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## ***Our team of family law attorneys survey the available facts, rumors and speculation surrounding when Massachusetts Probate Courts will re-open from the Covid-19 shutdown.***

Like the rest of Massachusetts, Massachusetts courts of all kinds – including the state’s Probate & Family Courts – closed their doors to the public in mid-March due to the coronavirus pandemic. As we have covered ad nauseum in our Covid blogs, the Covid-related shutdown did not close courts in Massachusetts entirely. Indeed, since the earliest days of the pandemic, Massachusetts courts have continued to hear emergency motions – and as the weeks have turned into months, the state’s Probate & Family Courts have heard an increasing range of non-emergency matters.

The [latest Supreme Judicial Court \(SJC\) order](#) keeps the physical doors of Massachusetts courts closed to the public for everything but the most extreme emergencies until at least July 1, 2020. Given that SJC has previously extended similar orders prior to the start of April, May and June 2020, few observers expect courts to throw open their doors on July 1, 2020. Indeed, most agree that likelier scenario involves the SJC extending court closures past July 1<sup>st</sup>, while (hopefully) announcing a clear plan for re-opening similar to the [state’s recently announced guidelines for school re-openings](#) that includes some specific dates upon which courts will reopen in the Commonwealth.

## **The Current Situation Massachusetts Probate & Family Courts**

As noted above, the [SJC last extended](#) the physical closure of Massachusetts courts on May 26, 2020. The current order keeps the courts closed until at least July 1, 2020 while continuing all currently scheduled trials past July 1<sup>st</sup> unless a judge determines that a “trial may be conducted virtually”. No Probate & Family Courts appear to be conducting virtual trials at this time, although could soon change in at least one court, as discussed below in our review of Probate Court operations in Plymouth, Norfolk and Barnstable counties.

The most [recent SJC order](#) emphasizes that “courts are open for business, but courthouses are closed to the public and all business is being addressed virtually.” Individual trial court departments, including the Probate & Family Court Department, continue to define what constitutes an “emergency”. For its part, the Probate & Family Court (PFC) Department released its [most recent order on May 27, 2020](#). The PFC order continues to define certain actions as “emergencies” – such as 209A restraining orders, orders to vacate pursuant to G. L. c. 208, § 34B, and a variety of guardianship and conservator actions, while allowing individuals courts and judges latitude to determine that motions for temporary orders and contempt filings are emergencies “where exceptional/exigent circumstances have been demonstrated.”

## **How are Probate & Family Courts Handling Non-Emergency Hearings Right Now in General?**

The area of greatest confusion and/or variation from Probate Courts from county to county, and even judge to judge, involves the handling of non-emergency matters. Most courts are currently positioned to enter signed agreements as orders and judgment, although entering separation agreements in divorce cases – which require a hearing by phone or video with a judge to approve – continue to pose challenges, particularly for self-represented parties. As the shutdown has rolled on, courts have been increasingly aggressive about hearing Pretrial Conferences by phone or video, particularly in cases involving clients represented by attorneys. However, the scheduling of Pretrial Conferences by courts remains a somewhat uncertain business, with wide variations between counties in terms of whether judges are using phone or video, as well as significant differences in how these hearings are scheduled. (We will discuss this further below in our section on Probate Court operations in Plymouth, Norfolk and Barnstable counties.)

Of course, Pretrial Conferences are scheduled by the court, not by parties or their attorneys. This added degree of control over scheduling has made it easier for courts to schedule and hear Pretrial Conferences compared to motions and hearings scheduled by attorneys and litigants. That brings us to the huge range of non-emergency motions that Probate Courts regularly hear in domestic relations cases – from temporary orders for child custody and child support, to discovery motions, to non-emergency contempt and modification hearings. Here we find the widest variations between counties and judges, as well as between cases involving attorney-represented parties vs. pro se parties.

## **How are Probate & Family Courts Handling Non-Emergency Motions Scheduled by Parties and Attorneys?**

Following the immediate shutdown of the courts in mid-March, Massachusetts courts generally spent the remainder of March figuring out how they would do business without providing physical access to the public. For better or worse, the SJC has settled on a system of one-month extensions of the shutdown. In practice, this has created a framework for parties and attorneys seeking to schedule non-emergency motions and hearings in the Probate Court. Most Probate Courts have not allowed non-emergency motions to be scheduled for the immediate month affected by the current shutdown order. However, in many cases, attorneys have been permitted to schedule non-emergency motions in the month following the expiration of the current order.

