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## HOW TO STAY-AT-HOME WHEN YOU HAVE TWO HOMES: COVID-19'S EFFECT ON CO-PARENTING AND CHILD CUSTODY

Multi-household families are prevalent in America due in part to the large numbers of children of divorce,<sup>1</sup> and 39.6% of American children being born out of wedlock.<sup>2</sup> As state and local governments across the nation ordered people into their homes during the coronavirus pandemic, the orders seemed to skip over members of multi-household families.

If the Covid-19 pandemic had broken out even twenty years ago, it likely would not have caused quite the extent of the custody issues it has today. Child custody has changed drastically over the years as divorce rates have risen and increasing numbers of children are born out of wedlock. As of 2015, fewer than 46% of children live in families with two parents who are in their first marriage.<sup>3</sup> Mothers overwhelmingly now work outside the home, requiring families with two working parents to be innovative in their custody and childcare solutions. As gender roles and family structures have changed rapidly over the years, so has the child custody system. The “usual” parenting plan with a mother having the children full-time and a father having them every other weekend and for two weeks in the summer is no longer the norm.<sup>4</sup> Truly “joint” parenting plans where the children spend equal or substantially equal time with each parent have increased

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<sup>1</sup> *Marriage and Divorce*, AMERICAN PSYCHOLOGICAL ASSOCIATION, <https://www.apa.org/topics/divorce#:~:text=they%20are%20also%20good%20for,subsequent%20marriages%20is%20even%20higher> (last visited Aug. 20, 2020).

<sup>2</sup> National Center for Health Statistics, *Unmarried Child Bearing*, CENTERS FOR DISEASE CONTROL, <https://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm> (last visited Aug. 20, 2020).

<sup>3</sup> *The American Family Today*, PEW RESEARCH CENTER, (Dec. 17, 2015), <https://www.pewsocialtrends.org/2015/12/17/1-the-american-family-to-day/>.

<sup>4</sup> Danielle Braff, *Why Modern Custody Agreements Look So Different: 'Anything Goes, as Long as the Children Are Happy*, CHI. TRIB., (Mar. 8, 2018), <https://www.chicagotribune.com/lifestyles/sc-fam-modern-custody-agreements-0313-story.html>.

in popularity and frequency.<sup>5</sup> These equal-time parenting plans have opened up possibilities for those co-parenting across large geographic distances to see their children more frequently.

Many “stay-at-home” orders across the nation, whether they were city, county or state-wide, failed to mention parenting time exchanges at all. To understand custody in the time of Covid-19, one must examine the variety of official government and court orders that have been issued to address custody. Part I will examine how various states’ stay-at-home orders deal with custody exchanges and the fundamental concerns of exposure behind custody exchanges for co-parenting families. Part II will discuss how Covid-19 custody cases have been handled in the courts, as well as the effects of Covid-19 on children and how that impacts the best interest of the child standard. Further it addresses the extra challenges essential worker parents have faced in custody disputes and how schooling has been impacted during the pandemic. Part III will look at possible solutions for co-parents involved in Covid-19 custody disputes to resolve them outside the courtroom. Part IV will offer some final thoughts about how the Covid-19 pandemic and the child custody precedents established during it can assist families and courts moving forward.

## **I. Covid-19 and Co-Parenting**

### *A. Addressing Custody Exchanges in Stay-at-Home Orders*

The advertised goal of stay-at-home orders was staying at home as much as possible and only venturing out for essential tasks like grocery shopping. As online delivery and curbside pickup grocery shopping gained popularity, many Americans were not leaving their homes at all, even for “essential” errands. Stay-at-home orders caused two major issues for families who utilize custody exchanges. The first issue was whether custody exchanges were “essential” under the local orders. The second issue was whether custody exchanges had to be honored for families that were not leaving their homes at all for any reason.

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<sup>5</sup> *Id.*

Some states such as Maryland and Texas deemed travel for the purpose of custody exchanges as essential.<sup>6</sup> These types of orders make it clear that custody exchanges are required. Some courts have issued specific orders and notices regarding court-ordered parenting plans and custody. For instance, the Santa Clara Superior Court issued a notice stating that parenting plans should be followed “as closely as possible.”<sup>7</sup> The notice further specified that Covid-19 alone was not enough to deny visitation and/or parenting time.<sup>8</sup>

Some notices seemingly ordered that children not go between households. For example, Davidson County, Tennessee ordered that the primary residential parent take custody within four hours of a shelter-in-place order going into effect and keep the child in his or her sole custody until the order was lifted.<sup>9</sup> Cannon and Rutherford Counties in Tennessee ordered that parenting time should not be impacted by Covid-19 with the exception of a government mandated lockdown or stay-at-home order.<sup>10</sup> Orders such as these caused confusion for co-parents. Many parenting plans have an equal time split between both parents; in that event, it would seem to be impossible to follow a stay-at-home order and comply with a court-ordered parenting plan.

Covid-19 has caused chaos for all co-parenting, even when parents are not operating under a 50/50 split parenting plan. Parents who have supervised visitation with their children are in a particularly vulnerable position. The stay-at-home orders have

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<sup>6</sup> Elizabeth Chuck, *Sheltering in Place—With Your Ex-Wife? Pandemic Poses Extra Challenges for Divorced Parents*, NBC NEWS (Apr. 14, 2020), <https://www.nbcnews.com/news/us-news/sheltering-place-your-ex-wife-pandemic-poses-extra-challenges-divorced-n1182831>.

