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## Co-Parenting During Lockdown: COVID-19 and Child Custody Cases Before the Vaccine

New York Law School

# Co-Parenting During Lockdown: COVID-19 and Child Custody Cases Before the Vaccine

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NEW YORK LAW SCHOOL *FAMILY LAW*  
*QUARTERLY* EDITORS\*

## Introduction

This Article looks back at child custody disputes from the early days of the COVID-19 pandemic in the United States, when there were no vaccines available to limit the spread or impact of the disease and much of the country

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\* This project began in Fall 2020, when the 2020–21 New York Law School *Family Law Quarterly* Student Editors researched and prepared digests of selected 2020 Family Law cases that involved child custody and visitation during the first six months of the pandemic in the United States (from March through September 2020). The case summaries were initially included as part of the materials for an April 8, 2021, *Family Law Quarterly* virtual symposium event, *Family Law During COVID-19: Challenges, Adaptations, and Future Impacts*. Editing of the case summaries and development of this Article were completed by NYLS students Erin Peake, 2020–21 Symposium and Communications Editor, who also researched and selected cases; Aliyah Polner, 2020–21 student Editor in Chief, who helped to write, organize, and develop the structure for the Article; 2021–22 Curriculum Editor Mathew Fontanez and 2021–22 student Editor in Chief April Pacis, who completed additional editing work and developed the format for the Article; and faculty Editor in Chief Professor Lisa F. Grumet. Other contributors to this project include 2020–21 student editorial board members Lina Abdullah, Maraya Aboly-Brown, Natalie Alvarez, Shelby Arenson, Fatin Assaf, Jessica Awad, Kelly Barrett, Shannon Bartlett, Reid Bloom, Megan Brandon, Andrew Cohen, Martina Colaizzi, Alexis Dairman, Vlad Goldfarb, Natalie Gutierrez, David Hawkins, Caitlyn Kelly, Andreina Mendez, Lisa-Marie Ortiz, Julia Porzio, Serene Qandil, Laurence Reichman, Alana Reid, Madeleine Robinson, Courtney Roman, Hannah Ross, Kali Schlegel, Sabrina Smith, Elsie Tan, Kathy Torres, Victoria Wilton, and Sivan Zak. Thank you to Professor Ramesh Kasarabada for tremendously helpful feedback.

was in “lockdown.”<sup>1</sup> While the cases included here reflect the trajectory and uncertainty of the early months of the pandemic, they show how courts have weighed physical and emotional health considerations and the parties’ circumstances when determining the best interests of the child.

Beginning in March 2020, most state governments issued some form of “stay-at-home” orders with the goal of protecting public health by limiting the spread of the virus.<sup>2</sup> Most elementary and secondary schools closed their buildings and shifted to online learning, at least from March 2020 through the end of the 2019–20 school year.<sup>3</sup> Many courts suspended in-person proceedings and/or restricted nonemergency filings, and began using virtual technology.<sup>4</sup> The United States and other countries imposed some restrictions for international travel,<sup>5</sup> and 27 states and the District of Columbia imposed restrictions for interstate travel.<sup>6</sup> In an April 2020 custody decision, a Brooklyn family court judge summarized the “lockdown” rules in effect in New York City, which was hit especially hard early in the pandemic:<sup>7</sup>

Unfortunately, in March 2020, the United States became enveloped in the public health crisis of the Coronavirus Pandemic. The Mayor of the

1. For general information about COVID-19 and guidance from the U.S. Centers for Disease Control and Prevention (CDC), see *COVID-19*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/faq.html>. The first known cases of the virus appeared in China in 2019. The first known case in the United States was identified in January 2020. See Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (Mar. 17, 2021), <https://www.nytimes.com/article/coronavirus-timeline.html>.

2. See Amanda Moreland et al., *Timing of State and Territorial COVID-19 Stay-at-Home Orders and Changes in Population Movement—United States, March 1–May 31, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1198, 1200 fig.1 (Sept. 4, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6935a2-H.pdf>.

3. See CTR. ON REINVENTING PUBLIC EDUC. (CRPE), *HOW MUCH HAVE STUDENTS MISSED ACADEMICALLY BECAUSE OF THE PANDEMIC? A REVIEW OF THE EVIDENCE TO DATE 4* (July 2021), [https://www.crpe.org/sites/default/files/8\\_5\\_final\\_academic\\_impacts\\_report\\_2021.pdf](https://www.crpe.org/sites/default/files/8_5_final_academic_impacts_report_2021.pdf).

4. See Lynda B. Munro & Nicole M. Riel, *Our Virtual Reality: Facing the Constitutional Dimensions of Virtual Family Court*, 54 FAM. L.Q. 245, 261–66 & 262 n.57 (2020); Elizabeth G. Thornburg, *Observing Online Courts: Lessons from the Pandemic*, 54 FAM. L.Q. 181, 188–90 (2020); Univ. N.C. Sch. of Law Research Team, *Family Law Court Proceedings in the Pandemic’s First Year: The Experience of Each State as Reflected in Contemporaneous Interviews and Reviews of Court Websites and Orders*, 55 FAM. L.Q. 195 (2021–22).

5. See Robert G. Spector & Melissa A. Kucinski, *The Effect of COVID-19 on International Child Abduction Cases*, 54 FAM. L.Q. 268, 275 n.42 (2020).

6. See *Travel Restrictions Issued by States in Response to the Coronavirus (COVID-19) Pandemic, 2020–2021*, BALLOTPEdia, [https://ballotpedia.org/Travel\\_restrictions\\_issued\\_by\\_states\\_in\\_response\\_to\\_the\\_coronavirus\\_\(COVID-19\)\\_pandemic,\\_2020-2021#Map\\_of\\_active\\_travel\\_restrictions\\_by\\_state](https://ballotpedia.org/Travel_restrictions_issued_by_states_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020-2021#Map_of_active_travel_restrictions_by_state).

7. Corinne N. Thompson et al., *COVID-19 Outbreak—New York City, February 29–June 1, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1725 (Nov. 20, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6946a2-H.pdf>.