In other words, during the month of May, attorneys and parties were generally allowed to schedule non-emergency motions in June or later months. Similarly, in June, attorneys and parties have generally been able to schedule non-emergency motions in July or later months. Whether these motions are actually heard is another matter. During May, attorneys in our office scheduled a variety of hearings to take place in June, per the rules of the local Probate Court. As

June has arrived, many of these non-emergency motions have occurred by phone (and occasionally by video), particularly in cases with two attorneys. In cases where one party is unrepresented by counsel, however, approximately half of our non-emergency hearings have been continued by the court, often with only limited notice.

Here is how it has generally worked. In May, an attorney from our office scheduled a fairly typical Motion for Temporary Orders for parenting time and child support in our local Probate Court for a date in June. Then in late-May, the SJC extended its order closing courts until July 1<sup>st</sup>. In cases involving two attorneys, the June hearing that was scheduled the previous month has often stayed on the calendar and occurred over the phone, with the judge issuing orders by mail. In cases where one party is unrepresented by an attorney, our office has frequently received a notice in the mail – often just a day or two before the hearing – rescheduling the hearing for July, August or even September.

The reason for the disparate treatment between cases involving attorneys vs. *pro se* litigants is clear: Already complicated procedural rules have been made even more complicated by the need to conduct hearings by phone and video. Even the most experienced *pro se* litigants commonly struggle with following the schedule, filing pleadings, and complying with procedural orders. Simple necessity has driven courts to focus their efforts on cases involving two attorneys, in which the judge can rely on the attorneys to prepare and organize the hearing in way that allows the judge to understand the evidence and arguments and make decisions.

Regardless, Massachusetts Probate Courts continue to hear non-emergency matters when both parties (or their attorneys) agree and ask the court to hear the matter by phone.

## **What is happening in the Plymouth, Norfolk and Barnstable Probate & Family Courts?**

Although Lynch & Owens represents clients in some matters (such as appeals) statewide, the majority of work focuses on Plymouth, Norfolk and Barnstable counties. Our experience with these three courts offers a microcosm of how Probate Courts in different counties are handling the pandemic. Here are some observations:

**Plymouth Probate & Family Court Coronavirus Response** – Plymouth Probate Court has been blessed with a stable roster of five smart and talented Probate & Family Court judges that remained relatively unchanged for several years. The Court is led by First Justice Edward G. Boyle, III. Since the shutdown began, Plymouth PFC has worked hard to schedule and hear pretrial conferences telephonically, thus maintaining a semblance of order over cases in the system. The court has approved and entered electronically submitted agreements as orders as a matter of course. For full separation agreements, the Court has pre-reviewed agreements and sought to schedule hearings on agreements that contain no “red flags”. For agreements with possible issues or concerns, clerks have typically emailed attorneys to identify issues or seek explanations. Because Plymouth faces a high volume of cases, self-represented parties have likely struggled at times to navigate the multiple layers of contacts, phone numbers and email addresses that are sometimes required to navigate between the county’s five judges. In some

cases, pro se parties have retained attorneys on a limited basis simply to help navigate these challenges and move an agreement or case through the remote system.

In a recent letter to Plymouth county attorneys, Judge Boyle indicated that the judges will likely take a hiatus from hearing trials after courts re-open. Judges will use the additional time (i.e. from not having to hear trials) to catch up on the backlog of cases that have built up during the shutdown. Some judges in Plymouth county are using Zoom to conduct hearings, while others continue to rely primarily on phone hearings. Judge Boyle has indicated that the Court will continue working towards Zoom adoption.

**Norfolk Probate & Family Court Coronavirus Response** – Norfolk Probate Court is led by First Justice Patricia A. Gorman. From the earliest days of the pandemic, Norfolk PFC has been aggressive and concise about sending out notices assigning new dates for matters that were delayed due to the shutdown. Norfolk has also led the way on virtual hearings, with its judges seeking to schedule telephone hearings in cases involving one self-represented party. Former First Justice of the Norfolk and Middlesex Courts, Hon. Robert W. Langlois, has returned to the bench after a decade in private practice, and is currently hearing cases previously assigned to Hon. George F. Phelan, who is nearing retirement. Norfolk PFC is scheduling hearings on signed Separation Agreements and regularly holding telephone hearings in cases featuring attorneys, including some previously scheduled matters that were delayed in the early days of the shutdown. Attorneys from our office have recently appeared in telephonic hearings scheduled by Norfolk PFC in non-emergency matters that were previously delayed due to the pandemic.

