

# School & Custody Considerations in light of COVID-19

Responses to questions provided by  
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## **What are you telling your clients who are having a difference in opinion regarding school options for the coming year?**

The first thing that I am telling my clients is to take a deep breath. This is all new territory and while it is stressful for everyone, we need to try to approach the decisions around the coming school year rationally, much as we would any other big parenting decision. I urge my clients to make a list of the pros and cons to not only their choice regarding school, but also the pros and cons pertaining to their

coparents' preference. I am doing my best to help my clients understand that the more they are able to work together with their coparent, the better off they will be—because the truth of the matter is that most courts are backed up at this point, and we really do not have any clear precedent for advising our clients in terms of how any given judge would rule on this issue if faced with it.

## **Are there ways that you believe parents can change their custody plan to reflect the new reality many will face, where children will be in the home for all of their learning, while recognizing that such changes are only to last for so long as school remains virtual?**

Yes. It is clear that for some families, the reality of the coming school year might make their current parenting plan unworkable for any number of reasons.

I believe that changes that might be necessary due to virtual learning schedules and/or parents' work arrangements could be agreed upon by the parents and reduced to writing. Any such written agreement between the parties would ideally be notarized and should also clearly spell out that the changes to the parenting time will only last for so long as COVID-19 continues to impact school and/or work arrangements. It would, of course, also be an option in some jurisdictions to try to get a temporary custody

order to reflect these changes, but again, the dockets are backed up in many jurisdictions.

On a related note, if parents are in the process of setting their parenting plan or do not yet have one in place, they will want to make sure that the plan they draft accounts for how their parenting time will change once COVID-19 is no longer impacting schools and places of employment. It should also be noted that parents need to consider that any of these changes that they make to their parenting agreement, whether formal or informal, could potentially result in leverage for one of the parents, depending upon how long the "new arrangement" lasts.

## **What are you telling clients who are raising concerns about how the other parent is handling social distancing and other precautionary measures? Can visitation be withheld?**

Here, again, I am telling my clients that they need to take a deep breath and remember that even in the best of times, parents make different parenting choices during their parenting time. There is no question that the stakes feel higher around parenting differences related to social distancing, mask wearing, and the like; however, most courts have come forward with administrative orders indicating that these differences are NOT reasons to withhold visitation. Each parent should be clearly communicating their concerns to the other parent, and I certainly advise my clients that they should be following any laws or orders that are currently in place during their parenting time. But beyond that, absent egregious behavior, parents should move forward with their

normal parenting time.

Some parents will be faced with additional challenges, if, for example, travel is required for parenting exchanges. In those situations where travel might not be a viable option at this time, I am advising my clients to try to work towards creative solutions, including virtual visitation or an agreement to make-up for lost time once that becomes an option. If a case comes before the court down the line, judges have made it clear that they will want to see that parents worked together for the best interest of the children and did not try to take advantage of the unprecedented challenges we all find ourselves facing.

## **Have you seen parents going to mediations specifically for these school-related issues? How do you believe mediators can assist/what tools can they use?**

Mediation is a fantastic tool that can be used on a variety of issues, and, for many parents, it is likely the ideal forum to resolve school-related issues. Given the current restrictions and back up in the court system, I have encouraged many of my clients to take advantage of mediation. Mediation is a form of alternative dispute resolution that utilizes a trained, neutral, third-party mediator to enable discussions for parties to work towards an agreement. The mediator listens to each party and attempts to facilitate an

understanding of each party's viewpoint. During COVID-19, mediation has become even more accessible thanks to the availability of online mediation sessions.

In my experience so far, conducting mediation via Zoom has been widely successful. For the purposes of school-related issues, a neutral, third-party could be exactly what the parties need to feel comfortable with compromising on the given issue.

## **Do you believe that GALs, PCs, or even judges could face any liability if they recommend or order a child to resume in-person instruction and that child then contracts COVID-19?**

Judges will be protected by judicial immunity, which is a type of sovereign immunity that shields them from liability related to their decisions. Many statutes protect PCs in the same way and, at least in

Illinois, GALs have quasi-judicial immunity as well. Judges can, of course, be overturned or removed from the bench and GALs or PCs could similarly be removed from court-approved lists.

## **If faced with the decision, do you think that courts would find that the change from in-person schooling to remote learning amounts to a substantial change in circumstances warranting the modification of a permanent custody order?**

As with most family law questions, I believe the answer to this will vary and be very fact specific. If the only change is that the children will be attending school virtually, then perhaps the court would not find that it amounts to a substantial change in circumstances. However, if one parent's visitation is

effectively cut off due to travel restrictions and there has been an employment change for one of the parents that enables them to provide more parenting time than they once could, perhaps the court would then find that the substantial change burden has been met.

## **In what ways have the lessons of the past five months altered the way that you will draft custody orders and parenting plans moving forward?**

Every time we as attorneys help our clients through unprecedented times, we are reminded that clear drafting is key and that we need to be as broad as possible in our thinking as we work to draft orders and agreements that can withstand the test of time.

I do believe that some custody orders and agreements might begin to include clauses that address pandemics or other major events that might significantly impact the ways in which children receive an education, but I also think that it is worth considering whether or not one parent should be given final decision-making related to education. However, as we are seeing in the current situation, that would not entirely solve the problem as it could easily be argued that the decisions parents are currently making related to education also fit squarely

into the realm of healthcare-related decisions, which might have been delegated to a different parent than the one with final authority related to education.

I would also consider including a provision that the parties treat any executive order of the Governor of their state as though it were a court order. I would provide for shared costs of any additional testing or medical expenses due to any pandemic. I would not allow automatic "make up" parenting time if such time is due to a pandemic as it would be impossible in most cases. But I would provide for more virtual face time meetings for quarantined children, especially where one parent is unable to exercise their regular or holiday parenting time due to the pandemic.



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Thomas T. Field practices in the areas of matrimonial and family law, primarily in Cook and Lake Counties in Illinois, and where his expertise is of particular value throughout the State of Illinois. Mr. Field is a seasoned litigator of custody disputes, relocation actions (including interstate and international matters involving the Hague convention), resolution of post-dissolution conflicts, and more.