

MICHELE A BROWN

EVOLVING CASELAW COVID AND CHILDREN

Domestic Violence, COVID and Children

In general, these cases illustrate that COVID alone is not sufficient to suspend parenting time, even when considering domestic violence. However, where there are orders of protection, the courts will not endanger the protected party by altering exchanges.

S.V. v A.J., 68 Misc3d 330 (Family Court, Bronx Co. 2020) A two-year complete stay away order of protection was entered in favor of mother against father, with a carve out for access exchanges to be at a police precinct because of the parties' history. Mother argued against any visits because of COVID, further arguing that police precinct exchanges further endangered the children with exposure. The court ordered that valid orders must be followed – if the mother doesn't comply the court will consider whether she is a fit custodian. In light of the parties' history, despite possible exposure, police precinct transfers continued.

S.C. v Y.L., 67 Misc3d 1219(A) (Supreme Court, New York Co. 2020) A Family Court Order of Protection was in place. Mother was denying access to father presumably because of COVID (identified as a high conflict divorce). The court ordered access resume but directed supervised transfers which could “ally the COVID concerns stoked by” mother.

A.S. v N.S., 68 Misc3d 767 (Supreme Court, New York Co. 2020). IDV Court ordered virtual custody trial over the objections of the AFC and the father. Court noted it had ample opportunity to observe the parties during appearances and the criminal proceeding.

V.G. v Hanley (as Clerk of the Family Court), 70 Misc3d 392 (Supreme Court, Richmond Co. 2020) The issue was the Family Court's refusal, pursuant to Administrative Orders (AO), to docket the father's custody petition. He alleged he co-parented with mother until May 6, 2020 when she filed a “bogus” Family Offense Petition against him. The Supreme Court discussed the COVID shut downs, and the fact that out of wedlock parents are being treated the same as

married parents. Clerk was correct in not docketing a non-essential custody petition.

Samantha G.S. v Jonathan G.B., 70 Misc3d 1202(A) (Family Court, Kings Co. 2020) A relocation case with a myriad of factors. Father's relocation permitted with the Family Court noting domestic violence between mother and her sister, and mother's failure to comply with COVID protocols.

Mercedes E.H. v Dexter R.N., 197 AD3d 1038 (1st Dept 2021) Prior order provided for access transfers at school. Modified to mother's home as pickup at school, when school is remote because of COVID, is "nonsensical". Father's claims of safety concerns with collecting the child curbside at mother's residence unsupported by the evidence. Father also appealed the denial of the motion to recuse the trial judge. Denial of recusal of trial judge affirmed.

J.F. v D.F., 73 Misc3d 1215(A) (Supreme Court, Monroe Co. 2021). These litigants had been "at it" for years. There is a companion case in the vaccination section of these materials as well as a child support case I elected not to include as it had no bearing on COVID issues. All of these cases were decided by Justice Richard Dollinger, who writes beautifully. In this matter, mother filed for a family offense proceeding, based primarily on emails from father accusing her of violating COVID protocols. His "persistent" insistence would "seriously annoy" almost anyone, but it does not constitute a family offense.

Vaccination Disputes.

These disputes occur on two levels. First, exposure of unvaccinated children to adults who are not vaccinated. Second, whether to have children vaccinated. As a general rule, discussed in the cases, a hearing is necessary to compel vaccination over the objection of a parent.

C.B. v D.B., 73 Misc3d 702 (Supreme Court, New York Co. 2021) The issue presented was: Can a mother, with de facto custody, condition father's access (already limited and supervised) to both father and his supervisor being vaccinated or tested before each access period. (Underlying the supervision are allegations pertaining to father's substance abuse, mental health and prolonged periods of absence.) The court considered the danger of voluntarily remaining unvaccinated versus the father's duty as a parent. Father was motivated by a desire to burden mother, as opposed to keeping the children safe. His access was suspended and the Court compared father's right to refuse vaccination or testing versus mother's

reasonable conditions. The court discusses the preschool requirement that the parents be vaccinated, and the expectation that as society returns to normal, vaccinations are expected to “participate meaningfully in everyday society”. Father’s right to refuse vaccination is not absolute but is “subject to his duty as a citizen to other citizens and his duty as a parent to his child.”

Heffer v Krebs, 196 AD3d 684 (2nd Dept 2021) pertains to vaccinations generally and gets cited in COVID vaccination cases. The court essentially held that one party to a joint custody agreement having the children vaccinated, knowing the other party’s religious objections, does not constitute contempt, nor does said action form a foundation to convert joint to sole custody. Moreover, the parties’ express intent was to maintain the children in public schools, which required vaccinations.

Matter of Athena Y., 201 AD3d 113 (3rd Dept 2021) A hearing was required when a 13 and 15-year-old wanted to be vaccinated, their father consented, their mother objected, and the children were in foster care. There is no statutory or other authority to permit a 13 and 15-year-old to consent to vaccinations (a parent retains the right to direct a child’s medical care, short of neglect, until the child turns 18 except for certain statutory and constitutional exceptions). The Court noted there was a legislative bill pending which would give a 14-year-old authority to consent to vaccinations over a parent’s objection. The issue for the hearing was: Does refusal to authorize vaccination constitute an acceptable course of medical treatment?

J.F. v D.F., 74 Misc3d 175 (Supreme Court, Monroe Co. 2021) This case was decided subsequent to the family offense case above, also by Justice Dollinger. The Court ordered COVID vaccinations on papers and with testimony of pediatrician, over the objection of the father. The doctor and the AFC both supported vaccination where the 11-year-old wanted to be vaccinated like her older sister. “Waiting” for more science and testing, like the father wanted, was simply untenable “when the specter of a killing or incapacitating disease is swirling in the environment surrounding this young girl.”

