



Parenting Plans for the COVID-19 Pandemic Era

BY JOAN MCWILLIAMS AND STEPHANIE E. DANKEL

This article explains challenges divorcing parents face in the COVID-19 era, as well as opportunities that arise when parties take a creative approach to overcoming these challenges. It also discusses the importance of creating a flexible parenting plan with pandemic-specific provisions.

The COVID-19 pandemic has created chaos for many families, but it is also creating opportunity. Many co-parents, out of necessity, are seizing the moment to reject conflict and work together for the benefit of their children. In fact, it is possible that the pandemic could create a “tipping point”¹ at which parties will reject the adversarial approach to divorce and prioritize the children’s needs. The anticipated tipping point is supported by

- family circumstances that are drastically changing from day to day. Parents and children are experiencing emotional, physical, and financial traumas that demand immediate attention. Parenting plans that require the interpretation of a judge and countless hours of litigation are impractical. Clients need parenting plan provisions that are straightforward and flexible and can be implemented as their needs evolve.
- the unique judicial morass resulting from the pandemic. Courts are either closed or operating on an emergency basis, and court staff has been reduced, with further reductions anticipated.² In addition, legal precedent for parenting plans is sparse. This combination of limited availability of hearings and uncertain case outcomes encourages parental cooperation.
- the increased importance of the lawyer’s role as an advisor. Due to the factors outlined above, clients need attorneys to act primarily as advisors and to assume the role of advocate only in the most extreme cases.³ Many attorneys are counseling clients to prioritize their children’s mental and physical health and adopt a cooperative approach to parenting after divorce.

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This article describes the current challenges faced by divorcing parents and children as well as opportunities for enhancing parenting presented by these same challenges. It focuses on the status of the courts in Colorado, the lawyer’s role as an advisor, and factors to consider when drafting parenting plans.

The Emerging Parenting Challenges

The COVID-19 virus has made co-parenting even more complicated. Parents must now plan for unanticipated events such as illness (the parent’s or the children’s), self-isolation, job modification or loss, home schooling, mental health issues, working at home, and perhaps food shortages. They must make decisions regarding the necessity to self-quarantine, whether to take out-of-state vacations, choice of childcare if schools are closed, and extracurricular activities. In some instances, parents are dealing with increased conflict, domestic abuse, and an unpredictable future.

The pandemic has created challenges for children as well, with parents unable to reassure them when or whether things will return to normal. Children may suffer anxiety and mental health issues, which may go undetected and/or untreated. The fear of losing a loved one, or the fear of becoming ill themselves, can create trauma. Social isolation is harmful for many children and devastating for children with special needs. For children experiencing increased conflict or violence at home, the situation is especially troubling. Childhood trauma is extremely serious and may affect the children for the rest of their lives.⁴

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provisions in parenting plans that can be submitted to the court when appropriate.

Court Availability

Colorado courts are striving to balance public health considerations with the necessity to maintain the fair and effective administration of justice for communities.⁵ Due to ever-changing local and state guidelines, it is difficult to summarize how Colorado courts are presently handling cases related to COVID-19 and parenting plans. It is quite likely that while this article is being published, the statewide recommendations and procedures will change multiple times. But regardless of the fluctuating nature of COVID-19 orders and the courts' availability, the last few months may inform how courts will respond to a future resurgence of COVID-19.

When the "stay at home" orders were first put into place by Governor Polis, the Colorado Supreme Court issued an "Order Regarding COVID-19,"⁶ which suspended various court operations but allowed state courts to continue hearing matters to protect basic constitutional rights and address matters essential to safety and well-being. This order classified hearings on motions to restrict parenting time and parental abduction prevention as "essential."

After the Supreme Court's initial order on March 16, 2020, judicial districts proceeded to publish additional guidelines on their websites. For many judicial districts, this meant vacating and continuing all hearings not related to public health and safety for the foreseeable future. Where possible, hearings were held either online or by telephone. Permanent orders hearings were pushed back into the fall of 2020. Some districts even began accepting pro se filings via email or E-file.