<sup>7</sup> Robert Salonga, *Coronavirus: Navigating ‘Uncharted Territory’ of Child-custody Disputes Fueled by Virus Fears*, MERCURY NEWS (June 18, 2020), <https://www.mercurynews.com/2020/06/18/coronavirus-navigating-uncharted-territory-of-child-custody-disputes-fueled-by-virus-fears/>.

<sup>8</sup> *Id.*

<sup>9</sup> Megan Twohey, *New Battle for Those on Coronavirus Front Lines: Child Custody*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/coronavirus-child-custody.html>.

<sup>10</sup> Casey Leins, *Parents Struggle with Shared Custody During Coronavirus Pandemic*, U.S. NEWS (Apr. 27, 2020), <https://www.usnews.com/news/best-states/articles/2020-04-27/americans-struggle-with-co-parenting-during-covid-19>.

made it virtually impossible to exercise supervised visitation. Most parenting plans stipulate that a qualified professional or organization be the one to supervise all visitation between the parent and child. As these organizations shut down for stay-at-home orders, parents have found there is no one available to supervise their visitation and, therefore, they are not able to exercise it.<sup>11</sup>

Co-parents who share custody across state lines find themselves in an even more difficult position. Stay-at-home orders are different not only from state to state, but city to city and county to county. Some areas are encouraging custody exchanges to go on as normal and others are encouraging children to stay with a “primary residential parent.”<sup>12</sup> Some states have issued travel restrictions—for example, upon entering the city/state one must quarantine for fourteen days.<sup>13</sup> This was exactly the situation co-parents from Louisiana and Texas, respectively, faced.<sup>14</sup>

The father lived in Louisiana and the mother lived in Texas and they typically shared custody of their child.<sup>15</sup> For the father to secure his child from the mother’s home in Texas, he would have to quarantine for fourteen days before entering Texas because he was coming from Louisiana, a hot spot at the time.<sup>16</sup> The family’s attorney recommended the two parents meet at the border to avoid having to quarantine.<sup>17</sup>

Other states and cities have not been as clear with instructions regarding custody exchanges and this leads to more confusion and conflict between parents. With many stay-at-home orders having little explanation as to what “essential” meant and whether custody exchanges were essential, confusion over what parents were supposed to be doing was not surprising.

Many parents worried that sending a child back and forth between households, even if not a violation of the order, was put-

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<sup>11</sup> Samantha Melamed, *Exes Sheltering in Place Together? Parents Withholding Visitation? Co-parenting During a Pandemic Gets Messy, Fast.*, PHILADELPHIA INQUIRER (Mar. 24, 2020), <https://www.inquirer.com/health/coronavirus/coronavirus-coparent-divorce-separation-custody-quarantine-isolation-20200324.html>.

<sup>12</sup> Leins, *supra* note 10.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

ting the child at unnecessary risk for contracting Covid-19. While there was an outright ban on non-essential trips out in public, medical professionals discouraged even spending time less than six feet apart with people outside a household.<sup>18</sup> People have been encouraged to not see family members who did not live in their house such as grandparents or in-laws.

#### B. *Moving Between Households Is a Concern*

The argument in favor of not socializing with anyone living outside one's home is that people from a different household have encountered different germs than the other household has. For example, Household A and Household B (grandparents) decide to have dinner together in one of their two respective homes. All the adults in the two households are working from home now. All children in the two households are attending school online. At first glance, it does not appear that there is an issue of exposure. However, Covid-19 is an extraordinary virus that can travel remarkably far distances and live on surfaces.<sup>19</sup> Say a member of Household A went to the grocery store, to do curbside pickup of food, or even just out in their driveway to get a grocery delivery. All three of these activities have been deemed essential and all three have minimal contact between people. Yet, it is very possible for Covid-19 to be transferred in all three of these instances. Say the delivery driver is asymptotically carrying Covid-19. The bags of groceries for Household A were touched by the ill delivery driver, then exposing all of Household A. Household A members then expose Household B members to Covid-19 at dinner. Household B members would not have been exposed to the ill delivery driver if Household A and Household B were not socializing outside of their household. The request to not socialize outside one's household for this reason seems reasonable enough when it is grandparents or in-laws, but what about when it is one's child who does not live in one's household full-time?

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<sup>18</sup> *Social Distancing*, Coronavirus Disease 2019, CENTERS FOR DISEASE CONTROL (July 15, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html>.

<sup>19</sup> *How Covid-19 Spreads*, CENTERS FOR DISEASE CONTROL (Sept. 20, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

Some parents have taken the position that having their child moving between two households exposes them to two households of people's germs. Throw stepsiblings in both parents' households into the mix who also move between two different households and there could be a large number of people with whom the children are coming in contact.

## II. Covid-19 Custody Cases

While the best interest of the child is still the primary standard applied in parenting time and other custody arrangements, the arrival of Covid-19 has changed the meaning of the child's best interest. It has long been understood that putting the child in danger is against the child's best interest and a valid reason to deny parenting time. However, in the world of Covid-19, putting the child in "danger" may look a little different.

