

Family Law in the Time of Corona



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Disparate policies, varied reactions, and choruses of, “We’re in this together,” and “Give each other some grace. We’re all doing the best we can,” have become the “new normal” in everyday life and the legal profession is no exception. But what happens when a system like ours, which isn’t designed to bend and where “grace” is only permitted when it’s the name of a litigant, is suddenly faced with a pandemic requiring both? This article will explore some of the various jurisdictional responses to COVID-19 and the attendant shuttering of the courts to all non-essential services. From the outset, however, the authors wish to state that they have no precognitive abilities, nor do they have the “right” answers to any of the questions posed herein. But as a thought exercise, these queries are worth exploring both for practice planning as well as informing issue-spotting and ultimately the advice being given to clients.

On Friday, March 12, 2020, in conjunction with Gov. Laura Kelly’s declaration of a state of emergency, the Kansas Supreme Court issued its first Administrative Order related to COVID-19, *AO 2020 PR 013*¹, which instructed Kansas courts to establish and/or review their Continuity of Operations Plan (“COOP”) in anticipation of the need for and implementation of various pandemic protocols. By the following Monday, March 16, the Sedgwick County courthouse², and the majority of Kansas courts, shut their doors to all but the most essential services, causing general confusion and some panic among practitioners as well as their clients. Through the e-filing system, attorneys in Kansas were still able to file new cases, motions, and various other pleadings they wished the court to address but the question of how the court would handle contested matters remained unanswered. Two days later, on March 18, Gov. Kelly made the unprecedented move to close all Kansas schools for the remainder of the school year, making Kansas the first, but as we later found out, not the last state to do so.³ That same day,



the Kansas Supreme Court issued *Administrative Order 2020 PR 016*⁴ instituting state-wide judicial restrictions applicable to all judicial districts in Kansas.

For family law practitioners, this newly created ambiguity limiting access to most of the court system, combined with the uncertainty in the world at large, created unique issues with no immediately available redress. For example, coparents who now had no childcare or schooling options, possible impending job loss, and an invisible disease sweeping the globe without a cure, ratcheted up the conflict in their cases. Phones in law offices around the state were ringing off the hook with clients asking their attorneys questions like, “She’s a nurse so she’s more at risk. Can I keep the kids away from her?” and “He just went to Colorado which is a hotbed right now. Can I keep the kids away from him?” and “They aren’t making the kids wear masks or social distancing. They clearly aren’t taking this seriously. Can I

keep the kids with me so I know they’re safe?” and “We’re under a Stay-At-Home Order. Does that mean I shouldn’t take the kids to the exchange?”

As time passed and more and more parents were laid off or furloughed from their jobs, the uncertainty and the negative reactions to it built. Parents with parenting time during spring break asked whether they could keep their children, citing as justification that since online schooling did not begin immediately, spring break was extended which, they argued, extended their parenting time. Adding another wrinkle was the fact that with schools no longer open for traditional in-person schooling, the calls to begin the summer parenting time schedule for those parents whose schedules were different for those months increased. Luckily, within two weeks judges in several counties offered guidance regarding schedules and advised that following court orders like parenting plans and custody exchange orders was a

permissible and even required activity during the stay-at-home order.^{5 and 6} But that left open the questions from clients who lost their jobs or were furloughed or laid off and wanted to know what would happen with their support obligations. Attorneys could file motions to modify those obligations but if they were based upon temporary circumstances such as a furlough would the client get their hearing before they were rehired and thus was it worth the expense of the motion? And what about the clients whose income actually *increased* when they began receiving state unemployment with the federal addition of \$600? Do those temporary circumstances warrant a notification to the other side?

For those clients who found themselves suddenly staying at home with a spouse they realized they could no longer remain married to, can practitioners request the *ex parte* Temporary Orders they ordinarily would which includes a provision requiring the other spouse to vacate the residence within 48 hours, particularly when foreclosure and forcible detainer actions were suspended? Or in cases where practitioners represent clients who believe false or indefensible protection orders have been entered against them and they are being kept from their children as the result of these orders, when does the practitioner tell the client a hearing can be scheduled to attempt to do something about that protective order?

