

TRUSTS AND ESTATES LAW

Expert Analysis

Consider the Potential Benefits of Mediation Or Referees During the Pandemic

With New York state “on pause” for the foreseeable future, many practitioners are coming up with creative ways to service their clients during the COVID-19 pandemic, while maintaining safe “social distancing” protocols and ensuring the health of our colleagues and clients. Our ability to service our clients, particularly in the trusts and estates field, is even more significant now that New Yorkers and individuals across the world are faced with uncertainty about their health, finances, and their ability to provide for their families.

RAYMOND RADIGAN is a former Surrogate of Nassau County and of counsel to Ruskin Moscou Faltischek, P.C. He also chaired the Advisory Committee to the Legislature on Estates, Powers and Trusts Law and the Surrogate’s Court Procedure Act. LOIS BLADYKAS is an associate at the firm. Her practice focuses on trust and estate litigation.



By
**Raymond
Radigan**



And
**Lois
Bladykas**

As nearly all practitioners will know, pursuant to the Administrative Order of the Chief Administrative Judge of the Courts Law-

The use of a mediator during this time of “social distancing” is possible through video and other electronic means, and if matters are resolved, the burden on the court system will be reduced.

rence K. Marks, dated March 22, 2020, the New York state court system has closed many of its functions, and no new filings shall be accepted except in matters deemed “essential,” the definition

of which varies by court and practice area. On April 13, 2020, Judge Marks expanded the court system’s operations to allow for “virtual” access to courts in existing matters, including the ability to conduct conferences and hearings by Skype or telephone. Courts have also been authorized to move pending matters forward by deciding pending motions.

This expansion of practitioners’ and litigants’ access to the courts is significant and will hopefully reduce the strain on the court system, which will undoubtedly occur when new filings are permitted and practitioners file many papers and new proceedings at once. In addition to the important and helpful expansion of “virtual courts,” parties and litigators alike should consider retaining mediators and requesting the appointment of referees in existing litigated matters, to

bring cases to resolution and move discovery along, to the extent possible.

In contested Surrogate's Court matters, the use of a mediator during this time of "social distancing" is possible through video and other electronic means, and if matters are resolved, the burden on the court system will be reduced. Throughout the state, Surrogate's Courts have implemented plans for presumptive, early alternative dispute resolution. Before the pandemic, many Surrogates appointed private attorneys, retired Surrogates, and retired court staff to mediate matters, with much success. Mediation sessions, like court conferences and hearings, may be conducted virtually, via telephone, Skype, Zoom or the like. Parties and counsel should consider whether now is an appropriate time to retain a private mediator, or request that the Surrogate appoint a mediator, if available through the court.

In addition to mediation, parties and counsel should consider whether the appointment of a referee pursuant to SCPA 506 would benefit their case at this time. Pursuant to SCPA 506, in any proceeding (other than a probate

proceeding, a proceeding where a constitutional right to trial by jury exists and is demanded, or in an accounting proceeding where the estate is valued at \$1,000 or less or the objections filed do not aggregate more than \$200), the Surrogate may appoint a referee to hear and report to the court upon questions of fact or upon the law and facts. The court may also appoint a referee to supervise disclosure in an existing proceeding, where appropriate, pursuant to CPLR 3104. Like mediation sessions, sessions with a court-appointed referee could be conducted telephonically or virtually, giving parties and counsel the opportunity to advance their cases and reduce the backlog of cases that continues to accrue.

Some Surrogates have appointed retired Surrogates and others to act as mediators, and if the mediation is not initially successful, the mediator may then act as a referee with respect to disclosure. Pursuant to CPLR 3104, the parties may stipulate to, or the court may appoint, the mediator/referee to supervise disclosure until the matter is ready for trial. At that time, the mediator may ask the parties to resume the mediation and attempt to

reach a compromise again, with the benefit of the parties having completed discovery and having disclosure of the relevant facts of the case.

The New York State court system, like all businesses and organizations throughout the state, has been significantly impacted by the COVID-19 pandemic. The appointment of a mediator or referee in contested Surrogate's Court proceedings is just one of the ways that practitioners may manage their caseload during these unprecedented times, with the added benefit of reducing the burden on the courts.