

Children as Pawns and Other Legal Issues During The COVID-19 Pandemic

Governor Andrew Cuomo issued Executive Order 202.6 on March 20, 2020, reflecting the unfathomable severity of an essentially invisible enemy, a virus. This novel coronavirus disease, COVID-19, is so transmissible that the all-too-familiar voice of Dr. Anthony Fauci repetitively reminds us all that we must continually adapt our behavior to the vectors of the contagion or risk his grim projections being realized.

To counter the dire and unthinkable, inspiring individuals have expressed uplifting expressions, words to the effect that *we all must work together to survive!* And yet, we see in our matrimonial community that there remain those misguided and unwise parents who are using their children as pawns; it is as if the pandemic crisis provided another opportunity for them to do so.

Mitigation Efforts, Visitation and COVID-19

Less than a month ago as of the writing of this article, Governor Cuomo took the never-before considered drastic measures of closing schools, prohibiting public gatherings, shutting restaurant eat-in services, and ordering non-essential employees to work remotely, when feasible, thereby shuttering most non-essential retail operations and other businesses.

But appreciably, what the Order did not do is prohibit parental access to children, whether such access be based upon ongoing voluntary schedules, written agreement or court orders. Certainly, parents who are divorced or legally separated, or in the process of being so, would work together to figure out how to serve the best interests of their own children in the face of the dreadful circumstances of COVID-19; it turns out that view now seems naive.

Despite that a primary responsibility of a custodial parent is to assure meaningful contact between the children and the other parent¹ and the willingness of a parent to assure such meaningful contact between the children and the other parent,² our esteemed Judge Jeffrey Sunshine, Justice of the Supreme Court of the State of New York and the Statewide Coordinating Judge for Matrimonial Cases, found it necessary to speak out to troubled parents at the beginning of the outbreak; he provided a message to the bench and bar in the hopes that his words would reach the right parties and wrote:

[T]hose who think that there is a lack of consequences to not conducting themselves appropriately during this crisis are wrong... One of the only things that should and can bring comfort to a child are parents cooperating... Let them have fond memories of how parents conducted themselves... If parents do not conduct themselves appropriately and sensibly, their children will remember throughout their lives how they acted and so will the judge deciding the case... If your clients are not listening to you and think they are not accountable for their conduct—might I suggest you send this to them.³

Every day, courts and counsel alike participate in countless cases wherein one parent interferes in the children's relationship with the other parent, where the child(ren) are being treated as pawns by the interfering parent. Sometimes, one parent overtly denies parental access to the other parent, but other times, the actions of the wrongdoer are a bit more subtle and insidious in their manifestation.

Such manipulations include, but clearly are not limited to, interfering with a parent's parenting time by scheduling social activities during a parent's parenting time,⁴ extorting money from a spouse by not allowing parenting time unless the other parent pays money not due and owing,⁵ showing up [unexpectedly] during a parent's scheduled time with the child,⁶ repeatedly texting a child during the other parent's limited parenting time,⁷ buying concert tickets for concerts scheduled during a parent's summer vacation time with the child,⁸ punishing a child for having a relationship with the other parent by forcing the child to take phone/video calls outside in inclement weather⁹ or by confiscating gifts given to the child by the other parent.¹⁰

Parents Facing New Challenges

Now, only a few months into the COVID crisis, the machinations of the offender parent are all too predictable, telegraphing his or her malintent. One parent deciding unilaterally to withhold the child from the other parent would be legally baseless when each parent is equally capable of following all the safety rules to protect the child. Likewise, a parent demanding to exercise his or her parental rights when he or she is immunologically compromised or showing symptoms of disease would also be legally without merit. Even where certain parents and their children should not be in physical contact with each other because of illness or vulnerabilities to the virus, the available technology opens a wide dimension of virtual contact. But where there is a controlling and ill-intentioned parent, that access may be shut down.

Clients who are dealing with such a troubled parent would do well to be counseled to keep a careful log of incidents of poor conduct by the other parent, including dates and times, changes in the child's behavior toward the visiting parent and statement made by the child that may seem derogatory or sound coached. Counsel should encourage the client to remain calm and work on providing additional allegations of alienating parental conduct to counsel so that he or she may use the reported information to form the basis to seek remediation.

Courts have always been attentive to protecting the well-being of their wards and have fashioned its awards accordingly: in extreme cases ordering a change in custody,¹¹ suspension or cancellation of child support payments,¹² awarding the parent who is the subject of interference expanded and additional parenting access,¹³ or ordering compliance with custody and visitation orders.¹⁴ Consequently, in the long picture, courts will ultimately be there to right the wrongs.

As a matter of practice within the legal framework, these parental-access cases, known to be tension-filled, motion saturated and litigation heavy, have traditionally been conferenced by the courts to give the process a chance to work and progress possibly to resolution. But now, just as New York State residents are being asked by the Governor to pause, attorneys and courts must do likewise and refrain from hitting the litigation lever when the pause button may provide more productive outcomes, especially when the courts, families and economies have been overwhelmed by sickness and death.

Consider for a moment the current status of pending cases. In this writer's experi-



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ence, attorneys are reaching out to each other to solve current issues between the parties, and parties are entering into signed stipulations, whenever possible. Governor Cuomo understood the need for legal life to move forward despite the closure of court buildings. Implicitly, he communicated the message that work does not stop because the workplace is closed. When the Governor issued the executive order to permit the notarization of signatures through

technology to adhere to the social distancing guidelines, attorneys were empowered to pick up the pace and use their talent, skills and experience to accomplish the clients' legal goals, minimizing court intervention.

Conclusion

The COVID-19 pandemic that has devastated New York State, especially Long Island and NYC, must now be considered a significant factor in the legal analysis of not only pending and future divorce actions, but also post-action financial applications that will undoubtedly be made as a result of businesses being closed, jobs being lost, and stock markets being wildly volatile. Attorneys who practice in the diversified and multifaceted areas of matrimonial and family law, have always had a large role in negotiations, therapeutic analysis, and hands-on problems

solving, and now more so, during these trying times.

Perhaps now, for example, when representing the non-monied spouse, the attorney will not be as quick to move for pendente lite financial relief and instead seek relief through negotiations with opposing counsel. Or, maybe counsel should first explore the possibility of resolution, without court intervention, when representing a payee spouse receiving benefits under a pendente lite order where payments are late. Being quick to seek a finding of contempt the moment a default occurs without investigating the cause of the default may no longer be good practice. Instead, attorneys renewing their commitment to work intensively towards resolution outside the judiciary system will become the new gold standard, providing a high quality of legal services while avoiding numerous, often inefficient, hours in court, scorching pretrial litigation and trial preparation.

Does it make sense at this time, for example, to make a contempt application against a payor spouse whose business has been shuttered for the past month? Or, to bring a preclusion motion against a first responder working around the clock who has not been available to collect the documents demanded as part of the discovery process? Or, to move for a visitation modification because one of the parties is a COVID-19 nurse and

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Children as Pawns ...

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alternate visitation arrangements need to be made? Maybe we are seeing the beginning of a new normal in matrimonial and family law practice.

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3. Justice Jeffrey Sunshine, Justice of the Supreme Court; State of New York; Op-Ed from Judge Jeffrey Sunshine: Custody and Visitation During the Current Pandemic (Mar. 27, 2020), available at <https://bit.ly/36lJOkx>.
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9. *Nieves v. Nieves*, 176 A.D.3d 824 (2d Dept. 2019).
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