## **Barnstable Probate & Family Court Coronavirus**

**Response** — Barnstable Probate & Family Court is led by First Justice Arthur C. Ryley, who covers all of Cape Cod along with Hon. Angela M. Ordoñez. Always known as something of a “rocket docket”, where cases tend to move along quickly, Barnstable PFC has adapted quickly to hearing cases remotely, with more hearings conducted via Zoom in Barnstable than other courts, where telephone conference calls are often the norm. Barnstable has been proactive about scheduling non-emergency matters for virtual hearings. At a recent conference with county attorneys, Barnstable PFC officials even suggested that the Court may lead the way on conducting Zoom trials, despite the formidable logistical hurdles that virtual trials may present. The skill and cohesiveness of Barnstable PFC’s registry staff has helped the court navigate the shutdown by quickly and flexibly scheduling matters for virtual hearings. Every court will face major backlogs as a result of the pandemic, but Barnstable PFC’s proactive approach to moving cases forward will likely allow the court to regain its footing faster than other counties upon reopening.

## **Massachusetts School Reopening Guidelines Offer Clues for Courts**

Although Massachusetts businesses have been rapidly (or perhaps less than rapidly, depending on one’s perspective) re-opening since May. The state has been much slower to fully re-open state-run offices and services. This week, Massachusetts announced its guidelines for school

reopening in the fall. These Guidelines include requirements such as each student wearing face coverings at all times, a 12-person maximum in classrooms (including teachers and assistants) and spacing of at least 6 feet between individuals. It is reasonable to expect that Massachusetts courts will be subject to similar restrictions when they reopen to the public. (Indeed, to the extent that Massachusetts courts are likely to contain more at-risk populations than schools, restrictions may be even more severe.)

How individual courts handle reopening will depend in many ways on physical features in court buildings that few have probably thought much about in prior years. The physical square footage of courtrooms, hallways and waiting areas will take on new meaning. Behind the registry desk, staff will also face challenges depending on how much room is available to move around in. For almost any hearing, we know that a judge, clerk and at least one court officer are required. If Massachusetts courts are limited to the same 12-person per room limit faced by schools, this will limit the number of individuals who can sit within the courtroom at one time. As attorneys and litigants are pushed into the hallways, clerks will struggle to perform basic administrative tasks such as “calling the list”, collecting financial statements and communicating with attorneys and parties.

It is a virtual certainty that Massachusetts Probate & Family Courts will continue to rely heavily on remote operations after reopening. The courts are likely to strongly recommend that attorneys schedule hearings by phone or video. This will increase safety and convenience, but may impact judicial outcomes to the extent that a big part of an attorney’s job involves physically standing before a judge and making arguments – while a big part of a judge’s job is observing the in person behavior and reactions of witnesses.

Clearly, the greatest challenge upon reopening will be trials. Even without a jury, civil trials are document-intensive processes that include multiple witnesses, attorneys exchanging documents and approaching clerks and witnesses, and a degree of physicality that simply is not needed in motion practice. All court observers agree that Massachusetts Probate & Family Courts are likely to face a huge backlog of trials that may take years to unpack after reopening. Indeed, courts may need to consider somewhat radical solutions – like restricting written findings of fact to cases that are under appeal – simply to speed up the trial process.

## **Predictions: Each Lynch & Owens Attorney Predicts when Massachusetts Probate & Family Courts will Fully Reopen**

We invited each of our Probate & Family Court attorneys to make predictions about when and how Massachusetts Probate Courts are likely to open. To be crystal clear, the predictions below are based on guesswork, instincts, and speculation – and not from inside knowledge about the trial court’s plans. Indeed, you will see from the differing views of our attorneys that some of the predictions below will be wrong while others closer to right. Either way, please do not treat our speculation and guesswork as fact. None of us know what the future truly holds for Massachusetts Probate & Family Courts at this point.

Below are the best guesses of our attorneys on reopening, presented in the order in which they responded to the survey:

**Jason V. Owens** - My best guess is that courts will physically reopen in August, subject to many of the same restrictions we saw in the [state's guidelines for school reopening](#). Upon reopening, PFC courts will strictly limit how many hearings are scheduled per day to keep the number of visitors down. I predict PFC courts will continue to incentivize and heavily lean on remote hearings even after reopening, with many attorneys continuing opting for phone/zoom hearings – at least early on – after seeing the delays and restrictions involving in person appearances. Most of the in-person hearings will focus on *pro se* parties who lack the resources or technical skill to participate remotely. Exactly when trials resume may vary from court to court, but some courts (like Plymouth) seem likely to delay trials for months following re-opening, with judges using the extra time to catch up on their backlog. (Other courts, like Barnstable, may begin conducting Zoom trials before reopening even arrives.) One wildcard could be if state budget cuts *force* courts to keep relying on remote operations because they lack the resources to fully reopen even after the virus is gone.