City of New York and the Governor of the State of New York declared a public emergency on March 7, 2020, and thereafter signed the “New York State on PAUSE” Executive Order, which “assures uniform safety” for the public. Among other things, the Executive Order prohibits non-essential businesses from operating, non-essential gatherings and advises individuals to take precautions by social distancing, limiting travel, wearing cloth face coverings and using precautionary sanitizing practices. The Order currently extends until May 15, 2020 (*see* <https://coronavirus.health.ny.gov/newyork-state-pause>). In addition, New York City nonessential stores, sports stadiums and public school buildings are closed until the end of the school year and children are remote learning at home (<https://www.schools.nyc.gov/>).<sup>8</sup>

Restrictions on travel as well as concerns about exposure to the disease impacted co-parenting arrangements for parents who shared custody or visitation of their children while maintaining separate households. At the same time, remote learning made different arrangements possible, as children could attend school virtually while staying with a parent whose residence was not close to the child’s school building.<sup>9</sup> Virtual technology also provided alternate means for children to see a parent whom they could not meet with in person.<sup>10</sup>

However, some parents went to court with emergency applications to enforce or modify custody and visitation arrangements based on pandemic-related disputes. Judges considered arguments that the pandemic itself warranted suspending a visitation schedule; that children should not travel or be exposed to “hotspot” jurisdictions; that COVID-19 testing or quarantine protocols should be followed; and that one parent’s noncompliance with COVID-19 protocols put a child at risk of infection.

In resolving these disputes, courts recognized the challenges of the pandemic and the importance of protecting children’s health, while also emphasizing the importance of continuity and ongoing relationships with

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8. Jennifer R. v. Lauren B., 126 N.Y.S.3d 324, 326 (Fam. Ct. Kings Cnty. 2020).

9. For example, a Texas court ordered that the child spend alternating weeks with each parent during the time of virtual schooling in spring 2020, “regardless of the distance between the parties.” Redacted, No. 16-DCV-237771, 2020 Tex. Dist. LEXIS 5882, at \*13 (Tex. Dist. Ct. May 1, 2020).

10. *See* Jeffrey Sunshine, *COVID-19 and Future Custody Determinations*, N.Y.L.J. (Mar. 27, 2020). Justice Sunshine, Statewide Coordinating Judge for Matrimonial Cases in New York State, wrote for an audience of matrimonial attorneys and their clients: “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. . . .” *Id.*

parents for children’s emotional health. In addition, some courts specifically ordered parents to comply with public health guidance. While no vaccine was available at the time of these decisions, some orders specifically mentioned masks, social distancing, hand-washing, and compliance with government protocols generally.

The cases discussed here are all trial-level decisions from March through November 2020, before vaccines became available.<sup>11</sup> We identified cases through research of electronic databases (Lexis and Westlaw); many of the cases are not “published” in official reporters. Some of the cases were decided at times when courthouses were closed to the public and many courts were limiting what types of cases or proceedings could be heard.<sup>12</sup> Many of the cases are from New York, which was an early “hotspot” for COVID-19 cases in the United States. We focused on cases that adjudicated specific disputes in particular families, and not on judicial administrative orders.<sup>13</sup>

The cases included here show different ways in which courts considered the circumstances of the pandemic when making best interests determinations. The Article groups the cases into three categories. Part I discusses several cases that considered general objections to children spending time in two households during the pandemic. Part II reviews varying approaches taken by courts in “hotspot” cases, where one parent argued that the child should stay with them in part because the COVID-19

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11. The U.S. Food and Drug Administration granted emergency use authorization for the Pfizer and Moderna vaccines in December 2020. See Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (Mar. 17, 2021), <https://www.nytimes.com/article/coronavirus-timeline.html>.

12. See *supra* note 4; see, e.g., *Chu v. Lin*, No. 306949/2018, 2020 NYLJ LEXIS 949, at \*4–5 (N.Y. Sup. Ct. May 18, 2020) (discussing challenges of adjudicating child custody cases “in a virtual courtroom setting, such as the one presently operating out of my kitchen . . .”).

13. For example, in Texas, the state supreme court specifically directed that compliance with custody and visitation orders continue notwithstanding the pandemic, while also providing parents with the flexibility to agree to alter visitation plans. The order broadly provided: “Possession of and access to a child shall not be affected by any shelter-in-place order or other order restricting movement issued by a governmental entity that arises from an epidemic or pandemic, including what is commonly referred to as the COVID-19 pandemic. . . .” Seventh Emergency Order Regarding the COVID-19 State of Disaster, No. 20-9050 (Tex. Mar. 24, 2020), *quoted in In re Williams*, No. 13-20-00236-CV, 2020 Tex. App. LEXIS 5122, at \*3 (July 10, 2020). However, “[n]othing . . . prevents parties from altering a possession schedule by agreement if allowed by their court order(s), or courts from modifying their orders on an emergency basis or otherwise.” *Id.* at \*5 (alterations in *Williams*); see, e.g., *Redacted*, No. 19-DCV-26314, 2020 Tex. Dist. LEXIS 6179, at \*3 (July 13, 2020) (approving modification to possession and access order, where the father “agree[d] to waive his visitation rights to the child until the COVID-19 ‘stay-at-home’ order is lifted in Harris County, Texas by local government or the Governor of the State of Texas”).

numbers were lower in their jurisdiction. Part III concerns cases that discussed compliance with government guidance or protocols such as testing, quarantining, mask-wearing, and social distancing, including Centers for Disease Control (CDC) recommendations as well as state or local policies. The Conclusion considers the relevance of these cases for today.

### I. “Generalized” COVID Concerns

One question that arose early in the pandemic was whether children should continue to go back and forth between parents who lived in different homes. On May 7, 2020, in *S.V. v. A.J.*, a New York City judge rejected an argument that it was “‘irresponsible’ to make parents comply with court-ordered in-person visitation” during the pandemic.<sup>14</sup> Under a temporary order issued in January 2020, the father had overnight visitation with his two- and three-year-old children in New Jersey every other weekend, and the children otherwise lived with their mother.<sup>15</sup> There was also a criminal order of protection in effect that required the father to stay away from the mother outside of the context of family court proceedings; the visitation order directed that the parties meet at a Bronx police precinct for the children to travel between parents.<sup>16</sup> The mother stopped facilitating the children’s in-person visits with the father and arranged for daily video visits instead beginning in March 2020, when “stay at home” orders went into effect in both New York and New Jersey.<sup>17</sup> The father sought to enforce the temporary visitation order, while the mother opposed all in-person visits between the father and children.<sup>18</sup>

The judge rejected the mother’s argument that the pandemic itself warranted restricting visitation, finding that “[a] generalized fear of the coronavirus crisis we all face is insufficient to severely limit and perhaps harm a child’s relationship with a parent.”<sup>19</sup> The court further determined the mother did not articulate an adequate health or safety risk that would allow the court to consider suspending in-person visits.<sup>20</sup> In explaining its decision, the court recognized the unprecedented challenges presented by the pandemic, but also emphasized the importance for children’s emotional health of continuing relationships with both parents:

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14. *S.V. v. A.J.*, 126 N.Y.S.3d 631, 633 (Fam. Ct. Bronx Cnty. 2020).