B.S. v A.S., 74 Misc3d 473 (Supreme Court, Kings Co. 2021) A long well-reasoned decision by Justice Jeffrey Sunshine. In April 2020, mother brought an action seeking compliance with COVID guidelines including social distancing. How she managed to file a “nonessential matter” during the COVID lockdown is not explained. However, the April 2020 matter resulted in a stipulation that required the parties to comply with New York State and New York City issued guidelines

for COVID. On December 7, 2021, mother brought an action seeking that the children be vaccinated or in the alternative that father be tested before periods of access. Mother and her partner were vaccinated and had a young child. Father was an attorney who asserted he has spent hours researching the issue and would “never” agree to vaccination. Essentially, father did what he wanted regarding masking, social distancing, and travel. He “shamed” the children for wearing masks. His quoted statements included: “a free county and I will do whatever I want,” “you’re literally a sheep,” “sheep, sheep, sheep,” and “they will not be brainwashed monkeys.” The court noted that the children’s activities and private school (which father paid tuition for) required vaccinations. The acrimony, including the name calling, called into question the continuation of the joint custody arrangement. The court ordered a hearing on custody – as who would have custody would decide the vaccination issue, not the court.

A.L. v V.T.L., 2022 NYSlipOp 22017, 2022 WL 2012378 (Family Court, Rockland Co. 2022) The prior order provided for joint custody with mother having final decision-making authority. Family Court held a hearing based on father’s objection to the COVID vaccine deciding that an unresolved disagreement on medical decision was sufficient to hold a hearing on the issue of final decision making. Family Court, however, found no evidence that mother was other than a thoughtful parent, and therefore did change in custody. Meaning the mother was free to have the vaccine administered.

Other COVID Related Issues

This is a miscellaneous grouping – however, the issue of relocation for COVID safety is raised in several of the cases. Many of these cases have been rendered moot by the passage of time and the abatement of the pandemic. Nevertheless, they are included as a window into how pandemic specific cases were managed by the courts.

Jennifer R. v Lauren B., 68 Misc3d 225 (Family Court, Kings Co. 2020) The court noted an extensive history of mother filing against the ex-wife seeking both sole custody and a relocation to New Jersey. When COVID hit, the parties voluntarily agreed to a two-week alternation of access to avoid unnecessary transfers. Mother moved yet again for an order of temporary sole custody and for the child to reside exclusively in New Jersey. The child wanted to live temporarily in New Jersey. Mother’s petition was denied. As nothing specific was cited where the ex-wife placed the child at risk of exposure. Mother’s citing Brooklyn/New York City as

the number one hotspot in the nation as a safety concern didn't impress the court, as New Jersey was the number two hotspot in the country.

S.A. v R.H., 67 Misc3d 1227(A) (Supreme Court, New York Co. 2020) Father wanted to “temporarily relocate to California.” He was given permission to temporarily relocate on 3/24/20, however, his conduct suggested an intent never to return (i.e. moved all the child's belongings to California). The Court noting that the Tri-State area remained the epicenter of the pandemic and California was less affected, extended father's permission to temporarily relocate until 7/8/20 after which the child had to be returned as it would be safe to resume supervised access. The decision was premised on the fact that mother's supervised access was “impossible” to exercise as the supervisor was unwilling to expose herself.

Toussaint v Doucey, 199 AD3d 693 (2nd Dept 2021) Mother's move to France was anticipated in parties' parenting agreement from 2018 which provided the children would live with the mother either in the US or France, depending on her place of employment. The mother's summer of 2020 temporary move to France was prompted by the COVID pandemic to provide a healthier environment and was in the best interests of the children.

Robert H. v Thurma S., 70 Misc3d 1202 (A) (Family Court, Kings County 2020) Father had had physical custody since 2017. Maternal grandmother requested visitation. Mother sought a custody modification. In February of 2020, both mother and maternal grandmother were granted visits once per week in a community space. Subsequently, considering the COVID pandemic, the maternal grandmother and mother could not continue visits “as there were in fact no community spaces where they could safely visit”.

Cleary-Thomas v Thomas, 200 AD3d 516 (1st Dept 2021) Concerned a dispute over transportation to facilitate access with a parenting agreement that had a 5-mile radius marker. The parties' temporary informal agreement to reside in their second homes (yes homes plural) on Long Island during the pandemic did not alter the radius clause. Additionally, the court noted that COVID testing of the children was diagnostic, non-invasive, and did not require the other parent's consent.

Damon B. v Amanda C., 2022 NYSlipOp 01082, 2022 WL 479478 (3rd Dept 2022) Visitation problems arose where the order required public place access, and public places were closed. The difficulties and confusion made any violation not willful.

Nelson UU v Carmen, VV 2022 NYSlipOp 01218, 2022 WL 547202 (3rd Dept 2022) There was a March 5, 2020 temporary order directing exchange of the children at a police station. The father alleged the mother failed to appear for the exchanges from March 6, 2020 to May 14, 2020. The lower court, in finding mother's violation not willful, also denied a change in custody. The Appellate Department affirmed. Mother's "violations" were due to her fear of the children contracting COVID," she was protecting the health of the children. The court noted it was the inception of the pandemic and there was great uncertainty and did not fault mother for not filing as the court was restricted to essential matters, making it difficult to fault mother for failing to seek judicial intervention. The father was awarded make-up time.