

COVID-19 and Future Custody Determinations

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Byline: JEFFREY SUNSHINE

Body

At this time of an historic health emergency, strains could appear in an intact relationship, while in a fractured relationship those strains and disputes become problematic quickly.

It is difficult for lawyers to tell clients that barring an absolute emergency they cannot come to court to seek relief. It is difficult for lawyers and judges to fathom that while our Chief Judge has ensured that courts remain open for essential matters, their access to non-essential courtrooms, hearings and motions are severely impacted at least for the time being. Certainly, comprehensive discussions are ongoing by court leadership to provide methodologies for safe remote access during the emergency.

So, what do lawyers tell their clients? What should clients be doing? In many ways it might be helpful for attorneys and clients to know what really is in a judge's mind when determining custody and visitation disputes. To look at it from my eyes and not theirs.

One of the important things I think about in making a custody determination is if this is how this individual is behaving while a case is pending or about to commence, how will they behave when it is over? Simply put, when you behave a certain way and there is a judge in the equation, how will a parent behave when I am no longer involved in their lives? With parents who are not obeying court orders, or where no orders exist are engaging in "self-help", attorneys may and should remind them that the actions they take today and during this crisis could well be determinative or dispositive at the time of final decision by a judge. The concept is well embodied in New York case law. One of the factors a court must consider in determining custody is which parent is likely to provide access to the other parent.

Those who think that there is a lack of consequences to not conducting themselves appropriately during this crisis are wrong. Jurists agonize over many custody and parenting time decisions. It is one of the most difficult life-impacting decisions a jurist can make. Often the court is presented with two good people, each convinced that their approach is better, unable to compromise or feeling that compromise leads to a sign of weakness. Sometimes the dispute is really about money-not wanting to pay child support; wanting to control how the other party spends support and maintenance or just being convinced that they could do a better job than the other-and, unfortunately, sometimes it's a power imbalance or domestic violence that defined a relationship.

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How they conduct themselves at parenting during a time of a pandemic crisis, one of which we have never before seen, will shape their relationship with each other as divorced parents in the future, the relationship they have with their children and most importantly the relationship that their children have with them. As adults we are all frightened over the events of the past few weeks and the uncertainty of the future. Through the eyes of a child, their world turned upside down-their school disrupted and social interactions with friends now almost impossible. One of the only things that should and can bring comfort to a child are parents cooperating. Not only is it the best interest of the child-the time-honored standard-it is the best interest in their divorce and their relationship to come. These events will have a lasting impact. For the last generation, it was the Great Depression and World War II; for my generation, it was the assassination of President Kennedy; for my children it was 9/11; and for the generation of children today, it is the events that now surround us. 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. I listen carefully and remember the children who have spoken to me during the hundreds of in-camera interviews I have done in the past 21 years. I hope over the next few years children will be telling me how positively 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 and they did it for me.

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.

JEFFREY SUNSHINE is a Justice of the Supreme Court and the Statewide Coordinating Judge for Matrimonial Cases.

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