

VIRTUAL HEARINGS IN CHILD PROTECTIVE PROCEEDINGS

There is ample support for the use of virtual fact-finding hearings in child welfare proceedings during the COVID-19 pandemic, at least while in-person proceedings are not permitted at all. While a variety of issues can arise from the manner in which a virtual hearing is conducted, it does not appear that such a hearing is per se unconstitutional.

In criminal proceedings, a critical component of the Sixth Amendment right of confrontation is the right to confront witnesses in person, face to face. *Coy v. Iowa*, 487 U.S. 1012, 1017-19 (1988) (There is “something deep in human nature” that regards face-to-face confrontation as essential to a fair trial). Even in criminal proceedings, however, the absence of in person, face to face confrontation, and the admission of video testimony, is permissible in certain exceptional circumstances.

This includes the need to protect emotionally vulnerable child sex abuse victims. See *Maryland v. Craig*, 497 U.S. 836 (1990); *People v. Cintron*, 75 N.Y.2d 249 (1990) (Court of Appeals upholds facial constitutionality of CPL Article 65, which authorizes trial court, under specified circumstances in certain sex crime cases, to permit child witness to testify from testimonial room over live two-way closed-circuit television). It also includes cases in which a prosecution witness cannot safely travel to appear in court because of old age and/or physical disability. See *People v. Wrotten*, 14 N.Y.3d 33, 36 (2009) (no error where court permitted adult complainant living in another state to testify via real-time, two-way video after finding that because of age and poor health he was unable to travel to New York to attend court; court’s inherent powers, and Judiciary Law § 2-b, vested it with authority to fashion the procedure).

Even less protection is provided in Article Ten and termination of parental rights proceedings, in which constitutional due process analysis under *Mathews v. Eldridge*, 424 U.S. 319 (1976) applies instead of the Sixth Amendment Confrontation Clause. *Matter of Nicole V.*, 71 N.Y.2d 112, 117 (1987) (“Because the accused parent is not subject to criminal sanctions in a child protective proceeding, the Legislature has provided that the usual rules of criminal evidence do not apply”).

Accordingly, even assuming *arguendo* that a virtual hearing cannot be held in a child welfare proceeding unless the court is faced with conditions similar to the exceptional circumstances required in a criminal proceeding, it is difficult to argue that the pandemic does not meet that test.

Longstanding practices in child welfare proceedings that limit the respondent’s confrontation rights provide additional reason to conclude that virtual hearings are permissible. Indeed, there is ample case law upholding the legality of conducting a hearing without the respondent being physically present, and/or being able to confront witnesses face-to-face, when the court provides adequate safeguards.

In Article Ten proceedings, when a sufficient evidentiary showing of necessity - usually the child's vulnerability - has been made, the court may allow a child to testify via Skype, closed-circuit television, or another videoconferencing procedure, or from a position in the courtroom that is not visible to the respondent. *Matter of Ariana M.*, 179 A.D.3d 923 (2d Dept. 2020) (Skype); *Matter of Nevaeh L.-B.*, 178 A.D.3d 706 (2d Dept. 2019) (closed-circuit television); *Matter of Emily R.*, 140 A.D.3d 1074 (2d Dept. 2016), *lv denied* 28 N.Y.3d 903 (child testified from position within courtroom from which she could be heard but not seen); *In re Alejandra B.*, 135 A.D.3d 480 (1st Dept. 2016) (closed-circuit television); *In re Arlenys B.*, 70 A.D.3d 598 (1st Dept. 2010) (two-way video conferencing).

In termination of parental rights cases in which a parent is incarcerated in another jurisdiction or for some other reason cannot personally appear, a hearing sometimes may properly be held in the respondent's absence. See *Neamiah Harry-Ray M.*, 127 A.D.3d 409 (1st Dept. 2015) (mother's due process rights not violated by court's refusal to permit her to testify via telephone where court properly determined that mother's credibility would be difficult to determine via telephone, but offered to let mother testify via video conferencing from local library or other location, mother was permitted to listen to proceedings by phone); *Matter of Eileen R.*, 79 A.D.3d 1482 (3d Dept. 2010) (respondent's counsel ineffective where counsel acquiesced in court's improper blanket policy barring respondent's telephonic testimony, did not request that respondent be permitted to present evidence or his own testimony, did not request adjournments so he could review transcripts with respondent prior to cross-examining witnesses, and was unable to comprehensively cross-examine without input from respondent); *In re Joseluis Juan M.*, 302 A.D.2d 219 (1st Dept. 2003), *lv denied* 100 N.Y.2d 508 (no due process violation where respondent participated by telephone).

Of course, the respondent's New York State constitutional right to the effective assistance of counsel would have to be safeguarded. We want to make sure that the court declares a recess after a witness's direct testimony so the respondent and his/her counsel might confer. See *Matter of Mirza S.A.*, 160 A.D.3d 715 (2d Dept. 2018) (after father viewed testimony via video linkup, court granted recess after ACS's direct case to permit father and counsel time to consult before cross-examining child, and permitted recess after completion of cross-examination for further consultation); *In re Hadja B.*, 302 A.D.2d 226 (1st Dept. 2003); *In re Falon P.*, 250 A.D.2d 497 (1st Dept. 1998).