15. *Id.* at 632.

16. *Id.*

17. *Id.* at 632–33.

18. *Id.*

19. *Id.* at 634.

20. *Id.*

We are now in a time of disruption, fear, uncertainty, and uncharted territory, and the Court appreciates how this stressful time may impact families, particularly those in conflict. However, to the greatest extent possible, we must ensure stability and comfort for children. While public health crises such as the one we face may impact children’s lives, and all of our lives, in many ways and for an unknown period of time, there is a presumption that continued connection and time with both parents is critical and in the best interest of children. . . .

While the best interests of a child obviously include health and safety issues, an analysis of children’s best interest must incorporate the impact of altering terms of parental contact on children’s mental and emotional health.<sup>21</sup>

The judge further noted that a March 23, 2020, administrative order issued by the Administrative Judge of the New York City Family Court had not suspended visitation orders, but on the contrary had “extend[ed] all temporary orders issued by the Family Court, including orders of visitation, until such time as the matter is re-calendared or changed by a jurist.”<sup>22</sup> In this case, the court determined that continuing regular visits with both parents was critical and in the best interest of the children.<sup>23</sup> The court also directed both parents “to follow all social distancing rules, to wear masks in public, and . . . make every effort to adhere to the laws, guidelines, and other directives set forth by the City, State, and Federal Government to ensure their safety and the safety of their children.”<sup>24</sup>

Similarly, on April 30, 2020, in *Chu v. Lin*, a New York City judge ordered a mother to comply with a prior parenting order, where the mother apparently had not permitted the father to see the children since the pandemic began.<sup>25</sup> The court in this case required that social workers from an independent agency be present when the children went from one parent to the other parent, in part to “help allay any concerns that either child might have about going to [the father’s] home especially any COVID-19-related fears that [the mother] may have stoked. . . .”<sup>26</sup> The court commended the family support agency employees for providing in person services during the pandemic, describing them as among the

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21. *Id.* at 633–34.

22. *Id.* at 634.

23. *Id.* at 634–35.

24. *Id.* at 636.

25. *Chu v. Lin*, No. 306949/2018, 2020 NYLJ LEXIS 949, at \*5–7 (Sup. Ct. N.Y. Cnty. May 18, 2020) (discussing interim order issued Apr. 30, 2020).

26. *Id.* at \*7.

“unsung heroes helping to keep the social fabric from fraying while we are in these fraught and frightening times.”<sup>27</sup>

However, in *K.B. v. J.D.R.*, a Delaware court denied an application to hold a father in contempt for not allowing the maternal grandmother to visit the child from March through July 2020 when the father was quarantining with the child, two other children, and the paternal grandparents.<sup>28</sup> A prior order provided for visitation between the child, the maternal grandmother, and a maternal uncle every other weekend “from Thursday after daycare until the following Monday morning before daycare.”<sup>29</sup> The court noted that a contempt finding required a showing that the father violated the order “without valid or legal excuse.”<sup>30</sup> Here, the father indicated that he had stopped sending the child to daycare because of the pandemic, and expressed concern that his parents (who were about 50) were “at risk.”<sup>31</sup> The court referenced “‘Stay Home’ Orders” that the Delaware governor had issued, and found that the father had “acted as a responsible parent in restricting the Child’s contact with others outside of his household.”<sup>32</sup> Going forward, the father advised the court that he had no objections to the maternal grandmother visiting with the child again as she “follow[ed] proper COVID-19 precautions.”<sup>33</sup> The court noted that the state of Delaware was “mov[ing] to lesser phases of restrictions,” and modified the visitation schedule so the maternal grandmother would have additional in-person visitation time during the summer.<sup>34</sup>

## II. “Hotspot” Arguments

Some custody disputes early in the pandemic involved parents who lived in different states or countries. In addition to raising concerns about travel safety, some parents argued that the child should not visit the other parent in person because COVID rates were higher in the other parent’s location. This Part discusses five cases in which judges specifically addressed arguments that one parent’s or caregiver’s location was safer

27. *Id.* at \*7 n.6.

28. *K.B. v. J.D.R.*, File No. CN20-03062, Case No. 20-14209, 2020 Del. Fam. Ct. LEXIS 16 (New Castle Cnty. July 31, 2020).

29. *Id.* at \*1.

30. *Id.* at \*2.

31. *Id.* at \*4. The decision does not discuss any particular health risks. *Id.*

32. *Id.* at \*4–5.

33. *Id.* at \*3.

34. *Id.* at \*5; *see also* Earhart v. Kondratenko, No. CJ-09-50-04, 2020 WL 6577861, at \*1–\*3 (Va. Cir. Ct. Culpeper Cnty. Nov. 8, 2020) (father violated order by not arranging visitation with the mother for the weekend of April 21, 2020, but “the violation [was] minimized” given the context of the parties’ communications and the pandemic).

for the child because the other parent lived in a “hotspot.” The cases are organized by date and location, with a note as to how the court assessed the “hotspot” argument. None of these cases discuss vaccinations as the vaccines were not yet available.

***A. Italy/New York (February–April 2020)***  
***(“hotspot” argument rejected)***

On February 27, 2020, in *Raia v. Pompeo*, a father sought to compel the U.S. State Department to issue a passport to him for his 10-year-old son, A.R., in order to bring his son back to the United States from Italy.<sup>35</sup> The father alleged that A.R.’s mother, an Italian citizen, had taken A.R. to Italy in January 2019 without the father’s knowledge or consent.<sup>36</sup> The father had previously begun an application under the Hague Convention on the Civil Aspects of International Child Abduction<sup>37</sup> (the Hague Abduction Convention) to bring his son back to the United States.<sup>38</sup> He had also filed a custody proceeding in Nassau County Supreme Court, where he was awarded full residential and physical custody of his son pending the child’s appearance in New York, and directed to bring his son back to New York.<sup>39</sup> The state court also ruled that the father should be issued a passport for the child, although the child was still in Italy with his mother.<sup>40</sup> The father had also filed a report with the State Department that his child’s passport was lost or stolen—which resulted in the passport being electronically cancelled—but had been unsuccessful in obtaining a new passport for his son.<sup>41</sup>

The father subsequently sought to compel the State Department to issue a passport, arguing that any requirements that had not been met should be waived due to his son’s status as an abducted child and his son’s congenital heart condition, which required ongoing care and made the son more vulnerable to COVID-19.<sup>42</sup> In support of a preliminary injunction application, the father argued that he faced irreparable harm because of the medical risks his son faced in Italy, which was at that time “the epicenter

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35. *Raia v. Pompeo*, 455 F. Supp. 3d 7, 9, 14 (E.D.N.Y. 2020).

