

The Supreme Court of Ohio

CASE ANNOUNCEMENTS

April 16, 2020

[Cite as *04/16/2020 Case Announcements #2, 2020-Ohio-1489.*]

MOTION AND PROCEDURAL RULINGS

2020-0490. State ex rel. McArtor v. Kovack.

In Mandamus and Prohibition. On relator’s motion for emergency stay of proceedings. Stay granted as to all nonemergency in-person hearings. This court’s order does not preclude respondent, Judge Mary Kovack, from holding telephonic proceedings or proceedings via video conference.

Kennedy, J., dissents, with an opinion.

Stewart, J., dissents, with an opinion.

KENNEDY, J., dissenting.

{¶ 1} I dissent from the court’s judgment granting an emergency stay in cases before respondent, Judge Mary Kovack of the Medina County Court of Common Pleas, Domestic Relations Division, involving relator, David L. McArtor. McArtor alleges that Judge Kovack “continues to hold in-person final hearings on non-essential and non-emergency issues” and therefore “has jeopardized and is continuing to jeopardize the health of the community at large.” He seeks a writ of mandamus to compel Judge Kovack “to reschedule all non-essential final hearings for no less than three weeks after May 1, 2020.” At this time, he asks for “[a]n emergency stay of all non-essential and non-emergency final hearings” in Judge Kovack’s court until this court rules on his petition.

{¶ 2} On April 2, 2020, the director of the Ohio Department of Health (“ODH”) issued an amended order directing that all persons stay at home unless engaged in essential work or activity.

Amended Director’s Stay at Home Order, <https://coronavirus.ohio.gov/static/publicorders/Directors-Stay-At-Home-Order-Amended-04-02-20.pdf> (accessed Apr. 15, 2020) [<https://perma.cc/84VN-GHBQ>]. The order provides that “[e]ach government body shall determine its Essential Government Functions.” *Id.* at 5. Judge Kovack, using this court’s “Guidance to Local Courts COVID-19 Public Health Emergency,” [Guidance to Local Courts COVID-19 Public Health Emergency](http://www.supremecourt.ohio.gov/coronavirus/resources/localCourtGuidance03.20.20.pdf), <http://www.supremecourt.ohio.gov/coronavirus/resources/localCourtGuidance03.20.20.pdf> (accessed Apr. 15, 2020) [<https://perma.cc/3GFM-V4RY>], to aid in determining which government functions are essential—including determining what issues require an essential hearing—has implemented policies and procedures to address the security and safety of employees, attorneys, and litigants needing to access the domestic relations division in accordance with the order. Therefore, I dissent and would deny the motion for an emergency stay.

{¶ 3} The crux of the issue whether to grant an emergency stay centers on what is a “nonessential hearing.” McArtor seeks an emergency stay of some of his cases pending before Judge Kovack on the basis that he believes certain hearings are nonessential.

{¶ 4} Judge Kovack responds that she is taking the COVID-19 pandemic seriously and has proactively addressed access to the court. Judge Kovack explains that she is concerned for the safety and security of all persons and is triaging cases and issues into essential and nonessential matters.

{¶ 5} This is in response to the rapidly evolving series of events that began on March 9, 2020, when Governor Mike DeWine declared a medical state of emergency after three Ohioans tested positive for COVID-19. Executive Order 2020-01D, <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/2020-03/Ohio%20Emergency%20Declaration.pdf> (accessed Apr. 15, 2020) [<https://perma.cc/5NVG-EQT8>].

{¶ 6} On March 13, 2020, President Donald J. Trump declared a national state of emergency regarding COVID-19. Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (accessed Apr. 15, 2020) [<https://perma.cc/B34A-FBFA>].

{¶ 7} On March 13, 2020, this court’s chief justice e-mailed a letter to judges across Ohio encouraging them to move forward in the administration of justice during the health crisis and declaring that “[c]losing the courthouse and disrupting services is not a plan.” March 13, 2020 Letter, <http://www.sc.ohio.gov/coronavirus/resources/letterOhioJudges.pdf> (accessed Apr. 15, 2020) [<https://perma.cc/L23K-LAFF>].

{¶ 8} On March 30, 2020, this court promulgated a guidance bulletin stating, “While there is no one solution that will be appropriate for every court, there are a number of options that should be considered under existing authority.” The guidance bulletin provides suggestions on how local courts could minimize physical appearances at court; maintain access to courts; handle bail, bonds and warrants, and incarcerated individuals; and maintain communication with staff, the public, and those who access court services.