Moreover, although hearsay is not generally admissible at a fact-finding hearing, FCA § 1046(a)(vi) makes admissible previous statements made by the child relating to any allegations of abuse or neglect. A finding may be made if such statements are corroborated by any other evidence tending to support the reliability of the statements. And, although a child's hearsay statement is inadmissible in a criminal proceeding if it appears that the child would not be competent to testify, no such rule has arisen under § 1046(a)(vi), and appellate courts have upheld the admission of out-of-court statements made by children as young as two-three years old. Against this backdrop, it becomes difficult to argue that a virtual hearing violates due process.

It is also significant that in Article Ten and termination proceedings, *fact-finding hearings are not always required*. Summary judgment is permissible in these proceedings. This procedure permits a court to make a determination based on admissible evidence in affidavits and other papers when the court also concludes that there are no triable issues of fact. The summary judgment motion must include factual allegations by someone with person knowledge; an attorney's information and belief affirmation will not be sufficient. The use of summary judgment was endorsed by the Court of Appeals in *Matter of Suffolk County Department of Social Services v. James M.*, 83 N.Y.2d 178 (1994), where summary judgment was granted where the acts of sodomy for which the respondent was convicted fell within the broad allegations in the abuse petition. Summary judgment has been ordered in TPR cases, although the clear and convincing evidence standard and the severe sanction involved should cause us to be even more cautious than in Article Ten cases. Mental illness and intellectual disability cases may lend themselves to summary judgment when there is a recent expert evaluation and a court finding regarding the respondent's other children. But permanent neglect cases involving nuanced, fact-driven diligent efforts and failure to plan determinations are much riskier, at least when diligent efforts have not been excused or the issues are less complex because the respondent is incarcerated.

In any event, putting aside the fact that the summary judgment procedure may itself be used during the pandemic, the point is this: appellate courts' endorsement of a procedure that precludes all witness confrontation provides further support for the use of virtual hearings.

Finally, while they do not involve state intrusions into the constitutionally protected right of families to be together, recent decisions permitting COVID-19 virtual hearings can be cited as well. See *Matter of Haydee F. v. ACS-NY*, Docket No. G-15246-19 (Fam. Ct., N.Y. Co., 10/28/20) (guardianship proceeding); *C.C. v. A.R.*, 2020 WL 5824118 (Sup. Ct., Kings Co., 2020) (matrimonial action that included contempt application).

The strongest argument against conducting a virtual hearing appears to be that in the absence of a compelling need to proceed, the best course is to wait until an in-person hearing can be conducted so the parties' due process rights are most effectively protected.

While the COVID-19 pandemic surely is an extraordinary circumstance that prevents this court from conducting an in-person hearing and providing full due process at this time, the court has the option to commence the hearing after in-person hearings become possible. In these circumstances, it makes no sense at all to conduct a hearing that will be difficult to navigate, is predestined to place the parties' due process rights at risk, and, if there is an appeal, may well be found unconstitutional. It makes far more sense to retain the status quo and wait. Waiting harms no one.

The court's desire to start clearing its case backlog falls woefully short of providing an important State interest generally, much less an individualized determination that this particular case needs to proceed despite the impairment of due process rights. No other

reason to proceed has been posited, or is apparent. There is no legitimate, much less important, State interest at play. See *United States v. Pangelinan*, 2020 WL 5118550 (D. Kansas 2020) (government failed to show it was necessary to present testimony by two-way video to further important public policies where prosecution of sex traffickers and those who abuse women, and limiting spread of virus, were important public policies, and video testimony might be reasonable resolution due to witnesses' health concerns, but there were reasonable alternatives, *including a continuance until transmission rate of the virus improves*). In contrast, the respondent's and the children's important constitutional rights are implicated. See *S.C. v Y.L.*, 67 Misc.3d 1219(A) (Sup. Ct., N.Y. Co., 2020) (in matrimonial proceeding, court declines to conduct virtual contempt hearing, noting that it would be problematic and perhaps impermissible to conduct virtual hearing in proceeding that could result in defendant being sentenced to jail, that hearing was unlikely to be workable on Skype for Business platform; and that a contempt hearing "is far too serious a proceeding to operate under these less than optimum conditions").

Perhaps most importantly, counsel's ability to provide effective assistance will, at the very least, be impaired. Even if the parties and counsel are permitted to communicate privately, the contemporaneous and ongoing communication that is so essential to a fair trial, and, quite often, to counsel's ability to cross-examine a particular witness, will be absent if the party and counsel are not in the same room. In *Craig*, the procedure required that the child witness, the prosecutor, and defense counsel withdraw to a separate room, while the judge, the jury, and the defendant remain in the courtroom. Under Criminal Procedure Law § 65.30(5), if the order of the court requires that the defendant remain in the courtroom, the attorney for the defendant and the district attorney shall also remain in the courtroom unless the court is satisfied that their presence in the testimonial room will not impede full and private communication between the defendant and his or her attorney and will not encourage the jury to draw an inference adverse to the interest of the defendant. Thus, neither the procedure upheld in *Craig*, nor the procedure upheld in *Cintron*, deprives a defendant of both the opportunity to consult with counsel during the child witness's testimony, and the opportunity to have counsel confront the witness face-to-face. And, of course, in *Wrotten* the defendant and his counsel were together during the televised testimony.