36. *Id.* at 9.

37. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 [hereinafter Hague Abduction Convention].

38. *Raia*, 455 F. Supp. 3d at 9.

39. *Id.* at 10.

40. *Id.*

41. *Id.* at 9–10.

42. *Id.* at 11.

of the European outbreak of the COVID-19 pandemic.”<sup>43</sup> The court found the issuance of a passport was “too attenuated” a remedy to address the alleged irreparable harm given that Hague Abduction Convention proceedings were still pending in Italy.<sup>44</sup> In its April 21, 2020, ruling, the court also responded to the father’s arguments based on the prevalence of COVID-19 in Italy by discussing the high number of cases in New York:

The Court notes that the circumstances surrounding the COVID-19 pandemic in Italy and here in the United States are rapidly changing. At the time [the father] commenced this action, no confirmed cases had yet been reported in the tri-state area and Milan, Italy (where [the father] believed A.R. to be located), was the center of the European outbreak. Now, New York State has more confirmed COVID-19 cases than any country outside of the United States.<sup>45</sup>

Thus, during the two-month period from when the proceeding was begun until the time of the published decision, the COVID-19 circumstances of the father’s jurisdiction as compared to the mother’s had changed. Noting that the number of COVID-19 cases in New York had grown to exceed the number of cases in Italy, the court remarked that “[the father’s] argument that A.R. is safer from COVID-19 in New York appears far less plausible than at the time of the hearing.”<sup>46</sup>

### ***B. New York/New Jersey (April 2020) (“hotspot” argument rejected)***

In April 2020, in *Jennifer R. v. Lauren B.*, a New Jersey parent unsuccessfully argued that the child should live with her during the pandemic instead of alternating time with her ex-spouse in Brooklyn, New York, because New York City was a “hotspot” for COVID-19.<sup>47</sup> The petitioner mother and her ex-wife were previously married and were parents to an 8- or 9-year-old child.<sup>48</sup> In 2017, while the parties’ divorce

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43. *Id.* at 12.

44. *Id.* at 13–14.

45. *Id.* at 11 n.4.

46. *Id.* at 12 n.6.

47. *Jennifer R. v. Lauren B.*, 126 N.Y.S.3d 324, 327 (Fam. Ct. Kings Cnty. 2020).

48. *Id.* at 325. The child was born in 2011; the decision was dated April 22, 2020. *Id.* Because both parents were women, this Article refers to them as the “petitioner mother” and “respondent mother.”

proceeding was pending, the petitioner mother moved to New Jersey from Brooklyn, New York, while the respondent mother remained in Brooklyn.<sup>49</sup> The petitioner mother was denied permission to relocate with the child.<sup>50</sup> The parties agreed to joint legal and physical custody and the divorce judgment was finalized in 2018; however, the petitioner mother filed several unsuccessful petitions to modify the divorce judgment and award her sole custody.<sup>51</sup> Before the pandemic, the petitioner mother generally stayed in Brooklyn when the child was with her during the week.<sup>52</sup> In March 2020, after State of Emergency orders were issued in both New York and New Jersey, the parents modified the schedule on a temporary basis so the child would stay with each parent for alternate two-week periods while attending school remotely.<sup>53</sup> However, after the child had been with the petitioner mother for two weeks, on April 6, 2020, she filed an emergency application for temporary sole custody so the child could live with her in New Jersey during the pandemic.<sup>54</sup>

The petitioner mother contended that “the Child should remain living with her in New Jersey during the Coronavirus Pandemic because her State and County pose significantly less risk of infection and transmission than New York . . . with its thousands of infections and deaths due to the Coronavirus.”<sup>55</sup> The respondent mother argued that this position was “subterfuge” and part of the petitioner mother’s repeated attempts to obtain sole custody.<sup>56</sup> The attorney for the child supported the petitioner mother’s application for the child to stay in New Jersey on a temporary basis, “based on the Child’s statement to her as to his preference and as a safer location during the pendency of the Coronavirus Pandemic.”<sup>57</sup>

The court found that the petitioner mother had failed to demonstrate a “change in circumstances” as required for modification of the custody agreement.<sup>58</sup> With respect to the “hotspot” argument, the court noted that New Jersey was “second in the Nation in terms of infections” and like New York was subject to a State of Emergency order issued by the

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49. *Id.* at 326.

50. *Id.*

51. *Id.* at 325–26.

52. *Id.* at 328.

53. *Id.* at 326–27.

54. *Id.* at 327.

55. *Id.*

56. *Id.* Also, the petitioner mother had failed to seek to resolve the dispute through mediation as required by the parties’ agreement. *Id.* at 328.

57. *Id.* at 327.

58. *Id.* at 328.

governor.<sup>59</sup> Moreover, the petitioner mother had “failed to cite anything specific” as evidence that the respondent mother acted in a manner that would put the child at risk of exposure to COVID-19.<sup>60</sup> The court denied the petitioner mother’s emergency application and granted the respondent mother’s motion to enforce the parties’ agreement and return the child.<sup>61</sup> However, the court indicated it would require both parents to adhere to “the government directives in terms of enforcing social distancing, using cloth face coverings and gloves for the Child, avoiding contact with vulnerable populations, and using precautionary sanitizer practices.”<sup>62</sup>

***C. New Jersey/California (March–June 2020)***  
***(“hotspot” argument successful)***

A “hotspot” argument was more successful in *A.S. v. H.R.*, a case involving a father who received the court’s permission to travel with the child from New Jersey to California in March 2020, and then argued that it was not safe for the child to return to New Jersey.<sup>63</sup> The father had full custody of the child, and the mother had supervised visitation.<sup>64</sup> On March 24, 2020, the father obtained judicial permission to visit his paternal grandparents with the child for Passover.<sup>65</sup> The court required the father to use a “private airplane” to travel because of the pandemic and directed the father to return to New Jersey by April 12, 2020, absent an extension based on a good cause showing.<sup>66</sup> The father obtained two extensions of the temporary order, and then applied for a third extension on May 6, 2020.<sup>67</sup> The attorney for the child supported the extension application, arguing in part that “returning the child to the Tri-state area would expose the child to unnecessary risks.”<sup>68</sup>

The court extended the date for the father to return to New Jersey with the child until July 8, 2020, even while observing that the father may have been “exploiting the current COVID-19 situation and using the temporary order as a guise under which to accomplish his desire for permanent

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59. *Id.*

60. *Id.*

61. *Id.* at 329.

62. *Id.* at 328.