While some parents are navigating this new world together (some well and others not so well), and some coming up with creative solutions, other parents have gone to court to settle the issue. As result, there has been an uptick in custody disputes due to Covid-19. For example, in Santa Clara County, there were at least nine child custody cases between March and June 2020 where parents violated a court-ordered parenting plan due to fears of Covid-19 exposure.<sup>20</sup>

Family law matters such as divorces and modification are generally not public unless published, typically in an appeals situation. It also has only been a short time since the lockdowns began. For these reasons only a few published cases deal with custody during the pandemic. One of the first to be reported was *Riberio v. Wright*.<sup>21</sup> The case took place in Ontario, Canada, which at the time of the decision had suspended all court operations other than urgent or emergency matters. The original custody order was from 2012.<sup>22</sup> The parents had joint custody of the child.<sup>23</sup> The child's father had parenting time on some weekends, while the mother had parenting time during the weeks and alter-

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<sup>20</sup> Salonga, *supra* note 7.

<sup>21</sup> *Riberio v. Wright*, 2020 ONSC 182 (Mar. 24, 2020).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 1.

nating weekends.<sup>24</sup> The mother went to court to modify the existing order to suspend all of the father's parenting time due to Covid-19, stating that she believed the child's father was not sufficiently adhering to social distancing recommendations.<sup>25</sup> She reported that she, the child, and other members of her household were not leaving the house at all.<sup>26</sup> As a result, the child's father exercising parenting time with the child would be the only exposure the child would have.<sup>27</sup>

The judge ordered that the parenting plan and custody order then in effect must be followed and the father could still exercise his parenting time with the child, despite the Covid-19 concerns raised.<sup>28</sup> While the judge acknowledged that Covid-19 was putting most things "on hold," relationships between children and both parents cannot be indefinitely put on hold.<sup>29</sup> To do so would not be in the best interest of the child.<sup>30</sup> He further found that it would not be in the best interest of the child to not have meaningful time with both parents.<sup>31</sup>

He did note, however, that some adjustments might be required.<sup>32</sup> For example, if a parent is under a fourteen-day self-isolation period, the parent might have to forgo parenting time that was originally scheduled for that time.<sup>33</sup> The court also noted that a parent's employment could necessitate limiting direct contact with the child.<sup>34</sup> A parent's lifestyle, such as not adhering to social distancing guidelines, could also limit direct contact with the child.<sup>35</sup> The judge noted that there would be zero tolerance for parents who recklessly exposed their child to Covid-19.<sup>36</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 2.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

The *Riberio* case set the stage for most of the Covid-19 custody opinions to follow.<sup>37</sup> It addressed the best interest of the child standard by balancing health and safety and maintaining relationships with both parents.<sup>38</sup> The *Riberio* opinion also laid the groundwork to deny parenting time based on exposure to Covid-19 whether via employment or poor social distancing practices.<sup>39</sup>

The problem with *Riberio* is that the family it involved was at low-risk from Covid-19. As a result, the opinion allowed parenting time based on the best interest standard, with the caveat that if the risk to Covid-19 was higher, the judge might have come to a different conclusion. The opinion offered no real definition of what constitutes high risk to exposure nor how much risk of exposure would be enough to justify restricting parenting time.

Family law is based on state law and often specific to even smaller areas such as counties. While the best interest of the child is typically used across the United States, specific statutes and local rules governing family law, including custody disputes, often vary greatly among states. It is also worth noting that family law matters leave a significant amount of discretion to the trial court. The family law legal system is not the only part of the equation that relies heavily on geographic location.

While Covid-19 has ravaged the majority of the world, including the United States, the circumstances of Covid-19 vary in cities and states across the nation. As a result, judges across the country have made different decisions regarding Covid-19's effects on parenting time based on the unique circumstances of each family and the specific circumstances of Covid-19 in the area in which they reside. At the beginning of the pandemic, New York City and other large cities were hit hard by Covid-19. As a result, bigger cities and more highly populated states took more aggressive lockdown measures on a quicker timeline. A judge's order restricting parenting time to protect a child from being exposed to Covid-19 in March in New York City might not have been reasonable in the rural Midwest. In August, doing the same in the Midwest and South might have been reasonable, but

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*



no longer reasonable in places like New York City where the peak had passed.

While those involved in the legal system hope that parents are utilizing the courts to protect their child from unnecessary Covid-19 exposure, some parents are exploiting the pandemic to obtain an advantage in long-term and ongoing custody. This raises the question of how judges should balance not rewarding parents for trying to exploit the legal system for their own benefit, while also taking into account the very real dangers of Covid-19. This balancing was put to the test in a high-conflict New York custody case.

This New York couple had been engaged in a custody battle for the past ten years.<sup>40</sup> In the last year, the father was granted full custody of the child with the mother receiving supervised visitation.<sup>41</sup> A request from the father to relocate with the child was pending.<sup>42</sup> On March 24, 2020, the court granted the father permission to travel to California with the child so that the child could celebrate the Passover holiday with his paternal grandparents.<sup>43</sup> Due to the Covid-19 pandemic, the court ordered certain precautions be taken for the visit to occur.<sup>44</sup> The court required the travel to take place via a private airplane to cut down on potential exposure to Covid-19.<sup>45</sup>

Perhaps unsurprisingly, the father then argued that he and the child should be allowed to stay in California permanently.<sup>46</sup> Covid-19 adds extra considerations to this request.<sup>47</sup> The court noted that the New York and New Jersey tri-state area, where the child would be returned, was the epicenter of the Covid-19 pandemic.<sup>48</sup> In comparison, California at the time was much safer and there was less risk that the child would be exposed to Covid-19 there.<sup>49</sup> The stay-at-home orders enacted in the New

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<sup>40</sup> A.S. v. H.R., 2020 NYLJ LEXIS 1002 (2020).

