20/20 Hindsight on 2020's Coronavirus Pandemic and Its Effect on the Practice of Family Law

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"Business as Usual" Took on a New Meaning in the Family Law Legal Arena Amid the COVID-19 Pandemic

In the wake of the COVID-19 pandemic in 2020, "business as usual" took on a new meaning in the family law legal arena. While families and businesses explored different ways to cope with changes to the *status quo* and adjust to "new norms" inevitably some problems, challenges and disputes remained the same. Such is life and for many, custody, parenting time, support, and other family law related issues did not cease in a pandemic. In fact, in some cases, they were exacerbated as a result of additional tensions caused by the public health crisis. Family law judges, arbitrators, mediators, and litigators worked around the clock trying to resolve the typical family law disputes but the problem solving was by far not "business as usual" amid the novel coronavirus public health crisis.

For one, as part of the New Jersey State Judiciary's social distancing efforts to slow the spread of the coronavirus, there were no in-person Superior Court proceedings as of March 18, 2020, except for extremely limited emergent matters and certain ongoing trials. The limited sessions had a profound impact especially on litigants who needed to resolve issues and disputes that were not deemed emergent but were important, nonetheless. With courts limiting sessions to emergent matters only, and having to postpone previously scheduled motions, hearings, etc., litigants and family law practitioners had to look elsewhere for resolution. New Jersey courts were backlogged as they were before the COVID-19 pandemic. More than ever, litigants and family law practitioners had to think "outside of the box" to resolve disputes. When litigation was no longer a realistic route, alternative dispute resolution such as mediation and arbitration where a neutral third-party assists parties in

resolving disputes outside of court proved to be effective and sought-after substitutes to litigation.

Well before the COVID-19 pandemic, technology allowed people to be in the "same room" without having to physically be in the same room. With Skype, FaceTime, Zoom conference, and other video conferencing platforms, people already were able to have virtual face-to-face communications. Business already was done by videoconferencing. But it certainly was not until social distancing was required to combat the COVID-19 pandemic did New Jersey courts and attorneys, in general, and New Jersey family law courts and family law practitioners, in particular, really start taking advantage of these virtual platforms.

In the family law legal arena, in-person case management conferences, motion hearings, early settlement panels and other hearings were converted to telephonic and/or video conferences to keep cases moving. To accommodate litigants who needed the immediate assistance of a neutral third party in resolving custody, parenting time, support, and other family law related issues in the midst of the COVID-19 pandemic, virtual mediation and arbitration developed. These changes gave litigants the opportunity to resolve issues and disputes without delay or interruption notwithstanding the state of affairs in New Jersey.

In some respects, for those who already settled their divorce cases, it became easier to put divorces through. Because there were no in-person court appearances, uncontested divorce hearings were conducted telephonically or by video conference. Some Family Court judges even started granting divorces "on the papers." Therefore, litigants who already settled their divorce by way of a marital settlement agreement did not have to appear in court in person to be granted a divorce.

Covid-19 Mandatory Lockdowns and the Rise in Divorce and Domestic Violence

Some married couples enjoyed the extra quality time and being home with their spouse. But, for others who were already in troubled marriages before the COVID-19 outbreak, the significant increase in time together due to a mandatory lockdown not surprisingly caused increased tension and stress at home. Stressors caused by the pandemic — health issues, disagreements regarding the children, financial stress due to layoffs or reduced wages, etc.– create problems in a healthy marriage. All the more

where there was already a breakdown in communication and lack of trust in a strained marriage, these stressors caused spouses to become even more estranged and decide to separate or divorce.

On March 21, 2020, New Jersey Gov. Phil Murphy signed Executive Order No. 107 requiring all New Jersey residents to stay at home until further notice, except for certain exceptions. This stay-at-home directive was intended to help "flatten the curve" as the nation dealt with the COVID-19 pandemic. The resounding message was: Stay SAFE. Stay HOME. But, unfortunately for victims of domestic violence, home was the least safe place to be. Within 24 hours of signing the Stay-at-Home Order, Murphy tweeted the COVID-19 update below — an important reminder for those who did not feel safe at home.

As predicted by experts and health care professionals, there was an increase in domestic violence cases. After all, abuse in all its forms, continues and even escalates when isolation and financial stress are at their peaks during a pandemic. Victims of domestic violence continued to suffer various forms of abuse at the hands of their abusers – physical, mental, emotional, financial, etc., and more than ever, it was important for victims of domestic violence to be reminded that they are NOT ALONE. State and local police departments, municipal courts, and the Family Part of New Jersey Superior Courts in all 21 counties of New Jersey continued to handle applications for temporary restraining orders (TROs) notwithstanding the COVID-19 crisis. But despite the strong response from the government and social service agencies, domestic violence rates continued to increase and disproportionately affected low-income and marginalized individuals more, according to research conducted by Partners for Women and Justice.