63. *A.S. v. H.R.*, No. 306655/2011, 2020 NYLJ Lexis 1002 (Sup. Ct. N.Y. Cnty. June 12, 2020).

64. *Id.* at \*2.

65. *Id.*

66. *Id.*

67. *Id.* at \*2–3.

68. *Id.* at \*3.

relocation.”<sup>69</sup> Notwithstanding the father’s “apparent deception,” the court found it significant that “the Tri-state area remains the epicenter of the nation’s COVID-19 crisis while California remains less affected,” and that the supervisor for visitation with the mother would not facilitate in-person visitation because of the pandemic.<sup>70</sup> In assessing the child’s best interests, the court concluded that “protecting the child’s health outweighs any concerns about any possible interference with defendant’s access with the child.”<sup>71</sup>

Writing on June 5, 2020, the judge explained the choice of the July 8 date by discussing current and anticipated future progress in the tri-state area with respect to COVID-19:

The good news concerning the COVID-19 health emergency is that situation has improved in the Tri-state region to the point that restrictions are now beginning to be lifted. It is[,] of course, not the place of a court to evaluate the level of danger posed by a virus, that is best done by the executive branch guided by expert medical advice. The court, in turn, will be guided by those executive decisions. The governors of both New York and New Jersey either have or are poised to issue directives that will greatly ease the restrictions placed on travel and activities. The court will therefore assume that by July 8, 2020, which is one full month from the date of this decision, neither New York City no[r] New Jersey will be subject to strict stay-at-home orders.<sup>72</sup>

The court thus selected the date for the father and child to return from California based on the court’s assumption that within the month, “the reduction of risk [would] be sufficiently reduced so as to require [the father] to return the child to New Jersey and thereby allow [the mother] to resume in-person supervised access in New York City.”<sup>73</sup>

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69. *Id.* at \*4, 6. In addition to seeking temporary relief, the father petitioned to relocate permanently to California. *Id.* at \*2.

70. *Id.* at \*4–5.

71. *Id.* at \*5.

72. *Id.* at \*5–6.

73. *Id.*

**D. Rhode Island/Minnesota (May 2020)  
("hotspot" argument rejected)**

In *In re Christensen-Byrns*, a Minnesota district court granted an emergency request to enforce an existing Parenting Time Order, rejecting the mother's argument that it was not safe for the child to travel to Rhode Island to see the father.<sup>74</sup> The mother, whom the 12-year-old child lived with in Minnesota for most of the school year, objected to the child seeing his father in Rhode Island for scheduled summer visits (from May 23 through September 2, 2020), due to her concern about the child contracting COVID-19.<sup>75</sup> The parents had different perspectives on COVID-19, although they both had medical expertise: The father was an epidemiologist, and the mother was a physician.<sup>76</sup> The mother argued that interstate travel was "extremely dangerous" and presented unacceptable health risks to the child, and objected to the child traveling from Minnesota to Rhode Island "until more is known about the pandemic and there are guidelines in place as to prevention, treatment, cure and/or long term risks."<sup>77</sup> Furthermore, she argued that Rhode Island presented greater risks than Minnesota "due to the urban setting, higher death rate than in Minnesota, and other related factors."<sup>78</sup>

In response, the father argued there was no difference in risk to the child between the two states, and the parents could mitigate the child's risk of infection by utilizing travel safeguards (including traveling by car instead of by plane).<sup>79</sup> Furthermore, the father expressed concern about the unpredictability and longevity of the pandemic and the possibility that if the mother prevailed, he would not see his son for an extended period of time:

[The father] is an epidemiologist and an infectious disease expert. [The father] testified in his affidavit that he has a strong understanding of the COVID-19 virus, the global pandemic and risks. . . . [The father] contends that while he assesses the risk of COVID-19 as indefinite at this time, the best estimates are that it could be a year or more before the crisis comes to an end. [The father] rejects the idea

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74. *In re Christensen-Byrns*, No. 18-FA-12-466, 2020 Minn. Dist. LEXIS 92 (Crow Wing Cnty. May 29, 2020).

75. *Id.* at \*2–4, 6.

76. *Id.* at \*3, 6.

77. *Id.* at \*8–9.

78. *Id.* at \*9.

79. *Id.* at \*3–4.

that [the child] should have no in-person contact while COVID-19 is a risk or a pandemic. [The father] asserts that up to a year or more is too long for a child to go without seeing a parent.<sup>80</sup>

For these reasons, the father requested that the current parenting time order be upheld, and the child be brought to him immediately for summer visitation.<sup>81</sup>

The court granted the father’s emergency request, citing the parties’ understanding of the need for safety measures, the lack of underlying health conditions presenting any particular risk for the child, and the child’s interests in seeing his father.<sup>82</sup> The court observed that “[n]either parent can provide an environment where there is zero risk to [the child],”<sup>83</sup> and described its ruling as consistent with federal and state COVID-19 protocols:

The Court further does not interpret any current CDC guidelines or [Minnesota] Governor [Tim] Walz’s peacetime declaration of emergency, subsequent orders or any authority as suspending parenting time for out-of-state parents, or forbidding travel between homes for a child, or travel between states in furtherance of Court Orders. Neither parent accuses the other of not understanding or not following protocols, e.g.[,] social distancing, hand washing, or other recommended practices.<sup>84</sup>

The court determined that there was “no reasonable basis to conclude that [the child] is safe in Minnesota and in peril if he is in Rhode Island.”<sup>85</sup>

***E. Ohio/Florida (August–September 2020)  
 (“hotspot” argument successful)***

In *Doe v. Franklin County Children’s Services*, a federal judge granted emergency relief directing that a child stay with his grandmother in Ohio instead of flying to Florida to be with his father, in part because of high

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80. *Id.*

81. *Id.* at \*2–4.

82. *Id.* at \*9–11.

83. *Id.* at \*9.

84. *Id.* at \*11.

85. *Id.* at \*10.