As we now know, the solution for cases where we could not reach some sort of agreement was hearings via video and telephone conferencing. This technology that has been widely used in the greater business world but rarely utilized in the legal field for a variety of reasons including the foundational principle in our legal system that both parties have a right to confront that evidence in the courtroom, including the right to effectively cross-examine witnesses. But in the age of COVID-19, pigs are flying and WiFi networks are being stretched to their limits.

Along with this solution came a new set of questions such as: how do we schedule multiple hearings and stay on schedule?; how can we be persuasive when our WiFi connection is bogged down by the kids next door playing online games or the neighbor who is sucking up the bandwidth giving a video presentation to their clients across town?; and if we are required to submit our exhibits to the court as well as opposing counsel via email in advance of a scheduled motion hearing, how can we object to exhibits the judge has previewed? How do you unring that bell? There is also the practical reality that when attorneys are not standing up in a courtroom with a crowd of other attorneys waiting for their opportunity to be heard, and are instead sitting at home or in their offices, hearings simply take longer than they used to which did not help in addressing the backlog of cases which had been pending for several weeks.

While most, if not all, practitioners prefer the formality and clarity of an in-person hearing as opposed to the video

conference version, the stop-gap measure of utilizing video and telephone hearings, which operated like a band aid on a gunshot wound, helped courts limp along and address the most pressing of issues. On May 27, Chief Justice Marla Luckert, issued *Administrative Order 2020 PR 0567* which affirmed the prior administrative order allowing two-way video conferencing for certain judicial procedures and stated the same could be used for trials as well. In Sedgwick County's Family Law Court, as of the date of this article, these trials by WebEx will be conducted only by the consent of the parties.

The next logical step though, as these video and telephone hearings become normalized, the COVID-19 curves begin to flatten, and states begin to reopen, will be to resume in-person trials. One question to be resolved here is the priority of scheduling trials. Many trials have been postponed due to the closure of courthouses across Kansas. However, new cases have been filed and some of those have now proceeded such that they are ready for trial while existing cases which had months' worth of discovery to issue and review are also now ready to be set for trial. Some of those cases may involve time-sensitive issues which could range from frail health of a party to a child custody issue that needs to be resolved prior to the start of school for the 2020 fall semester. Many of the trials that were postponed may not have a time-sensitive issue but the parties can't move on with their emotional and financial lives waiting for the closure they hope a trial will bring. There is also the question of whether, in counties where judges hear all types of cases, will criminal law cases or cases with constitutional issues take precedence over family law cases in the scheduling hierarchy?

The trail-blazing state on this issue was Oregon.⁸ There, jurors were summoned to civil service at the start of May, offered masks upon entering the courthouse if they did not already have one, and were spaced six feet apart in the courtrooms as they were seated for voir dire. Jury selection is something of an art as opposed to a science but practitioners who regularly do it will tell you they look at the overt and micro cues from the prospective jurors both in response to the instructions given and questions directly asked as well as the response other jurors give. This begs the question, if half of a prospective juror's face is hidden behind a mask, can their responses be effectively gauged and a defendant's right to a jury of their peers be honored? And can a litigant's right to confront the witnesses and evidence against them be honored under the same circumstances?

Luckily for family law practitioners in Kansas, the myriad questions about jury efficacy plaguing the criminal courts which are resuming trials with jurors and witnesses alike wearing masks will not be a concern we have to address as our trials are exclusively bench trials. However, the ability of counsel and the judge in a family law bench trial to properly evaluate the credibility of witnesses and the evidence presented while everyone is wearing masks raises serious

concerns. It is a fundamental right of parties to a lawsuit to be able to effectively cross-examine witnesses. A mask will not only cover half of the face of a witness, it will also muffle the voice of that witness. How can counsel and the court evaluate the credibility and demeanor of a witness, gauge facial reactions or changes in voice inflections of witnesses under these circumstances? Will the recording devices be able to pick up the voices of the court, counsel, or witnesses if all are required to wear masks? If not, it is possible the record of the trial will be incomplete for post-trial motions and appeals. In this event, will a post-trial motion or appeal be denied because the movant or appellant cannot produce a complete record for review?

If we resolve these questions in favor of leaving the mask requirements in place, then what does a trial look like? Will witnesses be allowed to remove masks during their testimony? Will counsel be allowed to remove masks when questioning witnesses and making arguments or objections? Will counsel be allowed to approach a witness? Will barriers be erected at the witness stand? In a standard family law trial, each side has a binder(s) of exhibits which must be flipped through by more than one witness and which often necessitates the attorney leaning over and pointing to a particular line in a bank statement, income tax return or other financial document. How cumbersome will trials and transcripts become if those actions cannot happen due to social distancing?

