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## LawTalk Blog



# Trials by technology in family law - the traditional vs virtual courtroom

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In an [earlier blog](#), we touched on the way the courts are now conducting hearings in family law matters as a result of the COVID-19 restrictions.

So far, the [Federal Circuit Court](#) and [Family Court of Australia](#) have stopped conducting hearings, mediations and conferences in the usual court room setting due to social distancing restrictions. All hearings have been conducted remotely either by telephone or video link, with the video links being facilitated through the use of [Microsoft Teams](#).

Many trials were adjourned as a result of the pandemic but there are now reports that with the COVID-19 restrictions being eased, that those trials are now being listed to proceed by video mechanisms in the coming months.

The use of this technology during court proceedings has led the legal profession, and some of our clients, to wonder whether the Judge hearing their matter trial via these technological means will negatively affect the outcome of their case.

The question really is:

## Will clients be put at a disadvantage if their matter isn't being conducted in a traditional court room setting?

## The 'traditional' court room

If you haven't been to a court room before, you may have at least seen how the court room looks on television. There is a Judge sitting on the bench at the front of the court room, the lawyers sitting in front of the judge and the clients and rest of the public behind them.

[Section 97\(1\) of the Family Law Act](#) directs that family law proceedings under the Act conducted in the Federal Circuit Court are to occur in open court. This means that the court room is open to any member of the public to come and listen to the proceedings. The court does however have the power to close the court or exclude persons or classes of persons from the court. Children under 18 years old are not allowed inside the court room.

There is a sense of formality and personal nature that being in a traditional court rooms brings – the lawyers are able to speak to the Judge directly in person and all parties and the Judge have the benefit of reading facial cues and body language.

The benefit of being in a traditional court room, particularly for trials, is that a party can provide their evidence and be cross-examined or tested on their evidence in person. Testing the truth of what someone is saying at a family law trial is one of the most important factors of the litigation process. The way someone presents themselves and what they say in the witness box can ultimately affect the decision a judge makes in a family law matter. It has been said that conducting cross-examination in person brings benefits.

## Three main benefits of conducting cross-examination in person:

1. It enhances the prospect that the witness will remain conscious of being in a court setting and their obligations (to swear or affirm on oath to tell the truth);
2. It provides the cross-examiner (usually a barrister) comfort in knowing that the judge has a watchful eye over the witness;
3. It provides the court a more satisfactory environment in which to assess the nature, quality and reliability of responses by a witness.

So are these benefits affected by the use of the virtual courtroom?

## The 'virtual' courtroom

The move to hear trials by audio and video means presents the courts and profession with significant challenges.

## Challenges of a virtual courtroom:

1. The element of formality of a traditional court room has been somewhat lost. Appearing by telephone or by video link does not present the same significance that being in a physical court room brings.
2. Reports of children and animals making noises and appearing in the background of virtual hearings and practitioners in questionable court attire are a far cry from what is seen in the traditional courtroom.
3. Legal practitioners and parties have also somewhat lost the ability to read a Judge's facial expressions and body language during a hearing, particularly so when hearings proceed by telephone only.

## Virtual cross-examination

Concerns have also been raised as to the conduct of trials by video mechanisms and whether legal practitioners and parties will effectively be able to participate in the cross-examination process. It has been queried whether cross-examining a party through video mechanisms will affect the chemistry that happens during cross-examination in person and therefore the ultimate result. There are also concerns that witnesses giving evidence by video at home may have access to their own notes and documents they can rely upon secretly, therefore manipulating the evidence being presented during the trial.

One practitioner anonymously reported that trials running by technology during COVID-19 presented them with issues including:

*"The judge couldn't see anyone; lines dropped out regularly; witnesses didn't know where to go...subpoenaed material could not be accessed by anyone; feedback [from computers] made it impossible to proceed."*

Issues such as these could arise in family law trials and cause a flow on effect in time and cost, as a trial that would normally take 2 to 3 days in a traditional court room could potentially push out to a longer trial when taking into account technological roadblocks that may arise during the process.

## Conclusion – traditional or virtual court rooms?

The fundamental obligation of the court is to ensure that parties to proceedings have a fair hearing according to law. The use of video or audio mechanisms, whilst not perfect, still provide litigants the opportunity to present and defend their cases. Ultimately, a trial by video still allows for evidence to be gathered and assessed by the Judge, which is the main purpose of a trial.

Overall, the clear benefit of having a virtual courtroom during this pandemic is that the court has still been able to hear matters which otherwise would have been put off further into the already overworked and under resourced family law court system.

Only time will tell as to whether the courts will continue utilising the virtual courtroom post COVID-19.

This blog post was written by [Ryan Thomas](#) and [Daniella Cutufia](#).

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