COVID-19 numbers in Florida at the time.<sup>86</sup> A county child welfare agency had removed a 12-year-old child from his mother's custody following an abuse, neglect, and dependency action.<sup>87</sup> The child had been placed with his maternal grandmother in central Ohio and had enrolled in the local school district for the 2020–21 academic year.<sup>88</sup> The agency later determined that the child should be permanently placed with his father in Florida, and the child was to fly to see his father on August 13, 2020.<sup>89</sup> The child asserted Due Process and First Amendment claims in federal court and applied for a temporary restraining order for him to stay with his grandmother while the litigation was pending.<sup>90</sup> In addition to raising concerns about living with his father,<sup>91</sup> the child “expressed concerns for his health traveling to and living in Florida given the COVID-19 pandemic.”<sup>92</sup>

The court determined that the child had made a showing of immediate and irreparable harm warranting emergency relief.<sup>93</sup> With respect to the argument about COVID-19, the court specifically found that “placing [the child] on a plane to Florida, one of the current hotspots for the virus, would pose an immediate risk to his health and safety by creating an unnecessary possibility of exposure to the virus.”<sup>94</sup> The court cited to data from the *New York Times* about COVID-19 numbers in Florida.<sup>95</sup>

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86. *Doe v. Franklin Cnty. Child’s Servs.*, No. 2:20-CV-4119, 2020 U.S. Dist. LEXIS 145489 (S.D. Ohio Aug. 13, 2020), *stay denied*, No. 20-3983, 2020 U.S. App. LEXIS 31163 (6th Cir. Sept. 30, 2020).

87. *Id.* at \*1.

88. *Id.* at \*1–2.

89. *Id.* at \*2.

90. *Id.* at \*3.

91. The child indicated that he did not have a relationship with his father for most of his life; his father had a criminal history; and his father’s daughter and another family member died from drug overdoses. *Id.* at \*3, 7.

92. *Id.* at \*3.

93. *Id.* at \*7.

94. *Id.* at \*6.

95. *Id.* at \*6 n.1 (citing “*Florida Coronavirus Map and Case Count*, last accessed August 12, 2020 at 8:00 p.m. <https://www.nytimes.com/interactive/2020/us/florida-coronavirus-cases.html>”). In another case, a Delaware court declined to find a father in contempt when he refused to arrange for the children to use plane tickets purchased by the mother for them to visit her in Florida during their April 2020 spring break. Following negotiations, the father drove the children to meet the mother in South Carolina. *J.N. v. E.W.*, File No. CN16-05622, Case Nos. 17-37296, 20-08476, 2020 Del. Fam. Ct. LEXIS 17, at \*4–5 (New Castle Cnty. June 2, 2020) (“Father did not refuse to send the children. Rather, in light of the COVID-19 restrictions, Father decided that having the children fly in an airplane with hundreds of people for nearly three hours to Florida where the infections continued to increase was not in the children’s best interest.”).

### III. Government COVID-19 Guidance and Parental Behavior

In several early cases, courts considered arguments that parents should be tested for COVID-19 or quarantine protocols should be followed, or that a custody or visitation arrangement should be changed because of a parent's noncompliance with COVID-19 guidance. These cases do not discuss vaccination options or mandates because vaccines were not available.

#### *A. COVID-19 Testing and Quarantining*

In *R.M. v. B.S.*, an April 2020 case involving a child who had preexisting respiratory health issues, a New York City judge denied a father's request to enforce a parenting plan requirement that his children visit with him during their school spring break period in April 2020.<sup>96</sup> The children primarily lived with their mother in Massachusetts, in a house with a backyard.<sup>97</sup> The mother had denied access to the father beginning in March 2020 and objected to spring break visitation, expressing concern for the children's safety.<sup>98</sup> The mother noted that one of the children "had underlying respiratory issues" that required use of an inhaler.<sup>99</sup> She asserted that the father lived in New York City and was a first responder, the risk of exposure in New York was high, and the father had not quarantined for 14 days or taken a test for COVID-19.<sup>100</sup> The father countered that he worked at the World Trade Center, which had closed to the public on March 13, 2020; he did not use mass transit; Massachusetts ranked third in the country for COVID-19 cases (after New York and New Jersey); the mother had hosted company in her home during the pandemic; and the mother had interfered with his access to the children in other ways.<sup>101</sup>

Although the court acknowledged the father's rights under the parenting agreement and reserved decision on some issues, the court denied the request for in-person visitation during spring break.<sup>102</sup> While noting that "[u]nfortunately, this current public health crisis has upended the lives of us all," the court found that it was "in the best interest of the parties' children for their safety at this time" to temporarily follow a different

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96. *R.M. v. B.S.*, No. 36789/2015, 2020 NYLJ LEXIS 827 (Sup. Ct. Bronx Cnty. Apr. 16, 2020).

97. *Id.* at \*5.

98. *Id.* at \*3–4.

99. *Id.* at \*5.

100. *Id.* at \*4–5.

101. *Id.* at \*3–4, 6–7.

102. *Id.* at \*8.

schedule with daily telephone or video visits.<sup>103</sup> The court indicated that it would consider an application from the father for additional parenting time in the future.<sup>104</sup>

In May 2020, in *Robert H. v Thurma S.*, a New York City judge who had required a mother and grandparent to visit with the children in a public “community space” informed the parties that the weekly visits could not take place.<sup>105</sup> The judge explained that “the visits were de facto suspended” in light of the pandemic, “as there were in fact no community spaces open where they could safely spend time.”<sup>106</sup>

In September 2020, in *Pawanun v. Pettit*, an Ohio federal judge required a mother who came to the United States from Thailand while her Hague Abduction Convention proceeding was pending to be tested for COVID-19 before seeing her children.<sup>107</sup> The mother alleged that in January 2020 the father had wrongfully removed their four- and six-year-old children from Thailand, where the parties had lived with the children and divorced, to Ohio, where the parties had gotten married.<sup>108</sup> While the litigation was pending, the mother traveled from Thailand to Ohio, arriving in Cleveland on September 10, 2020.<sup>109</sup> The parties disagreed over custody and visitation during the litigation, and also over the father’s request that the mother test negative on two COVID-19 tests in order to see the children.<sup>110</sup> The mother opposed the testing requirement, noting that the father “didn’t quarantine when he wrongfully removed the children from Thailand,” and citing low COVID-19 rates in Thailand; the lack of a quarantine requirement in the state of Ohio; and that the mother had “no health coverage and . . . no means of obtaining the tests.”<sup>111</sup>

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103. *Id.*

104. *Id.*

105. *Robert H. v Thurma S.*, No. 157212, 135 N.Y.S.3d 585, 2020 WL 7550643, at \*2 (Fam. Ct. Kings Cnty. July 17, 2020).

106. *Id.*

107. *Pawanun v. Pettit*, No. 1:20CV1081, 2020 U.S. Dist. LEXIS 166508 (N.D. Ohio Sept. 11, 2020).

108. Complaint for Return of Children Pursuant to the International Child Abduction Remedies Act (22 U.S.C. § 9003, et seq.), Preliminary Injunction, & Monetary Damages ¶¶ 1, 7–13, *Pawanun v. Pettit*, 508 F. Supp. 3d 207 (N.D. Ohio 2020) (No. 1:20-cv-01081), ECF No. 1.