**James M. Lynch** - I am thinking that Probate & Family Courts will re-open July 6, but not for all business at first. It will be for the emergency matters – e.g., restraining orders and motions to vacate that the courts are currently conducting telephonically. Then after a few weeks, all of the bench trials that were put off during the shut-down will start up. The reason for this is that trials would require only opening courts to lawyers, the parties and witnesses involved in those scheduled trials – i.e. a limited number of people. Depending on how those proceedings fare, other types of hearings will gradually begin to be conducted as the late summer wears on. There is a staggering amount of unaddressed business facing the courts right now that keeps piling up each day the shutdown continues. And the later the courts become fully operational, the harder it will be to dig out of the hole. To some, this may sound overly optimistic, but my best guess is that the courts will have resumed normal operations by Labor Day. But good luck getting a motion hearing scheduled: It may take a while before normal scheduling of those matters resume.

**Nicole K. Levy** – My colleagues' optimism is not infectious. I do not think the Probate and Family Court will be open in July, other than maybe a small, partial reopening for a very few cases. I believe the courts *might* begin rescheduling some major proceedings, such as trials that were bumped from March and April, for live hearings in late-July, but will continue to address most other matters virtually well past July. Evidentiary hearings and emergencies may also be a priority upon the courthouse reopening, but these too will be heard on a very limited basis. Emergencies will likely have a much stricter definition to generate a live hearing, although the standard for obtaining a remote hearing may remain measurably lower. As for motions, Pre-Trial Conferences, Settlement Conferences, status hearings and other non-emergencies, I echo Attorney Lynch's sentiment of, "good luck." Even after the court resumes some live hearings, many such non-emergency matters will likely continue to be heard remotely or rescheduled. The court was already overburdened prior to the pandemic, and now they have an even larger backlog. We cannot expect them to rectify this overnight. I will be curious to see whether the court has seen more cases

settle without a hearing, temporarily or for judgment, due to the pandemic. [Mediation remains the best option](#) for many parties during the coronavirus pandemic.

**Carmela M. Miraglia** – I agree with Attorney Levy; I do not think PFC courts will reopen this summer. Possibly we will see staff return in September to allow administrative personnel time to fine-tune the technology that will continue to be used to hear cases remotely, even after some live hearings resume. I see courts moving toward holding Motions, Settlement Conferences and Pre-trial Conferences via Zoom as remote hearings allow for a strict schedule compared to having multiple live cases scheduled at the same time with litigants and attorneys milling around crowded courthouses. Once the courts do open, I think trials will take priority. Although some courts may attempt to hold trials via Zoom, I think the logistics may prove to be a nightmare. Video images of witness testimony is achievable, but managing voluminous exhibit binders full of documentary exhibits seems like an impossible task based on the current level of technology used by the courts (perhaps Google will create the ultimate free “etrial” app to solve this, but I have seen no evidence of this yet.) The courts have long encouraged alternative dispute resolution as an alternative to litigation; I predict more litigants will seek to use [mediation](#) and conciliation to resolve their probate and family court matters as a result of the court closures. The unfortunate reality for those who cannot reach a resolution will be much longer wait times to be heard by a judge as the backlog of probate and family courts continues to grow.

**Kimberley Keyes** – – Maybe it is the product of my own “quarantine fatigue,” but I believe the courts will reopen in July on a very limited basis. Maybe each judge will start with holding live proceedings one day per week, limiting attendance to parties and counsel. Attendees will need to wear masks when they are not inside the courtroom and observe social distancing at all times when practicable. Remote hearings and pre-trial conferences by telephone and Zoom will continue, but I agree with Attorney Miraglia that it would be nearly impossible to conduct trials by video using the technology that is currently in place. The inevitable budget cuts as a result of the pandemic will impede the courts’ ability to deal with the backlog created by a three-month shutdown, despite what must be enormous pressure to resolve both old and new cases. Alternative dispute resolution will be promoted more actively to help achieve this goal – perhaps when the court mails back a summons or notice of assignment, it will include a flyer encouraging litigants to seek [mediation](#), conciliation or arbitration since, as my colleagues noted, people will be facing much longer-than-normal wait times to have a court decide their matters.

**Schedule a free consultation with one of [our attorneys](#) today at (781) 253-2049 or send [us an email](#).**

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