<sup>41</sup> *Id.* at 2

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 3.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

York and New Jersey areas also made it impossible for the mother to utilize her visitation with the child anyway.<sup>50</sup>

The court did note its concerns with the father's behavior throughout this custody conflict.<sup>51</sup> The court acknowledged that the father packed most of his and the child's belongings before the "trip" to California.<sup>52</sup> This coupled with the pending motion to relocate with the child to California, implied that the father never intended on returning from the court-approved trip.<sup>53</sup> The court noted that it is likely that the father was using Covid-19 as an excuse to obtain the relocation permission he wanted.<sup>54</sup> The court remarked that it was reluctant to reward the father's poor behavior and intentions in this situation.<sup>55</sup> However, regardless of the poor intentions of the father, Covid-19 was still a very real and present danger.<sup>56</sup> As a result, the court determined that the least amount of exposure to Covid-19 would be in the best interest of the child here, regardless of the father's poor intentions.<sup>57</sup>

Additionally, there was not a concern about the child missing parenting time with the mother by staying in California because, due to the lack of supervisors, the mother's parenting time would all be conducted via videoconference.<sup>58</sup> If all parenting time would have to be exercised by videoconference anyway, the court determined it would be in the child's best interest to engage in the videoconference parenting time in California where there would be less chance of exposure to Covid-19.<sup>59</sup> The court ordered the child stay in California until July 8, 2020, when it was possible that in-person visitation could be resumed.<sup>60</sup>

Even when co-parents do not live separately, issues resulting from Covid-19 can still arise. The concept of "nesting" has gained

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 4.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 5.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

popularity in recent years.<sup>61</sup> Nesting is when parents trade off living in the marital residence with the children during their parenting time.<sup>62</sup> Since stay-at-home orders have gone into place, some nesting co-parents have transitioned into both living in the home at the same time. This comes with its own set of problems.

In Ontario, Canada, an immune-compromised mother and the father of the child who normally nested had been sharing the home since the stay-at-home order had gone into place.<sup>63</sup> The father continually left the house with no explanation as to where he went and did not wash his hands when he returned.<sup>64</sup> The father's behavior caused concern that that he would needlessly expose the mother or the children to Covid-19.<sup>65</sup> As a result, an Ontario judge ordered the father to leave the marital residence on March 31, 2020.<sup>66</sup> The judge also ordered that all further contact between the children and the father be conducted electronically to cut down on exposure.<sup>67</sup>

It may seem that removing a parent from the household is a drastic action that is not warranted based on popular sentiment that Covid-19 is only extremely dangerous to immune-compromised and elderly people. To understand how judges are determining the best interest of the child, it is important to understand the effects of Covid-19 on children and how dangerous it is.

#### A. Covid-19's Effect on Children

When Covid-19 first emerged, little was known about it, but a working theory of who was most affected by it quickly emerged. It was soon established that Covid-19 has disastrous ef-

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<sup>61</sup> Nicole Spector, *Birdnesting' Gives Kids One Stable Home After a Divorce. Does It Work?*, NCB NEWS (Nov. 13, 2018), <https://www.nbcnews.com/better/health/birdnesting-gives-kids-one-stable-home-after-divorce-does-it-ncna935336>.

<sup>62</sup> *Id.*

<sup>63</sup> Adam N. Black, *Judge Bars Ontario Father from Matrimonial Home for Failing to Take COVID-19 Risk Seriously*, FIN. POST (Apr. 7, 2020), <https://financialpost.com/personal-finance/judge-bars-ontario-father-from-matrimonial-home-for-failing-to-take-covid-19-risk-seriously>.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

fects on the elderly and the immunocompromised.<sup>68</sup> A common myth has persisted among many people that not only was the virus most dangerous to the elderly, but that it did not affect children at all.<sup>69</sup> Even if children do not manifest any symptoms or have any post-Covid-19 effects, the disease is still contagious between children and adults.<sup>70</sup> Any exposure that children have to Covid-19 could easily be passed on to parents, grandparents, and other older members of their households. The risk of exposing older household members to Covid-19 is reason enough to avoid children being exposed to Covid-19. However, when it comes to balancing equal parenting time, attending school and other things that are also deemed in the best interest of the child, just how dangerous Covid-19 is to children starts to matter more.

As the pandemic has raged on and more information has become available, it is becoming apparent that it is a myth that Covid-19 does not affect children. Children have contracted Covid-19 and have died as a result. A seven year old boy died in Georgia on August 6, 2020, making him the youngest person to die from Covid-19 in that state.<sup>71</sup> A nine year old girl with no pre-existing conditions also recently died of Covid-19 in Florida.<sup>72</sup>

Death from Covid-19 itself is also not the only concern with exposing children to Covid-19. A pattern of troubling illnesses arising in children after having Covid-19 has emerged. Multisystem inflammatory disease, presenting itself as similar to Kawasaki disease, has been observed in children who contract Covid-

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<sup>68</sup> *Older Adults and Covid-19*, Coronavirus 2019, CENTERS FOR DISEASE CONTROL (Sept. 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>.

<sup>69</sup> Rachael Rettner, *14 Coronavirus Myths Busted by Science*, LIVESCIENCE (July 14, 2020), <https://www.livescience.com/coronavirus-myths.html>.

<sup>70</sup> Adriana S. Lopez et al., *Transmission Dynamics of COVID-19 Outbreaks Associated with Child Care Facilities — Salt Lake City, Utah, April–July 2020*, CENTERS FOR DISEASE CONTROL (Sept. 18, 2020), [https://www.cdc.gov/mmwr/volumes/69/wr/mm6937e3.htm?s\\_cid=MM6937e3\\_w](https://www.cdc.gov/mmwr/volumes/69/wr/mm6937e3.htm?s_cid=MM6937e3_w).