{¶ 9} The ODH order followed on April 2, 2020, and mandates that “all individuals currently living within the State of Ohio are ordered to stay at home.” Amended Director’s Stay at Home Order at 1. But the order also provides for certain exceptions: “All persons may leave their homes or place of residence only for Essential Activities, Essential Governmental Functions, or to participate in Essential Businesses and Operations.” *Id.*

{¶ 10} The order includes a section titled, “Essential Governmental Functions,” in which it exempts “judges, court personnel, jurors and grand jurors, * * * and other governmental employees working for or to support Essential Businesses and Operations.” *Id.* at 5. The order defines “Essential Government Functions” as “all services * * * needed to ensure the continuing operation of the government agencies” and directs that “[e]ach government body shall determine its Essential Governmental Functions and identify employees * * * necessary to the performance of those functions.” *Id.* Moreover, the order directs that nothing contained within it “shall prohibit any individual from performing or accessing Essential Governmental Functions.” *Id.*

{¶ 11} The social-distancing requirements in the order mandate that people who are engaged in essential-business functions maintain at least six feet from others and that they frequently wash their hands or use hand sanitizers. *Id.* at 9.

{¶ 12} In response to McArtor’s motion for an emergency stay, Judge Kovack states that since the onset of the COVID-19 emergency, she has been at the forefront providing safety and security for employees, litigants, attorneys, and the public at large. Beginning on March 12, 2020, Judge Kovack’s efforts include furloughing all inmates who had been jailed in the Medina County

Jail pursuant to an order issued by her court, staying the execution of outstanding warrants, releasing all individuals arrested pursuant to a warrant from her court on a recognizance bond, engaging the county and other agencies—including the Medina County Health Department—in planning and establishing guidelines to protect the safety of those who access the courts and the public at large, formalizing regular cleaning and sanitizing of the courthouse “thoroughly and regularly throughout the work-day,” instituting procedural modifications to implement social distancing and limiting face-to-face contact, marking appropriate distance areas inside the courthouse with bright white tape, dividing the staff into shifts to limit on-site exposure, moving in-person hearings to telephone conferences, transitioning the teleconferencing system to a more stable and reliable system and affording parties and counsel notice about the transition, applying for a technology grant from this court to assist with eliminating “nearly all in-person hearings,” transitioning to the acceptance of fax filings, instituting “informal emergency mediation” to resolve parenting disputes regarding parenting time and parenting-time exchanges of children, closing the Supervised Parenting Time and Exchange Center, suspending parenting-education classes, instituting court-monitored virtual-parenting time, resetting hearings when litigants have been uncomfortable with attending their hearings, conducting triage on all cases—on a case-by-case basis—to assess when a hearing is essential, and rescheduling “all dissolution hearings one-half hour apart, so that no more than one case at a time will be on-site at the courthouse.” Judge Kovack states in her answer that “the Court uses the teleconferencing to assess the status of the case” and that the “teleconference system also allows the Court to exercise its discretion to determine whether those cases that have no likelihood of settlement need immediate attention (essential hearing) or can be set out (non-essential hearings).”

{¶ 13} According to Judge Kovack, McArtor has filed motions for continuances “en masse” and his motions are all “nearly identical insofar as they include a restatement of the Supreme Court guidelines that all non-essential cases may sua sponte be continued.” Whether to grant a motion for an emergency stay turns on the question of who decides what is an essential matter requiring an essential hearing.

{¶ 14} The order leaves it to the discretion of each governmental body to determine what its “essential governmental functions” are. Amended Director’s Stay at Home Order at 5. Our guidance bulletin is not an edict from this court. The guidance bulletin leaves to the sound discretion of the local judiciary how best to manage the daily challenges that the COVID-19

pandemic has foisted on local courts and provides suggestions—a list of what to think about—in managing the crisis while maintaining the central purpose of keeping courthouses open. The guidance bulletin suggests that local courts distinguish between essential hearings and nonessential hearings, use teleconferencing or videoconferencing, waive appearances, extend deadlines for court-ordered classes, issue recognizance bonds at bail hearings, refrain from issuing warrants on minor offenses, impose noncustodial sanctions, use discretion to release individuals in jail, coordinate with the county or city public-health department, and communicate about essential operations. Everything our guidance bulletin has suggested that a local court to do Judge Kovack has done. Ours is not a unified court system in which separately run courts are consolidated into one centrally managed court system. In Ohio, courts are controlled by the judges who have been elected to run them. The ODH order and our guidance bulletin leave the management of cases and categorizing hearings as essential or nonessential to the sound discretion of each individual judge.

