



Divorce & Family Law

NAVIGATING NEW PARENTING TIME ISSUES AMIDST A GLOBAL PANDEMIC

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For divorced or separated individuals, even the best days can have their challenges when co-parenting with an ex-spouse. Add a global pandemic to the mix, and the ever-changing regulations and day-to-day uncertainties that accompany same—it's no surprise that a new plethora of concerns/issues may arise, even when there weren't any before.

When the stay at home orders were first announced, there were a lot of questions: How strict is this meant to be? Is the house where the children are currently where they should stay for the time being? Do we continue our regular parenting time schedule? How do I know that my ex is properly following the social distancing guidelines? What do we do if one of us or, even worse, one of our child(ren) gets sick?

When the shutdown began three months ago, there was no way of knowing what was going to happen, how long it would last, or how these never before dealt with issues would be handled by the court. Litigants, attorneys and the courts were all in the same uncharted territory, navigating the unknown waters at the same time. While most courts have made it clear they will not entertain COVID-related parenting time disputes as emergent matters, some courts have heard such matters on an individual case by case basis. For non-emergent requests to address parenting time-related issues, parties have been strongly encouraged to try to resolve parenting time issues and arrangements between themselves. Pursuant to New Jersey Court Rules, a motion will be heard no earlier than 24 days following the filing date. With the courts closed and almost everything running virtually, there has been considerable back log, with many matters being moved beyond the initially scheduled date. Without immediate relief, and with the potential of not having a matter heard by the court for a month or more, the only remaining option is for the parties to try to resolve the issues together.

WHAT DOES THIS MEAN?

When it comes to the children and parenting issues, it is important to remember that for parents, attorneys and judges, everything is viewed with the intention of determining what is in the best interests of the children. When making any type of determination regarding custody and parenting time, whether it is an initial custody designation or a modification of existing custodial arrangements, the court views the totality of the factors in order to determine what is in the best interests of the children. In conducting such an analysis, N.J.S.A. 9:2-4 outlines the factors to be considered when determining what is in a child's best interests:

- (1) parents' ability to agree, communicate and cooperate in matters relating to the child;
- (2) the parents' willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse;
- (3) the interaction and relationship of the child with its parents and siblings;
- (4) the history of domestic violence, if any;
- (5) the safety of the child and the safety of either parent from physical abuse by the other parent;
- (6) the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision;
- (7) the needs of the child;
- (8) the stability of the home environment offered;
- (9) the quality and continuity of the child's education;
- (10) the fitness of the parents;
- (11) the geographical proximity of the parents' homes;
- (12) the extent and quality of the time spent with the child prior to or subsequent to the separation;
- (13) the parents' employment responsibilities;
- (14) and the age and number of the children.

What do "best interests" look like during a global pandemic? Short answer: the same as before. The best interests standard, and the factors viewed by the court, or to be considered by the parties, remain just as before. The only thing that has changed are the specific facts and situations that now may arise. For example, consider the matter of a parent who is deemed essential, continuing to go to work during the stay at home orders. Generally, a parent doing

their job, going to work, was never a “cause for concern” when determining custody. However, now, a parent going into a workplace raises concerns such as “What social distancing measures are in place? How do I know that he/she is following them? How do I know he/she isn’t being exposed to someone at work and then bringing it home to our child(ren)?” Without specific evidence that someone is exposed or is not following the required social distancing guidelines, courts will generally give parents the benefit of the doubt with regard to social distancing measures taken. Generally speaking, the guiding principle for co-parents with an existing custody and parenting time schedule in place is that, in the absence of someone becoming sick (or being exposed to someone known to be sick), the regular parenting time schedule should remain in place.

A TEMPORARY AGREEMENT TO MODIFY THE REGULAR PARENTING TIME SCHEDULE

If parents have concerns about the existing arrangements, there is always the option to enter into a temporary consent order modifying the current arrangements to address concerns about exposure, social distancing, etc. An attorney can assist in preparing any such consent order, ensuring the proper language is included making it clear the consent order is a “temporary plan” with language clarifying when the temporary plan expires and the regular schedule resumes. Such a consent order may address issues such as protocols for a change in custody/parenting time, communication between the parties/children, and other restrictions/requirements for the parties to follow to ensure the children’s safety and well-being.

WHAT HAPPENS IF ONE PARENT, OR A CHILD, GETS SICK?

If a parent gets sick or shows symptoms of COVID-19, one option for the parties to consider incorporating into a consent order is an agreement that the other parent must be immediately notified, and the children shall stay at the non-sick parent’s home for an agreed upon period of time (per current CDC recommendations, the “self-isolation” period for an individual who tested positive or was exposed to/shows symptoms of COVID-19 is at least 10 days after first signs of symptoms and 3 days “symptom-free”). Similarly, if a child gets sick or shows symptoms of COVID-19, the parties can agree that the child(ren) shall be returned to and remain at the primary custodian’s home for the agreed upon period of time. If there are multiple children, and only one child gets sick/shows symptoms, parties can agree that the sick child shall stay with one parent and the non-sick child(ren) shall remain with the other parent for the agreed upon length of time. It may also be helpful to clarify the window of time for notification of any sickness/symptoms presenting to the other parent (i.e. a window of one hour from initial discovery of the sickness, symptom, etc.).

With these arrangements, there is a possibility that one parent may lose out on a significant amount of parenting time with the child(ren). To address that concern, parties can agree to build in a provision to allow for make-up time to be arranged for time lost due to following the safeguards to prevent exposure to COVID-19, once the pandemic subsides.

FACETIME: THE NEXT BEST THING

In the unfortunate circumstances where a parent is missing out on parenting time, due to him/her or the child(ren) becoming sick, there are still plenty of options to maintain consistent communication between parent and child. Is it as good as “the real thing”? Absolutely not. But with Facetime, Zoom and an abundance of other apps and programs for video chat, etc., a parent can still communicate, share a meal, go over schoolwork, watch a movie, etc. with the child(ren) without risk or concern of exposure.

Parties can agree on the days/times for the video/telephonic communications to take place and can make them as liberal or specified as they want. It is also extremely important for parties themselves to keep communication open between the two of them, and regularly communicate his/her concerns and expectations with the situation as it develops. Virtual communication is a band aid at best, but it is important to keep in mind that it is only temporary.

OTHER GENERAL RESTRAINTS/GUIDELINES

Even if parties don't necessarily feel the need to modify existing parenting time arrangements, they may feel more comfortable having some general guidelines in place in a consent order for all parties/children to follow during the pandemic. For example, these may include complying with all existing CDC/WHO, local, state, federal guidelines and regulations, maintain good hygiene, practice social distancing, wear masks, refrain from exposure to large groups, limiting children's exposure to public places (restaurants, stores, etc.), clean/disinfect frequently touched surfaces, etc. Parties can also agree to specify that the parties shall ensure that other household members, visitors, etc. shall abide by the guidelines as well.

If parties cannot agree, courts are always there as a last resort. However, if an agreement can be reached between the parties to address concerns/issues related to COVID-19, they have a much better chance of having those concerns addressed and an agreement in place much sooner than a court would make a determination. With restaurants, retail stores and hair/nail salons now opening their doors, many people are happy to see a light at the end of the tunnel, while others are waiting with bated breath for a dreaded "second wave." While it is everyone's hope that we will come out on the other end of this pandemic, parties who are co-parenting should continue to keep the lines of communication open in the event another shutdown is ordered. Now, more than ever before, it is extremely important for parents and everyone involved to work together to help keep the children safe and ensure their best interests remain at the forefront.

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