

Episode #2: COVID-19 & Visitation

Jake: We are still in the middle of shelter in place in the COVID-19 outbreak. Brian, I thought this would be a good opportunity for us to talk about visitation schedules during shelter in place. Brian, what have you been seeing since the start of shelter in place? What are you seeing as far as visitation schedules in your office?

Brian: I started to get calls and emails almost immediately. It was kind of basic questions initially. Just, what in the world's going on, how does this affect things? I think the initial calls tended to be just really explanatory.

That was right about at the time spring break was going on in Texas, which has some specific rules in most people's cases. Once I got those questions answered within a pretty short period of time, I started to get a different set of questions altogether, which were more, let's say more contentious.

How about you? What have you been experiencing?

Jake: Yeah, same thing. I think shelter in place started right around spring break and everybody snapped to the fact right away that the standard possession order, which is what most people have in their orders, it's what set forth with the family code, the way the standard possession order reads is that spring break ends at the time that school resumed, and that's the language that's in most people's divorce, decrees, or custody arrangements. Everybody's looking at that and going "well, school's not resuming schools at that time."

People were talking about spring break being extended a week or two weeks or something like that. So, people started taking the position saying spring break can be indefinite. And I think probably the first half of spring break there's, fighting back and forth about that, or at least discussions back and forth on that. Brian, I know you and I are both members of various lawyer Facebook groups, and family lawyer Facebook groups, and people were talking about that.

Then about mid-spring break, the Texas Supreme court actually weighed in and issued an order that said that the way we're going to interpret it in the state of Texas is that we're going to go by the original school schedule. So even though your custody order or your divorce decree says at the time school resumed, the way we're going to handle it in Texas is that means look at the original schedule.

Now, Brian, I don't know what your opinion is, but I think that makes it clear what the orders should be. But when you're talking about contempt, if somebody doesn't turn the child over spring break, what effect do you think that has to the fact that there's a Supreme court order out there that says this when I haven't been served with it. It's not part of my divorce decree and I'm looking at a divorce decree that says I get my kid entails spring breaks back in session. How do you think that plays when we're talking about contempt? According to the enforcements?

Brian: I think it's a good point. I think if somebody really wants to take the position that they're not going to turn their child over to the other parent, I think that in the short term, at least until these shelter in place type orders go away or the courts are fully reopened. I think that it's probably possible for someone to get away with that. I wouldn't want to face the consequences of that on the back end of it necessarily, but, I think there's some problems with even getting a hearing or getting any kind of a judge's attention about that right now.

I think, as you alluded to there's questions about the enforceability of that as far as throwing somebody in jail for violating one of those orders.

Jake: I think the same, I think you'd have a hard time holding somebody in contempt. Now everybody would be pretty upset. And I know what I've been telling my clients on both sides of the issue going, look, it's an unprecedented time and the Supreme court has made clear what.

The way the court wants to address these issues and judges aren't going to be happier if he or she finds out weeks later that you haven't turned the child over because you're doing a technical reading of the divorce decree or custody arrangement. That's probably not the position that you want to be in going into a courtroom, when you eventually can get back into the courtroom.

I think the Supreme court order probably took care of a lot of those issues as far as the return is spring break, but then I know I've started seeing more and more phone calls though, about "Even though we had this, court order, what do I do if I've got concerns about the custodial parent or the other custodial parent, not sheltering in place or not? You're not taking safety precautions or going out in public when you're not supposed to." Those phone calls, and I'm also getting phone calls about folks that have kids with somebody who's a first responder or somebody that's a doctor and that's something that you've got to think about. I've gotten a lot of those phone calls. So how are you fielding those Brian?

Brian: Yeah, similarly. And that the doctor version of it made the New York times a day or two ago, which I'm sure a lot of people noticed. I've got cases where there's a parent out of state. So they've got to get on a plane and maybe travel, which is still allowed, but is not encouraged and could be from an area that's got a heavier concentration of infections than various parts of Texas do. I wouldn't tell anybody to violate an order.

A lot of things are unprecedented, but having the Supreme court of Texas be real specific about possession orders is really unusual. I don't think I've ever seen that in my 23 years or so of practice, anything like that. On top of that, some of the counties, Dallas County for example, have gone even further than that and have issued orders on their own from all the judges. Dallas County says essentially even if the other person has COVID-19, that's still no reason for denial of visitation.

