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PARENTING IN A POST-PANDEMIC WORLD: THE IMPACT OF  
COVID-19 ON CHILD CUSTODY DISPUTES

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I. INTRODUCTION.....	124
II. PRE-PANDEMIC CHILD CUSTODY DETERMINATIONS AND MODIFICATIONS .....	126
A. <i>Initial Custodial Decisions</i> .....	128
B. <i>Modification of Custodial Awards</i> .....	131
III. THE IMPACT OF THE COVID-19 PANDEMIC ON CHILD CUSTODY MODIFICATION AND VISITATION DISPUTES.....	134
A. <i>Proving a Substantial or Material Change in Circumstances During the Pandemic</i> .....	135
1. Is the Global Pandemic a <i>Per Se</i> Change in Circumstances?.....	135
2. Specific Impacts from COVID-19 and Whether These Impacts Amounted to a Substantial Change in Circumstances Necessary to Petition for Modification of Custody.....	139
B. <i>Proving Modification is in the Best Interest of the Child During the Pandemic</i> .....	145
1. Health Risks Associated with COVID-19 and Enhancement of Those Risks Due to Parental Conduct .....	145
2. Changes in Education due to COVID-19.....	150
3. Other Considerations in the Best Interest of the Child Analysis.....	153
C. <i>Interference with Custodial Rights and Findings of Contempt During the Pandemic</i> .....	154

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IV. LESSONS LEARNED AND PROPOSALS FOR THE FUTURE.....	160
A. <i>The Need for Family Stability and the Impact of Large-Scale Destabilizing Events</i> .....	160
B. <i>Presumptions and Burdens of Proof: Alternative Approaches to Establishing a Change of Circumstances in Child Modification Petitions</i> .....	164
C. <i>Applying the Best Interest of the Child Standard in a Pandemic or Similar Destabilizing Event</i> .....	167
1. Health and Wellbeing of the Child.....	171
2. Housing.....	173
3. Education.....	174
4. Parental Employment.....	175
5. Parental Willingness to Cooperate with Each Other.....	176
D. <i>Other Resources to Assist Family Courts in Meeting Needs for Resolution of Family Conflicts</i> .....	178
V. CONCLUSION.....	179

## I. INTRODUCTION

The Supreme Court has long held that parents have a fundamental right to the care and custody of their children.<sup>1</sup> When parents divorce or are unable to share custody, child custody disputes can become volatile. Family law practitioners attempt to counsel their clients through conflicts and help them plan for potential future conflicts in agreed parenting plans.<sup>2</sup>

The COVID-19 pandemic brought uncertainty into the lives of many families. Schools were closed or moved to alternative forms of education, and many parents found themselves working from home.<sup>3</sup>

<sup>1</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>2</sup> See Joan McWilliams & Stephanie E. Dankel, *Parenting Plans for the COVID-19 Pandemic Era*, COLO. LAW., Nov. 2020, at 40, 43–44 (discussing the use of parenting plans to help resolve conflicts during the COVID-19 pandemic).

<sup>3</sup> See Jessica A. Hoffman & Edward A. Miller, *Addressing the Consequences of School Closure Due to COVID-19 on Children's Physical and Mental Well-Being*, 12 WORLD MED. HEALTH POL'Y 300, 301, 303 (2020) (discussing the changes to education during the COVID-19 pandemic and the impact on children's wellbeing); Ellen McCarthy, *The Pandemic Gave Parents the Chance to Work from Home. Now They Don't Want to Give It Up*, WASH. POST (Apr. 19, 2021), <https://www.washingtonpost.com/lifestyle/2021/04/19/work-from-home-parents-remote-flexibility/>.

Court-ordered shared custodial arrangements were stressed with the disruption of family schedules and concerns associated with navigating a widespread and deadly novel virus.<sup>4</sup> For families sharing custody, COVID-19 exacerbated tense parental relationships and interjected new and challenging legal issues for parents, legal practitioners, and courts.<sup>5</sup>

Courts were faced with determining whether the emergent nature of the initial COVID-19 lockdowns permitted a parent with primary custody to deny, or alter the nature of, visitation rights by the other parent.<sup>6</sup> Pre-pandemic, a parent would not be permitted to adjust a visitation arrangement without consent or court approval.<sup>7</sup> During the pandemic, however, courts faced challenges by parents who argued that they were not able to comply with visitation due to state-ordered lockdowns or due to the practical challenges and risks associated with the virus.<sup>8</sup> Additionally, parents with primary custody sought to condition visitation on compliance with a variety of safety measures, including regular COVID-19 testing or vaccination of the other parent.<sup>9</sup> Such requests were met with varied results.<sup>10</sup>

In addition, parents challenged prior custodial orders, seeking modification of physical and/or legal custody.<sup>11</sup> Courts were asked to determine whether COVID-19 created a sufficient change in circumstances to permit a change in the custodial arrangement and whether

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<sup>4</sup> See Traci Capistrant, *Family Law: The COVID Chronicles*, BENCH & B. MINN., July 2021, at 16, 17–18 (discussing the challenges presented to parents and practitioners to resolve family law disputes during the pandemic).