Based on anecdotal information, family law attorneys are currently seeing a major uptick in both motions to enforce and restrict parenting time. These filings are primarily based on parents withholding parenting time and parents' varying ideas of what is "safe" for their children. The courts' handling of these disputes varies not only by district, but also by state.⁷ In some states, primary parents were directed to exercise 100% of parenting time until the stay at home

orders were lifted.⁸ In other states, if a parent was a first responder or essential healthcare worker, they were prohibited from exercising any parenting time.⁹ In Colorado, while policies are ever evolving, information and updates for each judicial district are currently available on the judicial districts' websites.¹⁰

A final factor affecting court availability is an increase in judicial fatigue. Before the COVID-19

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pandemic began, judges were already at risk for judicial fatigue and burnout.¹¹ Now, because most hearings, including all jury trials, have been delayed for months, the pandemic has created a bottleneck of cases. This will likely mean greater workloads for judicial officers on top of issues created by the reduction in the judicial budget.¹² In turn, already exhausted judges will be faced with quickly addressing domestic dockets, whether or not they have

experience in these matters. Contested hearings that should normally be allotted a full day may very well be consolidated into a one- or two-hour hearing. This is another reason why, in the days of COVID-19, many attorneys are encouraging their clients to resolve disputes outside of the courts, either among themselves or by employing professionals who can adequately hear and address their family matters, such as mediators and arbitrators.

The Changing Roles of the Attorney and the Judge

The Colorado Rules of Professional Conduct (Rules) identify the attorney's responsibilities as a client's representative. As set forth in the Rules' Preamble and Scope, a lawyer performs four functions: advocate, advisor, negotiator, and evaluator.¹³ As an advocate, the lawyer "zealously asserts the client's position under the rules of the adversary system."¹⁴ As an advisor, the lawyer "provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications."¹⁵ If the lawyer focuses only on being an advocate, the best interests of the client's children can get lost.

This problem was solved, in part, by the Colorado Supreme Court's adoption in 2017 of an amendment to Rule 2.1, Comment [2], which states that "[i]n a matter involving the allocation of parental rights and responsibilities, a lawyer should consider advising the client that parental conflict can have a significant adverse effect on minor children."

Colorado is the first state in the country to adopt a rule comment concerning children, and while it is not mandatory, lawyers may use it as a focal point for discussions with clients. The comment supports and enhances the lawyer's role as an advisor by allowing for considerations such as "moral, economic, social and political factors."¹⁶

Some lawyers have adopted the position that, while they do not owe a duty to children, they have a responsibility to them to educate parents and help them understand how they can significantly support (or damage) their children. And the lawyer's role as an advisor only grows in importance as the needs of the

family increase and court availability decreases in response to the pandemic.

The court's role is similarly taking on a new importance in connection with parenting plans. Courts must approve parenting plans, including by finding that the plan is in the "best interests of the child."¹⁷ As part of this process, at least one court is taking a much more active educational role.

In Colorado's 11th Judicial District, Chief Judge Patrick W. Murphy sends a letter to each parent who appears in his court.¹⁸ His letter asks divorcing parents to review the Adverse Childhood Experiences study¹⁹ and be prepared to discuss it with him in court. He refers parents to resources such as the "Divorce Toolkit"²⁰ and, if he senses a lack of co-parenting cooperation in a given case, he will order the parties to complete the "Up To Parents" program.²¹ He further refers parents to online programs or mobile apps for communication and to the Arizona Court Parenting Plan²² program for ideas on how to develop a parenting plan. The letter is included as an appendix to this article.

In this new era, family lawyers are increasingly focused on their role as advisors, and judges are expanding their role as educators. A positive result of the new reality is that parents, due to necessity and perhaps out of educated consideration, may be more inclined to cooperate. This cooperation will be enhanced by well-crafted parenting plans.

COVID-19 Parenting Plans

Many provisions recommended for COVID-19 parenting plans are similar to those found in standard parenting plans. Parties must continue to agree on (or the judge will order) how they will make major decisions for the health, education, and general welfare of their children. They must also agree on (or the judge will order) an age-appropriate parenting time schedule.

However, to accommodate the unpredictable needs of parents and children during the pandemic, parties may want to add provisions to their parenting plan that specifically address extraordinary circumstances. These provisions should be designed to reduce conflict and meet the unanticipated needs of the family members. They may be time-limited and, with court

approval, self-implementing. Such provisions might begin by stating the parties' intent and goals for their parenting relationship and may include, for example:

- an agreement to immediately inform the other parent of suspected or confirmed exposure to the virus that either the parent or children may have had.
- an agreement to immediately inform the other parent if the children are exhibiting any symptoms of the virus.
- the names and contact information (including email addresses) of the doctors either parent will use in the event of exposure.
- the names and contact information (including email addresses) of mental health professions that the children could use.
- agreed upon parenting guidelines for the physical well-being of the children, such as

how parents will make a good faith effort to comply with local, state, and Centers for Disease Control and Prevention (CDC) guidelines.

- the parenting time schedule that will be in effect during the pandemic. If one parent misses time, can that parent make it up? If one parent must work at odd hours, will the other parent cover for him or her? What about long-distance parenting? Will parents or children be able to travel during this period? What metric will the parties use to determine whether travel is safe?
- the access the children will have with each parent, for example, by telephone, Skype, Zoom, or some other means. Will the "away" parent be able to share books, movies, schoolwork, or games with the children online? Can the parties agree to a reading or schooling app in advance

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to share in the children's learning experience?