109. *Pawanun*, 2020 U.S. Dist. LEXIS 166508, at \*1.

110. *Id.* at \*2.

111. Plaintiff’s Reply to Defendant’s Brief in Opposition to Motion to Enforce Custody Determination Instantly at 2, *Pawanun v. Pettit*, 508 F. Supp. 3d 207 (N.D. Ohio 2020) (No. 1:20-cv-01081), ECF No. 45.

The court required the mother to get tested for COVID-19, noting that the CDC recommended testing following international travel.<sup>112</sup> Furthermore, the court noted that the parties' older child had asthma and that "[t]he CDC reports that individuals—young or old—who suffer from asthma may be at risk for severe illness from COVID-19."<sup>113</sup> In order "to protect the well-being of the children," the court required the mother to "take and pass one COVID-19 test before seeing her children."<sup>114</sup> The court further indicated that it had made arrangements for COVID-19 testing, and ordered that the father pay any costs for the testing.<sup>115</sup>

Courts have also denied in-person visitation requiring travel during times when there were travel restrictions between jurisdictions, or required that the parent travel instead of the child. For example, in *S.C.S. v. K.N.M.*, a New York court required that a July 2020 visit from North Carolina to New York for the child's birthday be virtual instead of in person in light of COVID-19-related "travel and quarantine restrictions between New York and North Carolina."<sup>116</sup> In *L.D. v. K.R.*, a court cited travel restrictions for New York and Saint Croix in directing that a Saint Croix mother visit the child in New York instead of the child visiting the mother.<sup>117</sup> The court further required the parents to "continue to adhere to any travel restrictions and advisories due to the Coronavirus outbreak or any future travel concerns that may arise."<sup>118</sup> However, in *A.K. v. A.K.*, a September 2020 court-imposed stay on a Delaware mother's weekend visits with her children who lived in New Jersey "was lifted after New Jersey issued a decision acknowledging Delaware's executive order to honor custody orders as 'essential.'"<sup>119</sup>

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112. *Pawanun*, 2020 U.S. Dist. LEXIS 166508, at \*4 & n.1.

113. *Id.* at \*4 & n.2.

114. *Id.* at \*4.

115. *Id.* at \*4–5. In December 2020, the court granted the mother's Hague Convention application for the children to be returned to Thailand. *Pawanun v. Pettit*, 508 F. Supp. 3d 207 (N.D. Ohio 2020).

116. *S.C.S. v. K.N.M.*, No. V-18421/18, 2020 N.Y. Misc. LEXIS 3284, at \*55 (Fam. Ct. Bronx Cnty. July 2, 2020).

117. *L.D. v. K.R.*, No. 129906, 129 N.Y.S.3d 260, 2020 WL 3968331, \*18 & n.1 (Fam. Ct. Bronx Cnty. June 29, 2020).

118. *Id.*; see also *In re Marriage of Stock*, 2020 IL App (5th) 200175-U, ¶¶ 77, 108 (Nov. 16, 2020) (noting the trial court had cancelled an April 2020 visit of the Texas mother and child with the Illinois father "due to the COVID-19 pandemic and the travel that would be required on the part of" the mother and preschool-aged child, but provided that the father could have supervised visits if he traveled to Texas).

119. *A.K. v. A.K.*, File No. CN17-01480, Case No. 20-23483, 2020 WL 8458117, at \*2 (Del. Fam. Ct. New Castle Cnty. Nov. 12, 2020).

### ***B. Parental Compliance with COVID-19 Protocols***

In June 2020, in *M.D. v. J.C.*, a Delaware judge granted a father’s petition to modify visitation based in part on the mother’s alleged noncompliance with COVID-19 protocols.<sup>120</sup> In December 2019, the father had been granted sole legal custody and primary residential custody of the parties’ children, who were two and four years old.<sup>121</sup> The mother had parenting time with the children several days a week, including some weekdays when the children were in daycare during the day.<sup>122</sup> On May 7, 2020, the father petitioned to modify visitation.<sup>123</sup> Among other things, the father alleged that the mother violated a COVID-19 “Stay-at-Home” order that was in effect in Delaware at that time by residing in a two-bed motel room with their two children, another child, and three other adults.<sup>124</sup>

The father argued that the mother had “placed [the children] in an overcrowded location thereby increasing their chances of exposure to the virus.”<sup>125</sup> The father urged the court to suspend visitation between the mother and the children until the mother could “provide a stable home for the Children.”<sup>126</sup> The mother, who had lived with her grandmother, disputed living in the motel room but acknowledged that the children were at the motel with her cousin’s family while she was working.<sup>127</sup> The court credited the father’s testimony and found that the mother’s actions potentially increased the children’s risk of exposure to COVID-19 and threatened the children’s health and welfare: “Mother willingly exposed her Children to a heightened risk of exposure to a very serious and deadly virus.”<sup>128</sup> The court determined that it was in the children’s best interests to reduce the mother’s visitation schedule to Sundays during the day and holidays, required the mother to be present during visitation time, and specifically ordered that “[t]he visitation may not take place at a Motel or

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120. *M.D. v. J.C.* [*M.D. II*], File No. CN18-01765, Case No. 20-10224, 2020 Del. Fam. Ct. LEXIS 20, at \*3 (New Castle Cnty. June 24, 2020).

121. *M.D. v. J.C.* [*M.D. I*], File No. CN18-01765, Case No. 19-26066, 2019 Del. Fam. Ct. LEXIS 65, at \*12, \*18 (New Castle Cnty. Dec. 23, 2019).

122. *Id.* at \*18. The order provided in part: “The parties will follow a four-week block of custodial time commencing December 23, 2019. On ‘A,’ ‘B,’ and ‘C,’ Mother shall have parenting time on Monday, Tuesday and Wednesday. On the D week, Mother shall have parenting time on Monday, Friday, Saturday and Sunday. Father will have all other times.” *Id.*

123. *M.D. II*, 2020 Del. Fam. Ct. LEXIS 20, at \*2.

124. *Id.* at \*3.

125. *Id.* at \*4.

126. *Id.* at \*5.

127. *Id.* at \*5, 8–9, 11–13.

