for the judicial process and diminish the impact of court orders?¹

Our local justice system is currently equipped with the proper technology for remote access litigation. In Nassau County, television screens and computers are set up in every courtroom to facilitate Skype testimony. The Suffolk County Courthouse maintains mobile carts to ensure that every courtroom can have remote technology installed if and when virtual communications are needed. Notwithstanding the tools in place, there is hesitation to consider unfettered virtual access in matrimonial litigation.

On April 6, 2020, we spoke with Justices Jeffrey A. Goodstein, Supervising Judge of the Matrimonial Center in Nassau County, and Andrew A. Crecca, Supervising Judge of the Matrimonial Parts of Suffolk County, to explore liberal remote access in years to come. Both Judges are familiar with remote access (having used same for witness testimony), recognized the difference between conferencing virtually versus in person when you have clients present, and noted a current judicial preference to have people [present] where you are close to them and you get to interact with them on a personal basis.

Before the March 2020 expansion of remote access in response to the COVID-19 pan-



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dem, New York State placed strict limits on electronic appearances compared to more liberal jurisdictions such as California which strongly encourages remote appearances and engages the services of a commercial service provider (CourtCall) to facilitate state-wide remote access.²

Such appearances in New York family law matters are governed by Family Court Act sections 433 (relating to child support), 531-a (relating to paternity), and 580-316 (relating to support and paternity proceedings under UIFSA) and Domestic Relations Law section 75-j(2) (relating to custody and neglect proceedings brought under the UCCJEA). According to the Bill Jacket that accompanied FCA §§ 433 and 531-a when they were passed in 2000, the legislation establishing electronic court access was "introduced at the request of the Chief Administrative Judge" and enacted to "accommodate the interests of litigants and witnesses by sparing them unnecessary appearances in Family Court."⁴

However, both FCA §580-316 and DRL§75-j apply only to out-of-state parties or witnesses and do not contain provisions for the electronic testimony of those residing in New York State. Both FCA §§ 433 and 531-a are more expansive, providing for the possibility of electronic testimony: (1) where a party or witness resides in a county that is non-contiguous to that of the Family Court where the case is pending, (2) where a party or witness is presently incarcerated, or (3) where the Court determines that it would be "an undue hardship for such party or witness to testify...at the Family Court where the case is pending."

However, except for FCA §580-316, which states that "a tribunal of this state shall permit [emphasis added]"⁵ a qualifying party or witness to testify via electronic means, the Court is given broad discretion in determining whether to permit electronic testimony.⁶ A review of the limited case law regarding this issue reflects that in practice, such approval may be difficult to secure absent a showing of necessity⁷ or exceptional circumstances.⁸ Although technological development has facilitated a greater acceptance of remote participation by litigants in judicial proceedings, Courts maintained hesitations because of the effect electronic testimony may have on the trier of fact to determine the witness's credibility.⁹

Conclusion

With the implementation of the Administrative Orders, the accessibility of

electronic testimony and virtual appearances has been forced upon us and our judicial system. The process of E-filing is becoming more commonplace practice in matrimonial matters. Changes and adjustments are being made daily to expand and improve the Court's response to the pandemic—it is possible that by the time this article is published there may be answers or even more questions. While we cannot predict the future, it is a virtual certainty that this "new normal" will push the Judicial system to forever adapt to the technology at hand.

In times of crisis, even the most traditional people and institutions must adapt to move forward. Sometimes, we find that the new way is better than the way before. As a result of the accommodations and emergency protocols established to navigate this crisis, perhaps we can achieve increased access to justice through Courts that "extend beyond courthouse walls."¹⁰

As Judges Crecca and Goodstein stated:

Access to justice always involves the concept of allowing people to participate in the process and have access to the courts. There is no question, when we come out of this, we will be in a better spot to provide access to people who might not have otherwise had access to the courts.

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1. John Greacen, *Remote Appearances of Parties, Attorneys and Witnesses – A Review of Current Court Rules and Practices*, Self-Represented Litigation Network, March 17, 2017, available at <https://bit.ly/2UX8o7h>.
2. California State Civil Rules, Rule 3.670.
3. *In re Thomas B.*, 139 AD3d 1402, 1404 (4th Dept 2016).
4. N.Y. Bill Jacket, 2000 A.B. 7162, Ch. 475.
5. FCA §580-316(f).
6. *Matter of Jaydalee P.*, 156 A.D.3d 1477, 1478 (4th Dept. 2017)(upholding denial of mother's application to appear electronically in neglect proceeding where she moved to Michigan less than one month before the trial date).
7. *Melissa S. v. Allen S.*, 54 Misc.3d 684, 690 (Queens Co. Fam. Ct. 2016)(upholding denial of husband's application to participate by telephone where he voluntarily departed the state and did not establish an "inability to appear or genuine necessity").
8. *Pamela N. v. Aaron A.*, 159 A.D.3d 452, 453 (1st Dept. 2018)(upholding denial of father's request to testify by videoconference where he claimed not to have the funds to travel to New York). See also *Ulster County Support Collection Unit on Behalf of Beke v. Beke*, 170 A.D.3d 1347, 1348 (3d Dept. 2019)(upholding finding of default where father's application to give electronic testimony because he could not afford to travel to New York had been rejected by Family Court).
9. *UFISA Suffolk County Department of Social Services v. Grassi*, 6 Misc.3d 1028(A)(Fam. Ct., Suffolk Co. 2005); *Melissa S v. Allen S.*, 54 Misc. 3d 684 (Queens Co Fam Ct. 2016).
10. *Call to Action: Achieving Civil Justice for All – Recommendations to the Conference of Chief Justices by the Civil Justice Improvements Committee*, National Center for State Courts, 2016, available at <https://bit.ly/2wqNzYg>.

