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## *Attorney Kimberley Keyes examines how courts handle child custody and parenting time when a parent becomes seriously ill.*



The [coronavirus outbreak](#) has placed a new emphasis on an old question: What happens in [child custody cases](#) when a single parent's medical condition threatens to interfere with his or her ability to care for a child? Of course, this question is not restricted to viral infections. Medical issues ranging from [car accidents](#) to cancer treatment to giving birth have the potential to interfere with a [single parent's](#) ability to care for his or her child temporarily. In the case of an infectious disease like Covid-19, however, the complications surrounding the parent's inability to care for the child are compounded by concerns over the potential for [disease transmission from the sick parent to the child](#) and vice versa.

It is important to start any analysis of parental medical concerns by noting that most judges are extremely reluctant to make long-lasting or permanent [modifications to child custody](#) based on a parent's illness or medical condition. The notion that a sick parent may permanently [lose custody](#) or parenting time due to his or her illness is disfavored in the same way that judges tend to be very reluctant to order changes in custody due to a parent's job loss or economic struggles.

That said, judges will order custody changes if a parent's medical or economic struggles become severe enough. For example, if a parent becomes chronically homeless or suffers from major [behavioral changes](#) due to brain impairment, a change in custody may be warranted. In most cases, however, a judge will seek to make changes to a parenting order due to a parent's illness [temporary and reversible](#). However, the longer a parent's illness or injury persists, the greater the chances that [temporary orders impacting child custody](#) may be difficult to reverse later.

## Parents Infected with Coronavirus Face Unique Challenges

Typically, when a parent becomes ill with an infectious condition, parents can [cooperate to temporarily change](#) the parenting schedule to prevent the child from becoming infected and to provide the child with ongoing care. However, the lengthy recovery period for individuals infected with the coronavirus, and the risk that virus transmission poses for children – and the other parent who cares for said children – are having an impact on child custody. With many [family courts closed](#) to non-emergency matters, formalizing custody modifications can be difficult. For this reasons, parents faced with a Covid-19 infection within the family are seeking resolve concerns over parenting time [with the help of attorneys](#) or mediators before seeking court intervention.

We will discuss the unique concerns raised by coronavirus below, but before that, it is important to understand the general legal principles at work when a parent becomes sick or injured.

## How Parenting Time Usually Changes When the Parent Gets Sick

In most cases, when a co-parent becomes sick or injured, he or she can rely on the other parent to “pick up the slack” and care for a child while he or she recovers. When the illness is something relatively minor, like the common cold or flu, it generally makes little sense for parents to formalize temporary changes in the schedule through a modification action. Indeed, for a medical issue that lasts less than a month, the illness or injury is likely to be resolved by the time the court has time to hear the issue, particularly with many courts currently [closed to non-emergency matters](#).

Of course, the seriousness of the medical condition and the circumstances surrounding the parties can impact this analysis. For example, an extremely serious medical condition that totally incapacitates a parent – such a parent being placed in a medically-induced coma – sometimes requires the issuance of an emergency order if the [non-custodial parent lives out of state](#). Similarly, if allowing a non-custodial parent to take custody of the child would cause serious disruption to the child’s life, it would not be unusual for the custodial parent’s family to seek a [temporary guardianship of the child](#) until the primary parent as recovered. In short, there are circumstances when [immediate court intervention](#) may be required, even if the parent’s medical condition is recent and uncertain.

In the context of the coronavirus, a more comparable scenario involves a parent who faces a lengthier recovery period from a medical issue such as a car accident resulting in major surgery or chemotherapy that leaves the parent sick

for weeks or months on end. When a parent's disability is more serious and prolonged, a more formal legal approach may need to be taken. The treatment and recovery period for more serious conditions can exceed several months, disrupting and displacing children and wreaking havoc on carefully constructed parenting schedules, even if the parent's medical condition does not pose a health risk to the child. A parent's [inability to effectively care for the child](#) can require a change to the formal custody arrangement, particularly if the child needs to attend to school in a new district that requires proof of residency at the other parent's home.