128. *Id.* at \*13.

any other location where there is close proximity to others in contravention of the guidelines in the Governor’s orders.”<sup>129</sup>

Also in June 2020, in *Hussain A.R. v Jennifer J.B.*, a New York judge required that a mother’s visitation with a 13-year-old child be supervised and imposed other restrictions because of the mother’s behavior.<sup>130</sup> Among other things, she sent “distressing[.]” texts on April 24, 2020, in which she “repeatedly pressure[d] the Child to ‘bolt out’ or leave her home without the Father’s knowledge in the middle of the night and without the protection of any facial covering in the midst of this Pandemic.”<sup>131</sup>

In November 2020, in *Samantha G.S. v. Jonathan G.B.*, a New York judge considered a child’s concerns about his mother’s noncompliance with COVID-19 guidance when granting a relocation application by the father.<sup>132</sup> The father sought to move from New Mexico to Utah after receiving a new job opportunity in that state.<sup>133</sup> When discussing the preference of the child, whom the court described as “mature and at the dawn of his teenage years,”<sup>134</sup> the court noted that the child was worried about the mother’s compliance with COVID-19 protocols:

The [Attorney for the Child] relayed that the Subject Child recently expressed to her reticence to visit with [the mother] because of her purported failure to comply with COVID precautions. This is particularly concerning to the Subject Child as the [mother] is in the midst of a several-month visit to Florida, a “hot spot” for the illness. The Subject Child is particularly concerned about the [mother’s] lack of compliance to conventional medical advice after he allegedly became very ill when she failed to timely take him to a doctor. The Subject Child explained that the [mother] stated that she “did not believe in doctors” and instead wanted to treat him with “natural remedies.”<sup>135</sup>

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129. *Id.* at \*13–14. The court authorized the mother to apply to modify visitation “[a]t such time as Mother actually resides in home and can provide proof to the Court of the living and care arrangements for the Children.” *Id.* at 14.

130. *Hussain A.R. v. Jennifer J.B.*, No. V-02341-18/18B, D, 127 N.Y.S.3d 865, 2020 WL 3096584, at \*4 (Fam. Ct. Kings Cnty. June 10, 2020).

131. *Id.*

132. *Samantha G.S. v. Jonathan G.B.*, 135 N.Y.S.3d 627, 2020 WL 7550601 (Fam. Ct. Kings Cnty. Nov. 20, 2020).

133. *Id.* at \*2–3.

134. *Id.* at \*7.

135. *Id.* at \*4 (citations omitted). The court did not specify which COVID precautions were identified by the child.

The court found that the child’s wish to stay with his father should be given “significant weight,” in part because the child’s preference was “based on reasonable logic,” including the COVID-19 issue as well as other concerns.<sup>136</sup>

#### IV. Conclusion

The COVID-19 pandemic has led to many legal questions involving how to safely implement child custody and visitation orders and promote children’s best interests. In addressing pandemic-related arguments, the judges in the cases discussed in this Article responded in different ways, with some judges discussing the pandemic generally and others focusing more on the specific circumstances of the parties.

Much has changed in the United States with respect to medical science and policy since the beginning of the pandemic. We have seen the development of vaccines; the reopening of schools and businesses throughout the United States; changes in federal leadership; and new federal, state, and local policies relating to vaccine and mask-wearing requirements (as well as legal challenges to some mandates).<sup>137</sup> As of the end of 2021, 62% of Americans were considered “fully vaccinated,” although the percentages for individual states ranged from 77% (Vermont) to 46% (Idaho).<sup>138</sup> However, as of February 15, 2022, nearly 80 million COVID cases had been reported in the United States since the pandemic began and more than 900,000 Americans had died of the disease.<sup>139</sup> The disease has also evolved with new variants that have led to increased

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136. *Id.* at \*7.

137. *See, e.g., COVID-19, supra* note 1; *State Efforts to Ban or Enforce COVID-19 Vaccine Mandates and Passports*, NAT’L ACAD. FOR STATE HEALTH POL’Y (NASHP) (updated Dec. 21, 2021), <https://www.nashp.org/state-lawmakers-submit-bills-to-ban-employer-vaccine-mandates/>; *States Address School Vaccine Mandates and Mask Mandates*, NASHP (updated Dec. 17, 2021), <https://www.nashp.org/states-enact-policies-to-support-students-transition-back-to-school/>; *States’ COVID-19 Public Health Emergency Declarations and Mask Requirements*, NASHP (updated Dec. 9, 2021), <https://www.nashp.org/governors-prioritize-health-for-all/>; *State Action on Coronavirus (COVID-19)*, NAT’L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/health/state-action-on-coronavirus-COVID-19.aspx>; *COVID-19: What Mayors Need to Know*, U.S. CONF. OF MAYORS, <https://www.usmayors.org/issues/COVID-19/>.

138. *See How Vaccinations Are Going in Your County and State*, N.Y. TIMES (updated Dec. 30, 2021), <https://www.nytimes.com/interactive/2020/us/COVID-19-vaccine-doses.html>.

139. *COVID Data Tracker*, CDC (updated Dec. 30, 2021), <https://covid.cdc.gov/covid-data-tracker/#datatracker-home>.

cases even among people who are vaccinated,<sup>140</sup> but overall infection, hospitalization, and mortality rates have been considerably higher for people who have not been vaccinated.<sup>141</sup> Changes in the course of the disease and changes in government policy have led to changes in the focus of child custody disputes. Cases are now arising where parents seek judicial intervention because they disagree over whether they or their children should be vaccinated.<sup>142</sup>

Even so, the issues addressed in the early cases discussed in this Article resonate today. The courts have sought to balance children's needs for time with separated parents; and safety concerns raised by the circumstances of the pandemic, the health needs of particular children and families, or the parties' own conduct. For so long as the pandemic continues, these considerations may continue to be weighed by courts in determining the best interests of the child.

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140. See *Omicron Variant: What You Need to Know*, CDC (updated Dec. 20, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html>; *Delta Variant: What We Know About the Science*, CDC (updated Aug. 26, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html>.

141. See *Rates of COVID-19 Cases and Deaths by Vaccination Status*, CDC, <https://covid.cdc.gov/covid-data-tracker/#rates-by-vaccine-status>; *Rates of Laboratory-Confirmed COVID-19 Hospitalizations by Vaccination Status*, CDC, <https://covid.cdc.gov/covid-data-tracker/#covid-net-hospitalizations-vaccination>.

142. See, e.g., *B. S. v. A. S.*, 2021 N.Y. Slip Op. 21349, 2021 WL 6069144, at \*1 (Sup. Ct. Kings Cnty. Dec. 21, 2021) (“The parties share join[t] custody of their daughters—8 and 10 years old—and have diametrically opposed opinions about whether the children should be vaccinated against COVID-19.”); see generally Danielle Campoamor, *Divorced Parents Are Going to Court over COVID-19 Vaccines for Their Children*, TODAY (Nov. 19, 2021), <https://www.today.com/parents/COVID-19-vaccine-kids-issue-co-parents-t237998>.