And I think it's going to be really hard on the back end for anybody to justify keeping a child away from another parent, no matter what it is. Let me know your thoughts on that. And then also, the next thought that comes to mind, have been these cases with a history of contentiousness.

Jake: I think probably, all of them probably are folks that don't get along and that can cause conflict for two reasons. One, it could be, somebody who's looking for a reason to withhold the child or be contentious. On the flip side too, I see a lot because folks that don't get along or have difficulty co-parenting, so you may have a custodial parent that now has valid concerns.

I know we have a case in the office now where dad is from out of state, just like you were saying, and really not taking shelter in place. Seriously, he posted on Instagram or Facebook or what have you, going out with the kids, going out socially, having folks over to the house and our client, frankly, she doesn't want it to stop his possession of the child, but on the flip side, she needs him to take it seriously. She's tried to reach out and co-parent with him and communicate and because there's that little contentiousness, he takes the opportunity to get under her skin. He says "I'm not going to talk to you about her. I'm not going to communicate and tell you what I'm doing." Frankly, we had to go to court on that issue.

We were able to resolve it right before hearing, but I do see judges intervening or stuff like that while they may not, like you said Brian, not do denial of possession based on that. But I do see judges, particularly in Travis County getting involved though, and they will make specific orders about what needs to be done as far as shelter in place, what needs to be done about communication. So I think that's why we're seeing it, I think that lack of co-parenting. I think it's causing some problems, more so than just your typical everyday problems where you don't communicate.

Brian: I agree. I think that as this goes forward we're just going to have more of the same. It's very hard to predict what's going to happen, obviously for all kinds of reasons, but I think there's going to be some greater variation on how different parts of the country or even the state of Texas are going to be handling this. Certainly we're going to have to go back to normal at some point. and I think that's going to be a further set of interesting differences. I've been out in California recently and it is a very different approach to things out there than it is in Texas.

Jake: What is it like? I was reading the paper the day that judges are ordering folks to talk about what they're doing. What are you seeing? Just colloquially, being out there.

Brian: Yeah, there's just a lot more seriousness out in California with the shelter in place and wearing masks and the social distancing is significantly more, I don't know if you want to call it stricter or more seriously taken or however you want to approach it. Probably you and I have talked about this a bit, there's probably even some difference between Houston and Austin versus even rural areas in Texas for example.

I expect that to continue as we go forward and that's a whole other set of circumstances. If you've got one parent in an urban area, that's taking it really strictly and another that's in an area that's maybe more rural or not taking it quite as strictly, that could be a whole set of other circumstances where each one thinks they're complying with what needs to be done. The other person may see it as excessive or not safe enough. That's certainly something that's going to happen. On top of that, we also have the lengthy summer visitation coming

around the corner here pretty soon, which always has its own set of issues even without this. So that'll be something to see as well.

Jake: Yeah, no, that's causing a lot of anxiety for folks that have a child with somebody that's a first responder or somebody that's an essential worker that's going to work out and about. And then, like you say, we had the summertime coming up that is going to be, I think we're going to have to, have to address it on a case by case basis.

Fortunately the courts are still open and my experience is that they are taking it on a case by case basis. I think they are trying to make these sweeping orders and stuff. I haven't had a judge not understand, not take the time and the attention, if an individual unique situation comes up for our family. My experience so far has been that Judges are taking the time and given that attention and, frankly, the lawyers are doing everything they can to work it out as well. We've spent a lot of time right now just communicating with the other side, working things out, going to mediations if we can and trying to work through this through collaborative means if we can since the courthouse is a limited option right now.

Which reminds me and brings me to the other point I want to talk about, which is unique possession schedules. One thing I saw in mediation the other day, which I thought was pretty smart. I have this family where the dad has an extended standard possession order and extended possession order is first, third and fifth weekend from pickup from school on Friday until Monday morning. Then every single Thursday during the school year from pickup from school until the following Friday. So if it's your weekend, you get Thursday all the way till Monday. But if it's not your weekend, you get that one day that Thursday from school until Friday morning, which makes sense during the school year, because you're just picking up from school and dropping off.