<sup>71</sup> Jamiel Lynch & Theresa Waldrop, *A 7-year-old Boy in Georgia Died of Covid-19, the Youngest Victim in the State*, CNN (Aug. 6, 2020), <https://www.cnn.com/2020/08/06/us/georgia-boy-covid-19-death/index.html>.

<sup>72</sup> *Id.*

19.<sup>73</sup> While children in a Pakistan study have met the usual criteria for Kawasaki disease, it is clinically presenting in a different way than usual.<sup>74</sup> The children in the study tested positive for the antibodies present in those who have had Covid-19 (SARS CoV-2).<sup>75</sup> However, none of the patients in the study had experienced the respiratory symptoms common in Covid-19 patients.<sup>76</sup>

Multi-inflammatory syndrome is a serious condition that causes key parts of the body including the heart, blood vessels, kidneys, digestive system, brain, skin, eyes, and hands and feet to swell and become inflamed.<sup>77</sup> The inflammation and swelling causes redness and severe pain and can lead to organ failure and ultimately death.<sup>78</sup>

Based on the new information scientists and medical professionals are gathering daily, it is clear that Covid-19 is not harmless to children. Children catching Covid-19 due to swapping households or carelessness on the part of one parent could have far graver consequences than previously thought.

Due to these consequences, preventing children from contracting Covid-19 is of the utmost importance for parents. The issue arises as how to best protect children from being exposed to Covid-19. When determining whether a parent is putting a child at risk for contracting Covid-19, it is tough to determine how much precaution is enough, too much, or too little. It is also difficult to determine how negligent a parent needs to be about precautions before denying that parent time with the child. Generally, medical professionals have encouraged wearing masks, using hand sanitizer, washing hands, and staying six feet

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<sup>73</sup> *Multisystem Inflammatory Syndrome Associated with Covid-19 in Children in Pakistan*, LANCET CHILD ADOLESCENT HEALTH 2020 (Aug. 10, 2020), <https://www.thelancet.com/action/showPdf?pii=S2352-4642%2820%2930256-X>.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Mayo Clinic Staff, *Covid-19 (Coronavirus) in Babies and Children*, MAYO CLINIC (Aug. 14, 2020), <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-in-babies-and-children/art-20484405>.

<sup>78</sup> *Id.*

apart from non-household members if people need to leave their homes for any reason.<sup>79</sup>

#### B. *Essential Worker Parents*

The easy transmissibility of the highly contagious and dangerous Covid-19 virus has caused even the smallest lack of precaution to be potentially deadly to a child. Something as simple as going to work to provide for one's child could now be putting that child in danger. For parents who are essential workers, such as doctors and nurses, this is exactly the dilemma that has arisen. All over the country, non-essential worker parents who share a child with an essential worker began to take steps that they thought would eliminate this danger.

A Florida mother, Dr. Setty, who works in urgent care, was shocked when her husband, whom she was divorcing, refused to release the children to her in accordance with their court-ordered parenting plan.<sup>80</sup> Despite also being a doctor, her husband, Dr. Sai, was concerned that her work alone would expose the children to Covid-19.<sup>81</sup> Dr. Sai's elderly parents also lived in the same household, causing the concern that they would be at high risk to contract Covid-19 from the exposed children.<sup>82</sup> Dr. Sai also expressed concern that the last time Dr. Setty had exercised her parenting time, the children had been allowed to play with other children in the neighborhood.<sup>83</sup> The police were called to the scene and shown a copy of the custody order, but decided that there was nothing they could do.<sup>84</sup>

Some judges have decided that protecting children of essential workers from any type of Covid-19 exposure is in the best interest of the child even if it prevents the child from having parenting time with both parents. In Miami, Florida, a father ob-

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<sup>79</sup> *How to Protect Yourself and Others*, Coronavirus Disease 2019, CENTERS FOR DISEASE CONTROL (July 31, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

<sup>80</sup> Mike Hixenbaugh, *A Doctor Didn't See Her Kids for Weeks After Husband Said She Posed Coronavirus Threat*, NBC NEWS (Apr. 27, 2020), <https://www.nbcnews.com/news/us-news/doctor-didn-t-see-her-kids-weeks-after-husband-said-n1192271>.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

tained an emergency sole-custody order for his daughter.<sup>85</sup> The four-year old's mother, Dr. Greene, worked as an emergency room doctor who was treating Covid-19 patients.<sup>86</sup> The order included the provision that her lost parenting time would be "banked" and made up later. She was also entitled to daily video calls with her daughter during the pandemic.<sup>87</sup> Even Judge Bernard Shapiro, the circuit court judge who handed down this ruling, acknowledged that the order was a drastic one,<sup>88</sup> stating, "The Court does not enter this Order lightly but given the pandemic in Florida and the recent increase in confirmed Covid-19 cases, the Court finds in order to insulate and protect the best interests and health of the minor child, this Order must be entered on a temporary basis."<sup>89</sup> One concerning aspect of this temporary order is that it expires when the pandemic is "over."<sup>90</sup> No one is sure when that will be. Many experts say that the pandemic will continue until there is widespread access to a vaccine.<sup>91</sup> As of now, no vaccine for Covid-19 has been released to the public. Some experts estimate that it could be late into 2021 before widespread access to a vaccine is possible.<sup>92</sup> If that is the case, Dr. Greene could be kept from her daughter for an unreasonably long period of time. This decision also raises the question of who gets to determine when the pandemic is over for the purposes of this sole custody arrangement. Medical experts have varying opinions on when and how the pandemic will end. It is unknown which of these medical experts this judge will rely on regarding when the pandemic, and thus the emergency custody order, are over. A Miami court of appeals has issued a stay of Judge Shapiro's order while Dr. Greene's case is under review.<sup>93</sup>

