

A **ROUNDTABLE** DISCUSSION**PANDEMIC DIVORCE****FAMILY LAW IN THE TIME OF COVID**

As the pandemic continues, divorce rates are reportedly rising as couples deal with fallout from health crises, lockdowns, job losses, e-learning, financial stress and more.



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**What's the most common question or concern you're hearing from clients who are currently contemplating a divorce?**

**Timothy M. Daw:** People are trying to deal with great financial and emotional uncertainty, much like what we saw in 2008 and 2009. Costs of a divorce are of concern, as is the time the matter will be pending; in other words, how long their lives will remain in upheaval. People contemplating divorce are searching for a sense of control over the process during this period of great uncertainty. Ultimately the clients are asking about and seeking alternatives to limit the emotional and financial costs to the family.

**Has the pandemic affected the number of divorce filings you're seeing?**

**“... THERE'S A LACK OF TOLERANCE IN THE COURT SYSTEM FOR PARENTS USING THE PANDEMIC TO TRY TO DENY ACCESS BETWEEN A CHILD AND THE OTHER PARENT.”**

— **TIMOTHY M. DAW, SCHILLER DUCANTO & FLECK LLP**

**Daw:** There's been a significant increase in people consulting with us to gather information about the process and the issues they might face. There's also been an increase in filings. The unprecedented combination of health and financial uncertainty is taking a toll on family dynamics and relationships. This uncertainty, anxiety and fear are driving some people to question where they are and who they're with in their lives. This, in turn, fuels the increase in consultations and eventually, in many instances, the filings.

**What's the biggest change in how the court system is currently handling divorces and related matters?**

**Daw:** Early in the pandemic, the court system was largely paralyzed. As a result, the remote/virtual court system took hold. The virtual system works well with routine court appearances and well-defined non-complex issues. It doesn't work well for the more complicated family law cases that require litigation and substantial evidentiary hearings. It's anticipated that at some point in the not-so-distant future a combination of in-person and virtual proceedings dictated by the issues in the case will be the new norm. Many of us believe the virtual system will continue to increase, even post-pandemic, to take pressure off of the court system, which was overwhelmed even before COVID. We hope this will allow more time for those cases that need the system's help for resolution.

**What impact has video conferencing had on the process, including the issue of attorney-client privilege?**

**Daw:** While simple technology issues can derail virtual court appearances, had the court system not adopted these technologies, the process would have ground to a halt and stayed grounded. Given health considerations, the current virtual system is a necessary—but not ideal—tool to move cases forward, provided the clients and attorneys

are motivated to reach conclusions. These remote proceedings require additional preparation and planning. Unfortunately, some individuals take these proceedings less seriously. Having a witness sworn in person before a judge is a better option when it's possible to do so. As to attorney-client privilege, the rules have not changed whether a matter is heard electronically or in person. Communication, with certain exceptions, between an attorney and client remains absolutely privileged and can only be waived by the client.

**Are there other ways the pandemic has impacted how you operate your practice?**

**Daw:** We have an obligation to not only safeguard our clients' interests, but also the interests of the people who work with us, as well as our families and ourselves. We've had the ability to work remotely for some time, but not on the scale experienced earlier this year. An even greater level of communication has evolved in multiple formats with clients that we currently don't regularly see in person. Video communications—instead of phone, emails and/or text communications—has been very helpful for some clients who respond better to a more personal visual and auditory communication format. Overall, the pandemic has made our lawyers work differently, and in many instances, harder to achieve results for our clients.

**How has COVID affected parenting issues such as visitation, childcare, holidays and travel?**

**Daw:** Judges want to make sure the parent-child relationship is protected and the safety of the child preserved, especially in these uncertain times. Having a parent drive instead of fly to see their child, expanding visitation times but with less frequency combined with more face time, video conferences and calls have been used by parents separated by great distances from their children. My experience with these issues has demonstrated that there's a lack of

tolerance in the court system for parents using the pandemic to try to deny access between a child and the other parent. At the same time, the court system is also having issues with parents who lack the proper appreciation for the seriousness of the current crisis by placing their families at additional risk.

**If an individual with a support obligation—child or spousal—has experienced a drop in their income as a result of COVID-19, what steps can that person take to modify their support obligation?**

**Daw:** If there's been a substantial change in circumstances and a motion is not filed, the person obligated to pay the support will need to continue regardless of the change. No one, especially the judge, knows how long the economic uncertainty will last or what the economy will look like down the road. It's essential to have documentation of the change as well as any support for how long the change may persist. If the change is believed to be only temporary, in addition to filing something, it may make sense to work with the other person to arrive at a short-term solution and revisit the support issue in the future. However, any agreed-upon modification needs to be in a court order—or incorporated by reference into an order—and approved by the court.

**How has the pandemic impacted business valuations, as they relate to divorce settlements?**

**Daw:** Greater economic uncertainty for a business or business environment tends to result in more conservative, lower values. Uncertainty as to whether prior earnings will continue or what the prospects are for future earnings creates greater risk. Greater risk negatively affects value. Because of income and performance uncertainties, some valuation professionals are being more conservative or opting to use an asset

approach—generally, the lowest form of value. While certain businesses are doing very well despite or because of the pandemic, even in these instances, value can be negatively affected because the current successes of the business may not be replicated going forward.

**What advice do you have for someone considering a divorce at this time?**

**Daw:** For those who chose to file for dissolution of marriage at this time, avoid litigation if possible. Many cases can be settled with good attorneys on each side, the sharing of the necessary information and the willingness of the parties to compromise and reach agreements. For issues that can't be settled this way, I advise clients to consider an alternative dispute resolution process. It requires a high degree of information sharing, a level of trust between the parties, and attorneys willing and able to facilitate the process. The emphasis in these scenarios is to try to avoid the uncertainty, time and expenses inherent in litigation, especially in the current environment.

**What options are available to those who want to proceed with a divorce, but prefer not to litigate, and have those options changed since the pandemic began?**

**Daw:** The options have not changed dramatically. A starting place is to hire attorneys who will work with their respective clients and with each other to define and wherever possible resolve as many issues as possible. If issues remain, some form of alternative dispute resolution such as mediation or collaboration may make sense. In these situations, especially for more complicated cases, attorneys should participate and provide guidance to the client. Attorneys bring value based on their experience with complex issues and the ability to spot issues that aren't being addressed. The decisions to be made are some of the most important in people's lives—they need as much support and guidance as possible.