- the names and contact information of friends and relatives that each parent agrees to allow to have FaceTime, Zoom, or Skype access to the children to provide relief for either parent. Grandparents can offer invaluable assistance by using the internet to read with the children, teach them new skills, engage in art projects, or play games. And this interaction can strengthen their bond with the grandchildren.
- agreements for how the parties will share financial responsibilities. This is the frightening side to this pandemic because layoffs, reduced work forces, terminations, and furloughs can lead to financial trouble. Generosity during this time will add a layer of protection for the children.
- how the parties will manage conflict. Even one parent taking the high road can change the conflict dynamic. Parties model behavior for their children; by managing conflict effectively they set an example that encourages love and peace.
- an alternative dispute resolution (ADR) provision for handling disagreements. This could include, for example, mediation, arbitration, or early neutral evaluation. Parties can agree in advance on a particular neutral and choose someone who provides virtual or online services.

The parties may devise other ways to successfully co-parent through this crisis. It is a challenge, but it is a creative challenge, and offers an opportunity to change the dynamic of the co-parenting relationship and create stability for children.

Litigation Alternatives

There are many reasons to encourage clients to include ADR provisions in their parenting plans generally, but COVID-19 makes the use of ADR even more compelling. As stated above, courts have become less available and parties have become less financially able to pay for expensive litigation. ADR offers significant benefits in this environment.

There are four primary methods of ADR for addressing parenting plan issues outside of the court:²³

- Negotiation: Parents could agree to negotiate disputes with each other a certain number of times before progressing to

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mediation, arbitration, or litigation. For example, a parenting plan could provide that the parties agree to notify each other about their disagreements, with supporting data or their rationale, and discuss the matter during a 24-hour period before submitting the dispute to mediation or arbitration. A provision

on negotiation procedures will likely be successful only with parties who have previously been able negotiate disputes in good faith.

- Mediation: Parties may agree to submit to mediation within a set time period to resolve a dispute. Given the increasing role of mediation in family law and that parties are seeking expedited resolutions during the current pandemic, it may be beneficial to provide the names of multiple mutually acceptable mediators in a parenting plan. Parties should include consideration of a mediator's ability to mediate via online platforms.
- Arbitration: An arbitration provision may be included, similar to a mediation provision. The primary difference between mediation and arbitration is that arbitration is binding. An arbitration clause may be more appropriate than a mediation provision where the parties have a lower budget or a history of noncooperation. The primary benefit of arbitration is that the arbitrator's decision resolves the parties' dispute, and they must abide by the decision. Of course, the risk that an arbitrator may not decide in your client's favor must be weighed when deciding on this form of ADR.

Parties should also consider default provisions in the event of an outbreak or changing COVID-19 guidelines. Such default plans include the Governor's orders, CDC recommendations, or other federal guidelines. An ADR professional could be designated to resolve any disputes on default provisions. Parties could even decide in advance what to do if schools are open, closed, or providing remote instruction.

Conclusion

This is a unique period in the evolutionary process of divorce. Families are experiencing life-threatening situations that make issues they previously had with a spouse or former spouse pale in comparison. And the virus has stripped many parents of the time, money, and energy to engage in protracted arguments. At the same time, family law lawyers and judges are stepping up by promoting creative and

flexible settlements. This could be the moment when the balance tips against the adversarial approach to divorce in favor of cooperative parenting agreements that benefit parents and their children. **CL**



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pdfs/6monthcheckup_Judicial_Burnout.pdf.

12. See HB 20-1360.

13. Colo. RPC Preamble and Scope.

14. *Id.*

15. *Id.*

16. Colo. RPC 2.1.

17. CRS § 14-10-124.

18. Letter from Chief Judge Patrick W. Murphy, 11th Judicial District, to the parents of minor children in dissolution of marriage or allocation of parental rights proceedings. Reprinted with permission.

19. CDC, Adverse Childhood Experiences (ACEs), www.cdc.gov/violenceprevention/acestudy.

20. See Sesame Street in Communities, www.sesamestreet.org/toolkits/divorce.

21. Up to Parents, www.uptoparents.org.

22. Arizona Supreme Court, Planning for Parenting Time: Arizona's Guide for Parents Living Apart (2009), <http://www.azcourts.gov/portals/31/parentingtime/ppwguidelines.pdf>.

23. ABA Dispute Resolution Section, Dispute Resolution Processes, https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses.