But it is a difficult time to know when to do that. First of all, when school's not in session you're picking up from the other parent's house and dropping off the next morning or the other parents picking up from you. So you have that back and forth that you wouldn't necessarily have during the school year, but also it's a lot of movement for a child when we're supposed to be sheltered in place.

So what they did rather than do that Thursday in the off week, they just pulled the weekend, the first, third and fifth weekend, and tacked on a Wednesday for that. Or you could do a Monday, that way the noncustodial parents are not losing that time, but you're just added onto a block on the weekend rather than have that one day in the off week.

I think we'll probably see that also in the summer. Have you seen anything like that in your cases?

Brian: Yeah. There's been some more of that. Also, the other interesting thing is that people's work schedules are different. I've seen people just adjust it to be noon to noon rather than, after work to the next morning or something like that, because that just makes more sense to do that in the middle of the day. You don't have any usual rush hour that everybody's rushing around or soccer practice that you're trying to try to catch up with. So I think when people want to be reasonable like that, which is by the way, the very thing the

Supreme court suggested everybody do is work together, then people have come up with some creative solutions that lowered some of the burden on the kids and make things a lot easier. Now that doesn't always happen obviously, but it can occur.

Jake: I think, even those that can't work it out just amongst themselves, I think I see more and more people doing mediations and being able to get to that resolution that maybe they weren't able to if this wasn't going on. Just like we talked about last time though, there are those families, and this is why we have lawyers and why we have good lawyers is, there are those families that just can't work it out.

It's one side's been difficult. The other side has been difficult or it's just a problem that needs either a judge or an arbitrator resolving it. I think we'll probably see that tick on those as this continues as summer comes. I guess the last topic, I think it'll be interesting, I don't know if you've given any thought to this, Brian, when you think about families out there where one parent has made the unilateral decision to just withhold the child, maybe not for maybe for a long period of time, maybe just for a weekend or two and there's people that haven't been able to get to the courthouse and their enforcements.

I'm curious to see how the judges handle it when they, when the courthouse reopened. Are they going to hear all these motions for enforcement about what happened and how people behaved in the COVID outbreak? Or are they just going to shrug their shoulders and say, "look, everybody, it was a crazy time and we're not going to retroactively go back and give makeup time or hold people in contempt or grade people's paper on how they behave. Let's just move forward."

I don't know what they're going to do. I'm curious what your thoughts are on that, Brian, but it seems like they take the attitude of we're going to do make up time and contempts and attorney's fees and stuff like that.

That's probably the right approach. The question is, can the courthouse handle that? It seems like that's all they'll be doing when this is over if that's the approach they take, but I, frankly, I don't know what the right answer is. I'm curious to see what happens.

Brian: I agree. It was mid March when they closed things down. I think I had the very last hearing in Harris County I'm pretty sure, until 5:30 that day when they kicked everybody else out of the courthouse on short notice by noon and I don't think they're going to reopen until May 11th, I believe is the date, at the earliest.

So it's essentially a two month shut down. You're right, it's a slingshot thing. If they reopened in full power in mid may, then they will have twice as much work in the next two months after that would be trying to jam in four months of work.

If it goes any further than that, it's just going to be a bigger problem. I agree with you. I'm not quite sure how they're gonna handle all of that. I know that the summers are often tough, especially the second half of the summer tends to be pretty slow with the courses, a lot of vacations, and advanced family law conferences max out a week in August.

I think this summer is almost certainly going to have to be the busiest we've ever seen to try to just catch up on things and get people back to where we need to be with our legal system.

Jake: Yeah. It'll certainly be a time where I think a lot of people are going to be looking for hearing in the courthouse.

We've talked about that in our office, both you and I have Brian about being prepared and making sure. I think we touched on this a little bit last week, and this is actually a time where the law firm is growing. That's pretty uncommon for other family law firms in Texas.

But, we're staying just as busy. And of course like you said Brian, I think we're anticipating being quite a bit busier when all this is over and then trying to stay on the forefront and everything and keep our finger on the pulse of what's happening in each County that we practice and, take it one day at a time one family at his time and see where it takes us.

So it'll be interesting looking back on this podcast in a few weeks and seeing if we were right or wrong or somewhere in between, as far as how we thought things were going to go. But that's why we stay on top of it and try to stay involved and stay informed.

Brian: Alright. Take care and we'll be back with another episode next week.

Jake: All right. Talk to you soon.