Most parental illnesses and injuries do not involve the total incapacitation of a parent. Courts generally will not seek to limit the parenting time of a parent who is disabled, but maintains control over his or her faculties and is able to communicate effectively with the other parent, and make reasonable arrangements to ensure continuity of care for a child. Consequently, most adjustments to parenting time due to parent's illness or injury are temporary. However, the longer and more serious a parent's disability, the greater the chances that formal change in the parenting schedule might be required, particularly if the parties are [separated by geographic distance](#).

## When the Medical Condition Passes, the Previous Schedule Can Usually Resume

In most instances, the parenting schedule will go back to normal after a sick parent recovers. However, this assumes the parent makes a complete or nearly complete recovery from their medical condition. Parents who, for example, have a stroke that leaves them with debilitating long-term effects may struggle to care for a child in their custody, especially if the child is young. Similarly, parents whose medical conditions permanently impact their cognitive function, speech or mobility may face practical limitations, such as an inability to easily transport a child to and from school or communicate with the child's medical and educational providers. In these infrequent instances, the parenting and custody arrangements may need to be modified permanently, or at least until either the ailing parent shows signs of improvement or the child reaches an age where he or she no longer needs the degree of care that the parent is unable to provide without help.

However, a parent's recovery from an injury or illness does not automatically guarantee a return to the previous parenting plan if there has been a lengthy disruption of the prior arrangement that has been [formalized by a temporary order](#). For example, if a child is forced to temporarily change schools due to the primary parent's incapacity, and the child subsequently thrives at the new school

in clear and measurable ways, a court may determine that it is in the child's best interest to continue residing with the other parent and attending the new school. If a child articulates a clear preference for remaining with the substitute parent, a court may also take this into account when considering a permanent change, [depending on the age and maturity of the child](#).

In Massachusetts (and most other courts in the United States), judges [decide child custody cases](#) based on the somewhat amorphous "best interests of the child" standard. Although individual parents certainly have rights, the rights of parents are supposed to be secondary to the best interests of the child. In the case of parents who become temporarily incapacitated, most judges will seek to avoid a scenario in which a parent who becomes sick or injured at no fault of their own loses parenting time as a result. However, scenarios can and do occur in which a child's lengthy residence with the other parent results in changes in the child's circumstances that suggest that a permanent change in custody or parenting time would benefit the child.

## Child's Best Interests Require Consideration of Parenting Abilities

If the parents are unable to agree on a long-term change to the parenting plan or custody arrangement, they must resolution of the dispute by the Probate and Family Court. As with all other questions in child custody law, the primary focus of the court's decision will be the [best interests of the child](#). The judge will presumably issue an order that gives the child meaningful access to both parents, but also ensures that the child gets the care he or she needs.

In the context of sick or injured parents, most judges will work hard to avoid the impression that a sick or injured parent is being "punished" for his or her diminished capacity through a change in custody. Nevertheless, judges are required to examine the [objective parenting abilities of each parent](#). If a parent's disability directly impacts his or her ability to care for the child, the court must consider this reality in fashioning a parenting order moving forward. Of course, most judges are likely will likely view skeptically arguments that a parent's physical limitations truly hamper the parent's ability to care for a child. Disabled individuals are often wonderful parents and opposing parties who seek to use a parent's disability as fodder for a custody fight face a real risk of [angering a judge](#).

## With Re-Opening, Social Distancing and "Stay Home, Save Lives" Called into Question

Thanks to the coronavirus, many single and divorced parents worry about the impact of the illness on both their child and their parenting plan. With so little known about the effects of Covid-19, coupled with the closure of the courts that would otherwise have decided such issues, judges in Massachusetts and elsewhere have been struggling to come up with uniform solutions during the crisis. Meanwhile, the [process of “re-opening”](#) has created basic contradictions between the ongoing recommendations of public health officials for parents to engage in social distancing and an [increasingly permissive](#) regulatory framework that permits parents to bring children to churches stores and restaurants, subject to various rules that may be selectively enforced by business owners, hosts and attendees.

John D. Casey, the Chief Justice of the Massachusetts Probate and Family Court, has [urged parents to maintain their parenting schedules](#), but to stay flexible in these difficult times and cooperate when one parent has to self-quarantine. Early in the crisis, FaceTime calls and Zoom meetings replaced more traditional parenting time for many parents. Parenting trade-offs – where one parent holds on to the children for longer than their allotted time under the court order, with the promise that the other parent gets “make up” time later on – also became more common. As society re-opens, however, the logic behind such adjustments seems to be eroding.