{¶ 15} As for holding essential hearings, I would reiterate that the safety and security of everyone involved is paramount. Pursuant to the order, certain parameters must condition any court’s determination of whether and how an essential hearing can be held. Judge Kovack and her staff should continue to review the ODH order and all ODH updates, continue to maintain the measures already in place, and as more information becomes available, implement new measures that will enhance protections for the safety and security of all persons who access the court. Although the order, for obvious reasons, cannot require social distancing for all governmental bodies, ours is a world in which social distancing is possible. I would recommend that Judge Kovack and her staff develop and implement, as the order requires other essential businesses to do, socially distanced designated spaces for litigants and attorneys to stand and sit in the courthouse while waiting for essential hearings and in the courtroom while essential hearings are being conducted. Also, courts must recognize that the order “urges” people in the high-risk category—the elderly and people with underlying health issues—to take additional precautions and remain at home unless seeking medical care. *Id.* at 3.

{¶ 16} Although Sup.R. 39, which sets a case’s time limits, may impact a local court’s decisions about what is an essential hearing, this court’s tolling order issued in response to the health crisis tolls the time requirements contained in the Rules of Superintendence for the Courts of Ohio. *In re Tolling of Time Requirements Imposed by Rules Promulgated by Supreme Court and Use of Technology*, 158 Ohio St.3d 1447, 2020-Ohio-1166, 141 N.E.3d 974; *see also In re*

Application of the Rules of Practice of the Supreme Court of Ohio, 158 Ohio St.3d 1469, 2020-Ohio-1461, 142 N.E.3d 706. The order tolls the time by which appellate courts and trial courts are required to complete certain case types of cases from March 9, 2020 until “the expiration of Executive Order 2020-01D or July 30, 2020, whichever is sooner.”

{¶ 17} The responsibility for keeping people safe while continuing to administer justice does not lie solely with judges. To aid Judge Kovack and other courts in engaging in case triage, I recommend that in lieu of systematically citing the guidance bulletin’s recommendation of the sua sponte granting of continuances, counsel should set forth specific reasons for the requested continuance—e.g., a party or witness is in a high-risk category or is unavailable as a result of quarantine. Counsel could also present reasons why the hearing is nonessential.

{¶ 18} This is a time when now, more than ever, all partners in the justice system must work together. While no one solution is right for every court, working together will yield the right solution for any court. As Judge Kovack stated, this is “an evolving situation for everyone,” and we should be prepared to engage and address the challenges as they come.

{¶ 19} Seeking emergency intervention from this court by requesting an injunction and asserting that Judge Kovack somehow lacks jurisdiction to manage the caseload of her own court is the wrong approach. But the majority accepts McArtor’s invitation to interfere. Because Judge Kovack is doing everything the order requires and our guidance bulletin recommends, I would deny the motion for emergency stay. Therefore, I dissent.

STEWART, J., dissenting.

{¶ 20} Relator, David L. McArtor, seeks to stay the *possibility* of in-person hearings in his cases. “To be justiciable, a claim must be ripe for review, and a claim is not ripe ‘if it rests on contingent events that may never occur at all.’ ” *State ex rel. Quinn v. Delaware Cty. Bd. of Elections*, 152 Ohio St.3d 568, 2018-Ohio-966, 99 N.E.3d 362, ¶ 37, quoting *State ex rel. Jones v. Husted*, 149 Ohio St.3d 110, 2016-Ohio-5752, 73 N.E.3d 463, ¶ 21. Even if this court takes respondent Judge Mary Kovack’s inartfully worded order for “Instructions for Hearings” at face value, an in-court appearance will be required *only* if a telephonic hearing fails to resolve the matter. McArtor’s complaint does not allege that Judge Kovack has conducted a telephonic hearing in any of his cases, so the issue whether an in-person hearing will be required is therefore not ripe. I would thus deny the motion for an emergency stay at this time.
