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Losing Your Child for Saving Lives: The COVID-19 Timesharing Dilemma

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By **Brian Karpf** | April 21, 2020

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By now, most of us have read the story or seen the news report about the ER physician mother who lost temporary custody of her 4-year-old daughter as a result of her career choice. This legal ruling swept through South Florida, then the entire state and now the country. Dr. Theresa Greene had equal timesharing of her daughter until the child's father filed an emergency motion, asking that her timesharing be completely suspended (on a temporary basis) until the COVID-19 crisis subsided. The grounds raised were that the mother's exposure to the coronavirus posed a risk to both the child as well as the father by virtue of the

timesharing exchanges. The presiding judge granted the motion to suspend the mother's timesharing, while requiring video contact as a substitute and providing for make-up time later. Of note, the mother was wearing protective gear at work and had tested negative for COVID-19. The court further ruled that the mother was to be jailed if she did not turn the child over. The ruling is now before the Third District Court of Appeals, which has already granted mother's emergency motion to stay the decision.

There has been resounding commentary both sides of the table on this issue

Should a parent working on the coronavirus front lines helping those in need lose the right to have physical contact with their child? Should every individual who could be exposed to COVID-19—law enforcement officers, government officials, medical workers, restaurateurs and the like similarly be stripped of all physical contact with their children for the coming months? Even more, is a doctor who sees patients while wearing full protective gear more of a risk to a child than a parent who continues to venture into stores without a mask and gloves?

On the flipside, is it not rational to be concerned knowing that a parent *is* being exposed to COVID-19 on a daily basis? If the court is able to safeguard a child (and those with whom the child is in contact with), doesn't the court have the responsibility to do so? Certainly, the father had reasonable grounds for concern. The question is, what are the appropriate protective measures to take?

The ruling has *stung* parents, lawyers and judges across the country. There are few subjects as painful or emotionally devastating as losing the right to see one's child. It is for this very reason that due process rights must be strictly adhered to in a "typical" case where one party seeks sole timesharing or the termination of parental rights. Whether due process was afforded to the mother here is a point raised on appeal.

Almost across the board, in those cases where timesharing is temporarily suspended, at least "substitute" measures are being implemented. However, deeper consideration of those alternatives is necessary. "Best interests of the child" is a common legal maxim and standard governing most decisions (although here, the ruling was a modification of an existing order, which *also* requires the higher standard of showing a permanent, material, substantial and unanticipated change in circumstances). One would be hard pressed to argue that it is in a 4-year-old's best interests to be forced to go what could be months without a hug from a parent with whom they previously spent half of their time. This is no doubt exacerbated by the child seeing her mother every day through a computer screen, wondering and asking why she cannot see her in person. An already scary and confusing time for the child is compounded by the sudden loss of physical contact with her mother. Lest we not forget that the child was 4 years old; for how long will she sit in front of a phone or computer screen to speak to her mother without being distracted? This, too, is a frequent point of contention in family law cases. While ordering video communication is certainly well-intended, it is far from a sufficient substitute to the real, old-fashioned "face time." And likewise, is the accompanying "make-up time" realistic, let alone in the child's best interests either? Family law attorneys know how difficult it often is to assist parents in agreeing to just *days* of make-up time; to implement months of it is beyond difficult. And then, the child—who will have grown accustomed to spending the last several months with just her father—will now go months without seeing him on an extended and meaningful basis. How is this in the child's best interests? The way the law stands, that make-up timesharing could technically be subject to modification itself, such that it never occurs. Regardless, this is a dangerous form of child ping-pong across a table the size of Texas.

And yet, other Judges have ruled differently. Courts have determined that timesharing exchanges are an "essential activity" and thus not subject to the state lockdown order. I have personally experienced this ruling in a case, and as a result asked the presiding Judge to issue an order explicitly stating recognizing this lockdown exception, for the parties to carry with them in the event that they are stopped by police during a timesharing exchange. While many family law issues remain discretionary, it is puzzling to litigants in particular how different courts can reach such opposite decisions on whether timesharing exchanges are to

be continued or ceased in light of the quarantine. It would no doubt be helpful for the bench and the bar for a single, binding policy on this issue (subject, of course, to the usual fact-dependent variations). Without this, is it fair to overly chastise a particular party, attorney or judge?

The COVID-19 pandemic is a matter of first impression for all of us—judges, lawyers, parents and children. In the end, we are all human beings. We must stand in the proverbial shoes of others and question how we would feel or how we would act if we were in their position. Mistakes will be made; as the "best interests of our children" remain paramount, we should endeavor to avoid them in the familial setting.

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