How close will counsel be permitted to sit to his/her client? Will barriers be erected at counsel tables? If counsel is not allowed to sit next to a client, how effectively can they confer during a trial? Will litigants be allowed to bring family members or friends to be there for moral or emotional support? If so, how many support persons will be allowed? Where will they be allowed to sit in a courtroom?

In Sedgwick County, at least two judges are requiring masks and gloves to be worn at all times. What recourse does an attorney have who cannot write as quickly with gloves on or who is accustomed to utilizing touch-screen technology

in their presentation, but those features do not work through surgical gloves?

For larger dockets like traffic and protection order dockets in Sedgwick County, the courthouse staff has taken a staggered approach to allowing citizens into the courthouse. As shown in the pictures above, litigants are lining up outside the courthouse on specified, socially distanced circles. Clerks and other staff members, including assistant district attorneys, are then calling them forward and meeting with them outside the courthouse at tables under tents, reviewing their cases, and directing them to the courtrooms they are assigned to that day. From there they are sent through metal corrals to get through security where they are handed masks if they are not already wearing one. They then are sent to their respective floors which are each equipped with hand sanitizing stations covered in literature about appropriate hygiene and distancing. Litigants can wait in chairs spaced six feet apart until their case is called. Once in the courtroom, the various seating options are cordoned off; an X to indicate which seats may not be used so that the recommended distance is maintained at all times. Once all of those protocols are observed, the hearing which may only last a matter of minutes, can begin.

The questions posed herein, and so many others present themselves on a daily basis and will only continue as each new solution presents a host of new and varied conundrums to which our staid system must adapt. We are less than a month into the re-opening process, but Sedgwick County and courthouses across the state continue to adapt their protocols as new information about the spread of COVID-19 becomes available. For now, it appears the new practices are working to get people back in the courthouses and add some certainty to an uncertain time. Family law practitioners can only hope that we all give each other a little grace during these trying times. We are all in this together and doing the best we can.

1 Kansas Supreme Court Admin. Order No. 2020_PR-013, *Re: Kansas Judicial Branch Policy on Pandemic Disease*, (2020), <https://www.kscourts.org/KSCourts/media/KsCourts/Orders/2020-PR-013.pdf?ext=.pdf>

2 *Sedgwick County Court Reduces Court Functions*, K.S.N., (March 16, 2020, 2:09 PM) <https://www.ksn.com/news/health/coronavirus/coronavirus-in-kansas/sedgwick-county-court-reduces-court-functions/>

3 Colin Dwyer, *Kansas Becomes the First State to End In-Person Classes for the Year*, N.P.R. (March 18, 2020 3:07 PM) <https://www.npr.org/sections/Coronavirus%20Live%20Updates/2020/03/18/817886198/kansas-becomes-the-first-state-to-end-its-school-year>

4 Kansas Supreme Court Admin. Order No. 2020-PR-16, *Order Imposing Statewide Judiciary Restricted Operations Due to COVID-19 Emergency*, (2020), <https://www.kscourts.org/KSCourts/media/KsCourts/Orders/2020-PR-016.pdf?ext=.pdf>

5 Johnson County District Court Admin. Order No. 20-06, *RE: Restrictions to Mitigate COVID-19 Spread*, (2020), <https://thelayneproject.com/wp-content/uploads/2020/03/Admin-Order-No-20-06.pdf>

6 E-mail from Judge Jeffrey Dewey, Judge Division 21, 18th Judicial District to the Family Law Section of the Wichita Bar Association (March 20, 2020, 2:50 PM) (on file with author)

7 Kansas Supreme Court Admin. Order No. 2020-PR-32, *Order Amending 2020-PR-016*, (2020), <https://www.kscourts.org/KSCourts/media/KsCourts/Orders/2020-PR-032.pdf>

8 Conrad Wilson, *Oregon Law Forces Jury Trials to Continue, Increasing Virus Risk*, O.P.B., (May 12, 2020 6:00 AM), [https://www.opb.org/news/article/oregon-jury-trails-coronavirus-risk/](https://www.opb.org/news/article/oregon-jury-trials-coronavirus-risk/)