Increasingly, it seems that parents are in conflict over potentially risky activities – such as [children’s attendance at summer camps](#) – have arisen. On the one hand, organizations like the WHO and [Massachusetts Department of Health](#) continue to repeat the mantra of, “stay home, save lives.” At the same time, an increasingly broad range of businesses and activities are opening up that clearly create the potential risk of transmission for parents and children. Evolving scientific views about the effects of the coronavirus, especially when it comes to how it can affect children, are also driving some of the uncertainty.



The advertisement features a woman, Kimberley Keyes, smiling. The text includes the firm's logo 'L&O', the tagline 'Need a family law lawyer? Hire the Best', and the question 'Need a Child Custody Attorney?'. A call to action button says 'CONTACT KIMBERLEY TODAY!' and her name and title are listed below.

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## What if a Parent Becomes Sick with the Coronavirus?

If a parent becomes sick with Covid-19, a three-pronged analysis arises. The first prong of the analysis focuses on the parent’s physical condition and ability to



care for the child, much like the analysis that applies to any of the parental illnesses discussed above. The coronavirus has become notorious for causing lengthy bouts of illness, including difficulty breathing, chronic coughing and extreme fatigue (and worse) that lasts for weeks or months. The degree to which a parent can effectively care for a child while infected by the virus involves a mix of complex factors ranging from the severity of the symptoms to the age and needs of the child, as well as the availability of a [willing and effective co-parent](#). For younger children who require round-the-clock supervision, meal preparation and assistance with remote learning, a severe bout of coronavirus may make it difficult or impossible for the infected parent to maintain the kind of childcare that he or she ordinarily provides.

For single parents who become infected, being able to rely on a co-parent to handle parenting tasks during his or her convalescence is generally a huge relief. For single parents with an [adversarial relationship with the other parent](#), however, the question of whether the parent is too sick to manage basic parenting tasks poses real challenges.

The second prong of the Covid-19 analysis focuses on potential transmission of the virus to the child, who may become sick or transmit the virus to the other parent. Science has not yet provided a clear picture of how likely children are to become sick with the disease. Early on in the Covid-19 pandemic, data indicated that [older people were far more likely to die from the virus](#), and that children rarely showed symptoms. There were [even doubts that children could carry the virus](#) and transmit it to other people. However, in the past few weeks it has become clear that some children – albeit a very small percentage of those who may have been infected – have [developed life-threatening inflammation to their arterial walls](#). The condition is very similar to Kawasaki disease and, while it is often treatable, it can be fatal in some cases. However, major questions remain unanswered regarding how likely children are to become infected, get sick or transmit the virus to others.

Complicating these questions is the third prong of the analysis, which focuses on whether the child may have *already been exposed* to the virus by the sick parent. The reality seems to be that parents who are sick with Covid-19 have often been contagious for a period of time before becoming symptomatic, potentially resulting in potential exposure to a child before the parent became ill. Accordingly, by the time a parent becomes ill, a child may have already been exposed to the virus. Some non-custodial parents in this situation may be reluctant to bring a potentially infected and contagious child into their own household. If a parent's illness arises following a physical separation from the child, the likelihood of exposure of the child becomes reduced. In these instances, many public health officials would recommend the child remain in the

care of the non-infected parent and avoid contact with the infected child. However, if the infected parent is the child's primary custodian, the risk of exposure to the child may be a risk worth taking, particularly if the parent's symptoms are fairly mild.

Against this complex backdrop, parents must weigh the three factors: the severity of the parent's symptoms, the risk of infecting the child, and the risk the child has already been exposed and could transmit the virus to the other parent. Unfortunately, there are no easy choices.

**About the Author:** [Kimberley Keyes](#) is a Massachusetts divorce lawyer and Massachusetts family law attorney for Lynch & Owens, located in [Hingham](#), Massachusetts and [East Sandwich](#), Massachusetts. She is also a mediator for [South Shore Divorce Mediation](#).

**Schedule a free consultation with [Kimberley Keyes](#) today at (781) 253-2049 or send [her an email](#).**

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