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<sup>85</sup> David Williams, *An ER Doctor Loses Custody of Daughter Because of Coronavirus Fears*, CNN (Apr. 13, 2020) <https://www.cnn.com/2020/04/13/us/custody-coronavirus-er-doctor-trnd/index.html>.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* (quoting the judge's opinion).

<sup>90</sup> *Id.*

<sup>91</sup> Maggie Fox, *Here's Why a Vaccine Will not Stop the Covid-19 Pandemic Right Away*, CNN (Sept. 15, 2020), <https://www.cnn.com/2020/09/15/health/vaccine-not-end-coronavirus-pandemic/index.html>.

<sup>92</sup> *Id.*

<sup>93</sup> Hixenbaugh, *supra* note 80.

This means that for the time being, Dr. Greene still gets to exercise parenting time with her daughter.<sup>94</sup>

In New Jersey, Dr. Mayorquinn lost parenting time with her children due to concerns over her possibly contracting Covid-19 at work.<sup>95</sup> Despite the fact that Dr. Mayorquinn was not treating Covid-19 patients at her job, was wearing personal protection equipment and taking drastic sanitization measures, the judge still determined the risk was too great.<sup>96</sup> Dr. Mayorquinn was able to get her parenting time back by asking her hospital to allow her to work in a remote position.<sup>97</sup> Not every essential healthcare worker is likely to have the option that Dr. Mayorquinn did.

While many of the doctors in the news concerning custody battles are being directly exposed to Covid-19 by caring for affected patients, other essential workers in the medical field are not. In theory, medical workers who are still deemed essential, but not working with or around Covid-19 patients, should not lose custody temporarily.

This was not the case for a post-anesthesia care unit nurse who lost visitation with her children due to concerns about Covid-19 exposure arising from her job.<sup>98</sup> Tricia Garcia and her ex-husband Matthew Meury were in continuing custody litigation over their children for years.<sup>99</sup> At the onset of the pandemic, Matthew filed a motion to bar Tricia from exercising visitation with their children.<sup>100</sup> Matthew cited Tricia's job as a post-anesthesia care unit nurse and the potential for her to come into contact with Covid-19 as the reason she should be denied visitation.<sup>101</sup> Tricia stated during the hearing that she had all proper personal protective equipment available to her at work

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<sup>94</sup> *Id.*

<sup>95</sup> Twohey, *supra* note 9.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Cara Tabachnick, *Custody Battles Take on New Complications Amid Coronavirus Crisis*, AL JAZEERA-ENGLISH (May 4, 2020), <https://www.aljazeera.com/indepth/features/custody-battles-complications-coronavirus-crisis-200501133356147.html>.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*



and did not work with Covid-19 patients.<sup>102</sup> Even so, Commissioner Barbara McInville denied Tricia access to her children until after the Covid-19 pandemic had “passed.”<sup>103</sup> Once again, parents run into the problem about when exactly the pandemic will be “over” and who determines when that is.

Cases like these raise the question of whether everyone in the medical field should be barred from having custody of their children, regardless of their actual exposure to Covid-19 at work. Negative outcomes also seemingly punish parents for remaining employed during the pandemic as essential workers. Some judges have determined that it is in the best interest of the child to maintain parenting times with both parents, even if one of those parents is an essential health care worker who may come into contact with Covid-19. Dawn Polich’s ex-husband filed a motion to prevent Dawn from exercising parenting time with their ten year old because of her Covid-19 exposure from her work as a respiratory therapist.<sup>104</sup> Santa Clara County Superior Court Judge James Towery ordered on April 15, 2020 that Dawn and her ex-husband must continue to follow their current parenting plan with both parents having parenting time.<sup>105</sup>

Health care workers are not the only workers receiving custody challenges due to Covid-19. Firefighters, another group of essential workers who do not necessarily directly come in contact with Covid-19, have been facing custody battles.<sup>106</sup> In Orlando, Tabatha Sams filed a motion for emergency sole custody of her two-year-old son due to concern that his firefighter father Stephen Thilmony would expose him to Covid-19.<sup>107</sup> The co-parents await a decision on whether the custody request will be granted.<sup>108</sup>

In California, Lisa Chu became concerned about her three children’s exposure to Covid-19 after two firefighters in the father’s firehouse tested positive for Covid-19.<sup>109</sup> Steven Biakanja

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Hixenbaugh, *supra* note 80.

<sup>105</sup> *Id.*

<sup>106</sup> Twohey, *supra* note 9.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

promised to quarantine if he had any symptoms or was exposed to any firefighters who had symptoms or positive test results.<sup>110</sup> Despite this, Lisa still had concerns of asymptomatic carriers in the firehouse.<sup>111</sup> Lisa requested that Steven provide a negative Covid-19 test result every time he exercised parenting time.<sup>112</sup> Due to the limited availability of testing, this would be almost impossible for Steven to do.<sup>113</sup> The judge denied Lisa's request for temporary sole custody unless Steven actually exhibited symptoms of Covid-19.<sup>114</sup> As the pandemic continues, the duties of essential worker parents will change and evolve as will the custody decisions being made for their children across the country.