Effects of COVID-19 Pandemic in the Legal Analysis of Family Law Disputes

Some of the questions that family law judges and practitioners had to answer included: What are the "rules" of shared custody while following stay-at-home orders? What if a parent is an essential worker? How can parenting time exchanges be done safely? What type of information do co-parents need to be sharing with one another to guard everyone's health?

Courts had to find the right balance between: (1) ensuring that a parent and child continue to have meaningful parenting time; and (2) protecting the child against the risk of exposure to the coronavirus. For divorced parents who were essential workers, especially those serving on the frontlines, parenting disputes with former spouses were especially contentious. Parents who worked in the health care industry as physicians, nurses, medical technicians, nurse aids, etc. had greater risk of exposure to COVID-19. And as such, this caused the other parent to demand the suspension of in-person parenting time.

Although generally, the terms of an existing divorce custody and parenting time agreement remain in full force and effect except as otherwise mutually agreed upon by the parents or ordered by a Court of competent jurisdiction, in the case of the COVID-19 outbreak, there were legitimate — and novel — health and safety factors to consider in determining custody and parenting time disputes between divorced co-parents. But the legal decision-making process for judges remained the same: cases were analyzed based upon their own set of unique facts and circumstances and disputes were decided on the merits of the arguments and evidence. The core inquiry remained unchanged: What is in the *children's* best interests? Family law judges called upon to decide these COVID-19-related disputes often inquired: (1) whether a parent adhered to the statewide stay-at-home order for New Jersey residents; (2) whether a parent or anyone in his or her household had been exposed to anyone who had tested positive for COVID-19; (3) what safety precautions a parent had taken to ensure that their home is a suitable and safe environment for parenting time; (4) whether a parent or any other household member exhibited any symptoms of the virus; and (5) whether the child(ren) had any health issues (e.g., asthma or other respiratory issues, compromised immune system, etc.) that made them more susceptible to contract the virus.

To err on the side of caution and to minimize persons in and out of one's home, curbside pickup and drop off were often utilized provided that the child(ren) was/were of an age where this could be safely accomplished. Before the COVID-19 pandemic, curbside pickup and drop off generally were only utilized in cases where there was an existing restraining order or in highly contentious divorces. Parents and/or third parties who were providing transportation were required to adhere to CDC guidelines and safety precautions such as cleaning and disinfecting frequently touched surfaces (car door handles, power window buttons, seatbelts, dashboards, etc.); covering the mouth and nose with a

mask; wearing gloves. Common sense hygienic and safety precautions recommended by the CDC to prevent illness and/or the spread of the virus also were required during parenting time exchanges.

It is human nature to fear the unknown. Because there were so many unknowns regarding the coronavirus, it was understandable for parents to have many questions and concerns. A good rule of thumb was: if the information is something that a judge may later consider either to allow or deny parenting time, it was probably best that it be disclosed, and if any way could be perceived as problematic, to be addressed head-on. Another good guide used by family law practitioners: Disclose to the other parent what you would want disclosed to you.

The COVID-19 pandemic also presented some questions regarding financial relief in the context of a divorce when the closing of businesses, layoffs, furloughs, and reduced income for those who were fortunate to keep their jobs were prevalent. Tensions were high between obligor-spouses who had alimony and child support obligations and obligee-spouses who were dependent upon that financial support. In New Jersey, alimony and child support obligations can be modified based upon a showing of a substantial change in circumstances such as unemployment or reduced income of the obligor-spouse.

One of the factors for the Court's consideration is whether the obligor-spouse who becomes unemployed and/or suffers a reduction in income has made diligent efforts to seek replacement employment or comparable income. Depending on the obligor spouse's work experience and qualifications, age, income, and other factors, this already may be a lengthy process. In the context of the COVID-19 pandemic when businesses are required to close, unemployment rates are high, work forces are being reduced, etc., this problem was compounded especially since by statute, the obligor-spouse seeking a modification of their support obligations are prohibited from filing an application for modification until they have been unemployed, or have not been able to return or attain employment at prior income levels, or both, for a period of 90 days. And even after that initial 90-day threshold, the obligor-spouse must show that the substantial change in circumstances is permanent.

With certain exceptions being made due to the COVID-19 pandemic – from the Internal Revenue Service extending the deadline to file income tax returns to mortgage relief for those experiencing financial hardship due to the coronavirus pandemic – some questioned whether the COVID-19

pandemic qualified as an extraordinary temporary circumstance that required a different analysis. The question remains unanswered as there is currently no reported case law directing how family court judges should handle support modification applications related to coronavirus cases, and the end of the COVID-19 pandemic remains unknown.