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Family

Why go back to the courthouse — the dialogue continues | AJ Jakubowska

By **AJ Jakubowska**

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(October 27, 2021, 11:57 AM EDT) -- Picking up the baton from my dear colleague, Gary Joseph, I am continuing the dialogue he initiated about going back to the courthouse ("Why go back to the courthouse?" Oct. 20). This is not a retort. Nothing in Joseph's piece deserves that agitated-sounding word.

Rather, we need to continue talking about this issue and to contribute different points of view because, I firmly believe, heterogeneity of ideas is the only recipe for improving and growing what we already have. I echo Joseph's invitation to members of the family law bar to speak up and share their comments, experiences and ideas.

Two distinct yet closely interconnected cohorts have been the consumers of the impressive advances our justice system has made since March 2020: the public and the justice system itself. I further divide the latter into two subgroups: the administration of justice and the practitioners.

There is no question that the onset of the pandemic placed a heavy burden on the administration — judges, court staff and other professionals who help our family courts perform their challenging function day to day. We, practitioners, have also had to climb a steep learning curve and adapt "on the fly," often doing so while trying desperately to maintain the appearance of normalcy for our clients.

Yet the comments I am about to make take the focus off the second cohort. That is because public interest must be the priority, at all times. Picking up on Joseph's language, the overriding question, including in a discussion of virtual court attendances, must be how we can "*better serve our clients*."

I write this during Access to Justice Week 2021. I suggest that is the only lens to use. There are many pros to virtual court, for the public. Joseph identified some of them, including convenience and cost savings. What about quality of justice (and I use this term to refer to both qualitative and quantitative justice)? The family court system is currently under a very heavy load and suffering from significant delays, at least in some jurisdictions. This is not a criticism. It is a statement of reality.

The reasons for these delays are complex but include the challenges identified by Joseph in relation to trials; despite our initial hopes that the virtual format would lead to more clockwork-like hearings — efficient, timely and focused — in reality they take more time. The virtual format also does not permit (at least not based on the current platform used) the "juggling" of cases — that efficient and most effective "*go outside and talk*" method used by conference judges pre-pandemic to keep the daily docket moving while maintaining ongoing contact with cases that benefited from the judge's oversight through the day.

What about advocacy, the central piece of our work for our clients in the court context? No one will convince me, and you are welcome to try, that advocating to a judge on a screen is the same as doing it in person. I have much more to say on this subject but must stop here as I am limited by the length of this piece. Perhaps we can take up the discussion at another time.

Access to justice means access to the best quality and quantity of justice possible. It means that the public's contact with the family court system when required should be prompt, cost-effective and

importantly, impactful. Has the quality of our advocacy suffered in the virtual context? I do not have a definitive answer.

What I do recall vividly are comments from many of my clients over the years about being in an actual courtroom and seeing a judge in person — what a profound impact that had on them, how much more seriously they took the process and how grateful they were to a conference judge who stayed in contact with their case for the entire day, patiently bringing it back to the courtroom and out again with the overall goal of brokering a settlement or at least a timetable. Such dynamic engagement is not readily available in the virtual context.

Let us not forget self-represented litigants (SRLs) when we talk about virtual court. For some, it is a boon. For others, it may mean new hurdles related to access to electronics/technology or challenges with privacy. Many found our system difficult to navigate pre-pandemic. For them, the virtual format, including electronic filing, has brought with it new potential obstacles to meaningful A2J.

My questions about the effectiveness of virtual advocacy notwithstanding, I believe that with ongoing effort, we can make virtual motions the new standard over time. I do support returning to the courthouse for conferences — the cornerstone of our case management system. I do not relish the thought for health reasons but this is not about me or us — it is about what is best for the public.

Each day, family court judges across Ontario continue to deliver the best justice possible in the current circumstances. I believe returning to live conferences would further enhance their efforts and put back in their hands some important tools they used before the pandemic, as gatekeepers to adversarial family law litigation.

I join Joseph's invitation to our colleagues to continue this dialogue.

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