

PRACTICAL NEWS COVID-19 News Source

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COVID-19 and Custody Arrangements

The COVID-19 virus threat to public health presents an unprecedented problem for divorced and separated parents. Many parents are faced with the dilemma presented by a court order that requires a child to move between their homes knowing that it's possible that the virus will travel with the child, potentially infecting others in the home(s). While some parents are indeed moving their children back-and-forth during this pandemic other parents have elected not to move their child to minimize the risk of infection. In some situations, this has caused strife between the parents. The following hypothetical situation is intended to explore the latter group.

Scenario

Under the terms of the parties' agreement and Judgement of Divorce (JOD), the child primarily resides with the mother and the father sees the child alternate weekends and one mid-week overnight each week. There is no history of interference with parenting time over the few years since the parties physically separated. Both parents are in their 40s, both are remarried and their respective new spouses have children of their own.

On approximately March 15, 2020, the mother declines to allow the child to go to the father's home for 14 days. The child and father continue to "speak" via electronic means (Facetime, Zoom, etc.).

The mother explains to the father:

There is no available test to determine whether anyone in either of our households is infected with COVID-19. The incubation period of this virus is, according to the published information, up to 14 days.¹ Further, we are told by the head of the CDC that public health officials estimate

that as many as 25% of infected individuals are asymptomatic² which means that even if we're all asymptomatic today, any of us could be infected and even after a 14 day quarantine, we can't be certain that we're all infection-free.

In the absence of a test, the next best way to assess our state of infection is inferentially: if we both quarantine our respective households for 14 days after which no one is symptomatic, the public health experts appear to tell us that the chances are that none of us is infected. At that point, if everyone in our respective households follows the rules of staying home and social distancing, we can resume having our child go between our homes because we've now demonstrated to ourselves that it's likely that no one in our households is infected.

On the other hand, if our child goes between our homes based on the schedule in our agreement, he could carry the virus between our homes and everyone in each of our homes would be exposed to the virus with consequences of illness ranging from mild flu-like symptoms to death. Mortality is not the sole issue. Infected people who do not require hospitalization can get very sick.³ The issue is not merely the health of our child; it's the health of everyone in our households, including us. Using masks and wiping down surfaces is a hopeless solution to the problem of infection between people in the same household. I think it's unreasonable for either of us to demand that the other take that risk.

I emphasize, my goal is not to interfere in your relationship with our child. You can "speak" with each other during this 14-day period and I have no problem arranging for make-up time once this crisis has passed. This is a public health emergency unprecedented in the modern world. Our economy, our society, has come to a screeching halt. To ensure everyone's health, our core institutions – legal and otherwise – have effectively suspended operations and our usual obligations have been put on hold. Our options for responding to this crisis cannot be restricted to complying with an agreement and judgment that pre-dates and obviously does not contemplate this emergency.

What Will the Court Do?

Once the father is able to go to court after the emergency has passed, will the court hold the mother in contempt? Can anyone say that the mother in this situation illegitimately took the steps she took? Consider the case where a parent declines to send an undisputedly ill child for parenting time. What court will hold such a parent in contempt? Will a court rule, given the constant warnings, that the mother's risk assessment was wrong; that she was exaggerating the risk of infection or the consequences of that infection; that she should have risked the severity of illness described in Jessica Lustig's article? Suppose the mortality rate for Covid 19 were the same as the 50% mortality rate for Ebola. Would that change the court's assessment? Are we to assess the mother's conduct on the basis of a standardless calculation of acceptable risk? Are courts and lawyers expected to contend with the complexities of epidemiological statistics to determine the reasonableness of the mother's conduct? Will a court rule that the only issue is the health of the child, that the risk to the mother and her family are irrelevant (see the ACS section below)? If a parent became ill with the virus or died, there's a chance that at some point that child will blame herself for the parent's illness or death. In the face of this emergency, is the father's insistence on adherence to the court order something to consider? A

court could conclude that it reflects poorly on his ability to adapt and on his priorities and judgment.