### C. *Schooling During the Pandemic*

Exposure to Covid-19 is not the only concern during the pendency of stay-at-home orders. With most school no longer being held in person, children have transitioned over to variations and mixtures of "distance" learning, online/virtual learning, and homeschooling. This style of learning requires significantly more parent time and engagement than children being sent to school for eight hours a day.

For parents that are essential workers and must go to work, virtual school for kids under high school age is problematic in multiple ways. Not only do the children who were previously supervised by school while their parents were at work now require daytime supervision for their safety at home, they now also need significant assistance with schoolwork. Even for non-essential worker parents, those working from home may struggle to find time to fulfill their own work obligations along with supervising children and ensuring that all schoolwork is completed. Virtual learning has required children to access Zoom video calls and turn in assignments virtually. Many children may not have experience with these tasks and will need parental assistance. This issue will continue to surface during the 2020-2021 school year.

While stay-at-home orders are largely lifting across the country, Covid-19 still has an impact on the multi-household

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

family. If cases continue to rise, it is possible, even likely, that another round of stay-at-home orders will be enacted.<sup>115</sup> Court precedents that have been established during stay-at-home orders can be used to guide both parents and co-parents through a second round of stay-at-home orders. However, even without new stay-at-home orders, Covid-19 still continues to affect multi-household families in unexpected ways.

As the new school year approaches, even more questions arise for parents in the time of Covid-19. In some areas of the country, all school districts (K-12) are going completely online until further notice.<sup>116</sup> Some school districts are opening in-person, but offering online options for families who do not feel comfortable having their children return to school.<sup>117</sup> Other schools are offering hybrid programs of both in-person and online instruction on alternating days or other approaches to keep the school facilities well below capacity to account for social distancing requirements.<sup>118</sup>

Some areas of the country are relying upon government orders for what systems they must implement. California, for example, was geared up to offer a variety of online, in-person, and hybrid options across the state.<sup>119</sup> Recently, Governor Gavin Newsom announced that any California counties being monitored for Covid-19 spread or increase would have to offer completely online school only.<sup>120</sup>

Whether a child attends school in-person/hybrid or online is up to the parents in many school districts.<sup>121</sup> Making this choice is already extremely difficult for parents, recognizing the many

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<sup>115</sup> See *How All 50 States Are Reopening (and Closing Again)*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/states-reopen-map-coronavirus.html> (last visited Sept. 20, 2020).

<sup>116</sup> Scottie Andrew & Alicia Lee, *Where Some of the Country's Biggest School Districts Stand on Reopening Schools*, CNN (July 20, 2020), <https://www.cnn.com/2020/07/20/us/schools-reopening-at-home-parents-choice-wellness-trnd/index.html>.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Sydney Johnson, *California School Districts Brace for an Online Back-to-School Season*, EDSOURCE, (July 24, 2020), <https://edsources.org/2020/california-schools-brace-for-continued-distance-learning-in-the-fall/636626>.

<sup>120</sup> *Id.*

<sup>121</sup> Andrew & Lee, *supra* note 116.

factors they must consider. While online school is likely the safer option to protect children from Covid-19, many parents have to go to work or work from home and would not be able to supervise young children doing online school at home. Attending school in-person also offers many positive mental and social benefits for children that just cannot be replicated in an online program. Parents also may be concerned that their own safety will be jeopardized by sending their children to in-person-school.

A recent study by the Centers for Disease Control raises concerns about group settings of children, which is what in-person-school would look like.<sup>122</sup> Daycare centers in Utah were monitored from April to July.<sup>123</sup> Out of the twelve children who contracted Covid-19 (exhibiting no symptoms or mild symptoms), those children infected one in four people they came in contact with outside of the daycare.<sup>124</sup> One adult infected by the children was hospitalized.<sup>125</sup> This level of spread between children in a group setting much like school raises serious concerns for in-person schooling.

As parents grapple with this decision, the decision is made more difficult when parents are no longer one cohesive household unit. With two households, two parents, potential step-parents or significant others, potential stepchildren who may go to a different school district and/or alternate households, and many different work situations, the choice whether to send one's child to school in person or online is more difficult with even more moving parts.

This raises the question of what happens when one parent wants to send the child back to school and the other parent wants the child to utilize online school. Most school districts are allowing families to choose between virtual and in-person classes. This could prove problematic for parents that both have parenting time on weekdays. If one parent is working from home and the other is not, the child cannot be sent in-person on the working parent's days and learn remotely on the working from home parent's days.

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<sup>122</sup> Lopez et al., *supra* note 70.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

Some parents may prioritize the importance of learning in-person and the mental and social benefits to children it brings over the possibility that the child contracts Covid-19 from school. A parent who is still working from home and still operating under strict social distancing guidelines may not want children going to school and exposing themselves and the rest of the household as a result. Even if school districts did offer the option for children to be half in-person, half online, the child would still potentially expose their other parent to Covid-19 from their in-person days.

Children in blended households would be at especially high risk if the children within the household were attending multiple different schools, bringing perhaps a number of different schools' worth of potential exposure into the home and then carrying it all to their other respective households. Some parents may now have a partner who is a homemaker or be a homemaker themselves and therefore can assist with online school without worrying about working from home in their own job, but the other parent may not have that luxury. With differing work, family, and economic situations in each household, having parents in separate households makes one unified decision difficult to obtain.