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NOTES

1. "The tipping point is that magic moment when an idea, trend, or social behavior crosses a threshold, tips, and spreads like wildfire." Gladwell, *The Tipping Point: How Little Things Can Make a Big Difference* (Little Brown and Co. 2000).

2. See HB 20-1360 (The Long Appropriations Bill).

3. Colo. RPC 2.1.

4. See Felitti and Anda, "The Lifelong Effects of Adverse Childhood Experiences" in Chadwick et al., *Chadwick's Child Maltreatment: Sexual Abuse and Psychological Maltreatment* vol. 2 (STM Learning, Inc. 4th ed. 2014), <https://www.acesconnection.com/fileSendAction/fcType/0/fcOid/399727599841203732/filePointer/465603194268564968/fodoid/465603194268564964/ChadwickChapter10%20.pdf>.

5. Order Regarding COVID-19 and Operation of Colorado State Courts, [https://www.courts.state.co.us/userfiles/file/Media/Opinion_Docs/COVID-19%20Order%2016Mar2020\(1\).pdf](https://www.courts.state.co.us/userfiles/file/Media/Opinion_Docs/COVID-19%20Order%2016Mar2020(1).pdf).

6. *Id.*

7. Twohey, "New Battle for Those on Coronavirus Front Lines: Child Custody," *N.Y. Times* (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/coronavirus-child-custody.html>.

8. *Id.*

9. *Id.*

10. Colorado Judicial Branch, Courts by District, <https://www.courts.state.co.us/Courts/District/Choose.cfm>.

11. Zimmerman, "Six-Month Checkup: Early Warning Signs of Judicial Burnout," *Mo. Bar Bulletin* (Nov. 2001), <https://www.lapnh.org/>

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APPENDIX



**ELEVENTH JUDICIAL DISTRICT
CHAFFEE COUNTY**

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SALIDA, COLORADO 81201
719-539-2561

CHIEF JUDGE
PATRICK W. MURPHY

District Administrator
Lisa Rowe

Clerk of Court
Karen Prosser

To: The parents of minor children in dissolution of marriage or allocation of parental rights proceedings

Greetings,

My name is Patrick Murphy. I will be the judge on your case and will be responsible for making decisions that affect you and your children. I do not take this role lightly. I know that these types of proceedings can be, but don't have to be, emotional, stressful and antagonistic. As a child of divorce myself, I am asking you to always keep in mind the impact that a separation or divorce can have on your child and to always put your child's needs ahead of your own.

The smoother you can make this situation for your children, the better off they will be going forward through their childhood and as adults. Extensive research on the biology of stress shows that healthy childhood development can be derailed by excessive or prolonged activation of the body's stress response systems, with damaging effects on health, learning and behavior. High conflict between parents during divorce or separation can be extremely stressful to children.

I encourage you to review the **Adverse Childhood Experience** (A.C.E.) study to find out just how damaging and long lasting the effects of stress can be on children. See: www.cdc.gov/violenceprevention/acestudy. You will also be given, along with this letter, a brief discussion of the A.C.E. study and the 10 A.C.E. questions. If I sense high conflict in your case, please be able and ready to discuss the A.C.E. study with me in Court.

For **younger children**, divorce or separation can be confusing and for parents, being able to answer questions from your child about the divorce or separation can be difficult. Sesame Street has available a "Divorce Toolkit" with books, songs and videos that can help parents answer, in a constructive way, these questions. See www.sesamestreet.org/toolkits/divorce.

Co-parenting is often a challenge for divorcing or separating parents. This challenge needs to be met in order for your child to make it through this process, both short term and long term, with as little stress as possible. A free, in depth and on-line resource to help parents meet that challenge can be found at www.uptoparents.org. If I sense a lack of co-parenting in your case, please expect an Order from me to complete the Up To Parents program.

Communication and coordination of parenting time and decision making can also be difficult with two homes. There are numerous online programs or mobile apps that can help parents keep communication lines open and constructive. These include www.2houses.com (\$10 per month), www.ourfamilywizard.com (\$99 per parent per year) and www.talkingparents.com (free). This is not an exclusive list and the Court does not endorse any particular service.

Developing a **parenting plan** can also be difficult. The state of Arizona has created a useful guide that can help parents determine what type of parenting plan is most appropriate for the child and for the parents. See: www.azcourts.gov/portals/31/parentingtime/ppwguidelines.pdf.

A divorce or separation does not have to be harmful to your child. In fact most of the cases I see do not result in high conflict between the parents and subsequent harm to the child. Whether you can successfully co-parent or whether you expose your child to conflict is up to you. Please keep in mind, if you choose the high conflict route, the damage it will do to your child.

Sincerely,

Patrick W. Murphy
Chief Judge, 11th Judicial District

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