ACS Memo as a Model for How to Make this Decision

The New York City Administration for Children's Services (ACS) is dealing with this problem in the context of visitation between children in its care and their parents. This situation is different than a private dispute between individuals because it involves the more complicated situation of state deprivation of a parent's constitutionally protected rights.

ACS has issued a memorandum that tries to balance the need for children and parents to see each other and the risks of contagion. ACS's memo insists that the agency make safety and health judgments. In-person visits should continue if they are "consistent with the health and safety" of the child and the adults. If it is "necessary for health and safety reasons," video visits can be arranged in lieu of in-person visits. Providers are directed to follow court orders "as closely as safely possible given the public health emergency." Further, by recognizing that the continuation of in-person visits must be consistent with the "health and safety of the child, parent, case planner and foster parent," the memo acknowledges that the child's safety is only one factor and that the safety of the adults is also relevant. In short, ACS tells caseworkers to make informed judgments balancing all of the factors.

Justice Sunshine's Memo

Justice Jeffery Sunshine, the Statewide Coordinating Judge for Matrimonial Matters, published an article in which he emphasized that even during a public health crisis, parents are expected to conduct themselves "appropriately and sensibly." Children benefit, he writes, especially in a crisis, when parents cooperate and, he points out, children remember when their parents "behaved to make sure they were safe, allowed access by technology if illness or the risks of travel prevented access, and that both of their parents put their differences aside...." Justice Sunshine does not say that parenting time based on an agreement, judgment, or order must proceed regardless of the current crisis. Judgment, sensibility, and adaptability to unique circumstances, including the use of technological work-arounds, are expected of parents.

Conclusion

This crisis presents an unprecedented parenting challenge. Justice Sunshine has emphasized that parents should keep in mind that their conduct during this crisis may be evaluated later. Parents who set aside their differences and give priority to their child's best interests, rather than their own, will be able to withstand scrutiny, but parents who use this crisis as a pretext to interfere with and undermine the child's relationship with other parent should not be surprised to pay a price down the road.

¹ NPR reported on 4/1/20, 0, <https://www.npr.org/sections/health-shots/2020/04/01/824903684/the-science-behind-a-14-day-quarantine-after-possible-covid-19-exposure>, "Once a virus infects someone - a host - it takes some time for the virus to make enough copies of itself that the host begins to shed the virus, through coughs or sneezes, for instance. (That's the way the host helps the virus spread to other people - who are then new hosts.) This is the virus' incubation period. For us hosts, it's generally the time between when we're first infected and when we start shedding the virus, which may be a little before we start experiencing symptoms. "The incubation period varies from virus to virus and sometimes from host to host," says [Rachel Graham](#), a virologist at the University of North Carolina's Gillings School of Global Public Health. For the virus that causes COVID 19 - its official name is SARS-CoV-2 - [researchers have found](#) that the typical incubation period is about five days. About 97% of the people who get infected and develop symptoms will do so within 11 to 12 days, and about 99% will within 14 days." *Science Daily* 3/27/20, www.sciencedaily.com/releases/2020/03/200317175438.htm, reported that "A new study [from the UMass/Amherst] calculates that the median incubation period for COVID 19 is just over 5 days and that 97.5% of people who develop symptoms will do so within 11.5 days of infection." *Medscape* 4/3/20, <https://www.medscape.com/answers/2500114-197431/what-is-the-incubation-period-for-coronavirus-disease-2019-covid-19>, "Symptoms may develop 2 days to 2 weeks following exposure to the virus."¹³ A pooled analysis of 181 confirmed cases of COVID 19 outside Wuhan, China, found the mean incubation period to be 5.1 days and that 97.5% of individuals who developed symptoms did so within 11.5 days of infection."

² See, e.g., NPR's report on 3/31/20, <https://www.npr.org/sections/health-shots/2020/03/31/824155179/cdc-director-on-models-for-the-months-to-come-this-virus-is-going-to-be-with-us>.

³ See, e.g., Jessica Lustig, "What I Learned When My Husband Got Sick with Corona Virus," *New York Times Magazine* 4/5/20, also published on 3/24/20, and at <https://www.nytimes.com/2020/03/24/magazine/coronavirus-family.html?searchResultPosition=1>.

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