For families that have to utilize virtual learning at least part of the time, co-parenting could make the process even more complicated. Family law attorneys suggest co-parents communicate about virtual learning.<sup>126</sup> With Zoom calls at varying times and assignments with differing due dates to be turned in online, it is easy for things to slip through the cracks if parents do not communicate. Attorneys also suggest that co-parents attempt to maintain a consistent virtual learning schedule for when the child is at both homes.<sup>127</sup> Concerns about successfully co-managing virtual learning could also influence whether children attend school in-person.

The standard parenting plan usually designates what school the child will attend. That same school now offering in-person or online is just not covered. When co-parents disagree on whether the child should attend in-person or online school, finding a solution can be complicated. A modification could be sought to re-

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<sup>126</sup> Aimee Key & Lindsey Obenhaus, *COVID-19 and Family Law – What Every Attorney Needs to Know*, 83 TEX. B.J. 310 (May 2020).

<sup>127</sup> *Id.*

solve this issue, but to do so would be costly and probably not fast enough.

When applying the best interest of the child standard, it is impossible to definitively predict in this situation what judges would say is in the child's best interest. However, with the current trend of best interest being applied in custody cases regarding Covid-19, it appears judges lean towards the less exposure to Covid-19, the better. It is very possible that this same logic will apply if there is a dispute between online and in-person school.

### III. Solutions

As parents hire attorneys and drag their co-parents to court over the issue, it may seem that Covid-19 has brought all co-parenting to a grinding halt. While stories of parents battling it out in court may dominate the headlines, many co-parents have found creative and successful solutions to safely co-parent throughout the pandemic. For instance, Erika Lenkhert and her daughter's father became concerned about the exposure their fourteen-year-old daughter was subjected to when living with her father because his live-in girlfriend worked at a hospital.<sup>128</sup> The two parents agreed to temporarily modify the parenting plan for their daughter to live full-time with Erika in San Francisco until the threat of Covid-19 exposure subsided.<sup>129</sup>

One creative solution that has been utilized by co-parents is both co-parents quarantining together, with their child(ren). Henry and Lisa Drake have been divorced for six years and share custody of their nine-year-old son, Alex.<sup>130</sup> Henry normally traveled via subway to exercise his parenting time.<sup>131</sup> As Covid-19 descended upon the United States in March, Henry became concerned about his and Alex's exposure riding the subway 45 minutes between the two parents' home to share parenting

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<sup>128</sup> Matt Villano, *Navigating Child Custody in the Time of Coronavirus*, CNN (Apr. 9, 2020), <https://www.cnn.com/2020/04/01/health/child-custody-wellness-coronavirus/index.html>.

<sup>129</sup> *Id.*

<sup>130</sup> Elizabeth Chuck, *Sheltering in Place—with Your Ex-wife? Pandemic Poses Extra Challenges for Divorced Parents*, NBC NEWS (Apr. 14, 2020), <https://www.nbcnews.com/news/us-news/sheltering-place-your-ex-wife-pandemic-poses-extra-challenges-divorced-n1182831>.

<sup>131</sup> *Id.*

time.<sup>132</sup> Alex missed his dad and video chatting was not the same as being together in person.<sup>133</sup> Lisa began to struggle with trying to work from home as well as assist Alex with his third grade remote schoolwork.<sup>134</sup> Henry and Lisa made the decision for Henry to move into Lisa's home with her and Alex so all three could quarantine together throughout the duration of the pandemic.<sup>135</sup>

For co-parents that are unable to agree between themselves, but want to avoid the adversarial and slow process of litigation, mediation may be a good option for Covid-19 related concerns. As Covid-19 closes courts and forces courts to prioritize other cases above custody ones, getting into court on a custody case can be a timely process.<sup>136</sup> Mediations can also be conducted virtually, making them a good option to maintain safe social distancing.<sup>137</sup>

Orange County, California has implemented a virtual-based voluntary settlement program.<sup>138</sup> Current sitting judges, retired judges, and practicing attorneys act as voluntary "settlement officers" on virtual platforms to assist co-parents to hopefully reach a solution in spite of court closures and other physical limitations.<sup>139</sup>

Amicable settling of custody issues between co-parents without court involvement is usually in the best interest of the child. Being able to be able to cooperate in civil co-parenting during a pandemic is a promising sign for many families.

#### IV. Conclusion

Since no one knows whether Covid-19 will continue or if another viral pandemic will start, addressing how child custody

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Joann Feld, *Mediation May Be the Best Option for Divorced Families Dealing with the Impacts of COVID-19*, N.Y. ST. B.J., June/July 2020, at 35.

<sup>137</sup> *Id.*

<sup>138</sup> David P. Monarch & Daniel J. Boehm, *COVID-19 Gives Rise to the Birth of the Remote Voluntary Settlement Conference Program*, ORANGE CTY. LAW., Aug. 2020, at 36.

<sup>139</sup> *Id.*

should be handled in a pandemic is both useful and necessary. For the best interest of the child, in the future it would be preferable if these situations could be addressed in parenting plans.

Covid-19 has brought about unexpected and unprecedented challenges to all aspects of life, including co-parenting. The pandemic has also forced courts and families to reevaluate what the best interest of the child really is and how to truly accomplish it in a way that has not been seen before. While one can only hope that the world never has to face a situation such as this again, some court and private responses to Covid-19 have laid helpful legal and practical groundwork when it comes to child custody and co-parenting in the future.

Madison McBratney