<sup>5</sup> See *id.*

<sup>6</sup> See discussion *infra* Part III (discussing the impact of COVID-19 on child custody modification cases).

<sup>7</sup> UNIF. MARRIAGE AND DIVORCE ACT § 409(b) (1970); see also ROBERT E. OLIPHANT & NANCY VER STEEGH, *WORK OF THE FAMILY LAWYER* 240–41 (5th ed. 2020).

<sup>8</sup> Compare *VanVlerah v. VanVlerah*, 859 S.E.2d 546, 552–53 (Ga. Ct. App. 2021) (denying Father's motion to hold Mother in contempt for failing to comply with custodial order), with *S.V. v. A.J.*, 126 N.Y.S.3d 631, 633–36 (N.Y. Fam. Ct. 2020) (ordering Mother to comply with custodial order).

<sup>9</sup> See *C.B. v. D.B.*, 155 N.Y.S.3d 727, 729 (N.Y. Sup. Ct. 2021); see also *Burrow v. Sieler*, 497 P.3d 921, 927 (Wyo. 2021).

<sup>10</sup> Compare *C.B.*, 155 N.Y.S.3d at 731 (requiring parent to obtain COVID-19 vaccine or test prior to visitation with the child), with *Sieler*, 497 P.3d at 927 (holding custodial parent in contempt of court when parent unilaterally conditioned visitation with child on COVID-19 testing by other parent).

<sup>11</sup> See, e.g., *Jennifer R. v. Lauren B.*, 126 N.Y.S.3d 324, 325 (N.Y. Fam. Ct. 2020).

a change would be in the child's best interest.<sup>12</sup> Courts were forced to re-evaluate how these legal standards should be applied in the context of an ever-evolving global public health crisis.<sup>13</sup> Not surprisingly, there were varied approaches taken by courts throughout the pandemic.<sup>14</sup>

This article examines the impact of COVID-19 on child custody disputes, focusing primarily on child custody modification determinations and the enforcement of visitation rights. It will examine how the pandemic influenced the role of the court in interjecting notions of public health concerns when resolving parental disputes. Additionally, this article will analyze the ways in which custodial determinations were impacted by the COVID-19 pandemic; it will examine possible implications on post-pandemic child custody disputes with an eye towards providing guidance to legal practitioners in drafting parenting plans to accommodate future disruptions that might arise due to future spikes in COVID-19 infections. Finally, this article will propose revisions to the current legal standard and procedure used for considering child custody modification petitions when large-scale disruptive events, like the pandemic, happen in the future.

## II. PRE-PANDEMIC CHILD CUSTODY DETERMINATIONS AND MODIFICATIONS

This part of the article addresses the traditional standards used by courts in resolving child custody disputes. The impact of the COVID-19 pandemic on the application of these laws will be discussed in Part III. While other custodial disputes, such as those between legal parents and third-parties seeking visitation with children or custodial decisions in the context of child welfare proceedings, might also address similar legal issues and apply the same or similar legal standards, this article will focus on disputes between two legal parents over child custody and visitation.

Family law is a product of state statutory law and varies from state to state.<sup>15</sup> Moreover, in addition to varied substantive law, the

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<sup>12</sup> See *A.L. v. V.T.L.*, 162 N.Y.S.3d 667 (N.Y. Fam. Ct. 2022).

<sup>13</sup> See discussion *infra* Part III (discussing the approaches taken by courts resolving child custody modification disputes and visitation interference cases).

<sup>14</sup> *Id.*

<sup>15</sup> See Barbara A. Babb, *Where We Stand: An Analysis of America's Family Law Adjudicatory Systems and the Mandate to Establish Unified Family Courts*, 32 FAM. L.Q.

procedural systems created to resolve family disputes can vary widely among states.<sup>16</sup> For example, some states create Family Law courts that resolve the types of claims at issue in this article, along with all other domestic relations matters.<sup>17</sup> In other states, family law matters are subdivided into different sub-specialized courts, such as Juvenile Courts or Probate Courts.<sup>18</sup> Even within a state, there is variation on how family law is applied at the local level.<sup>19</sup> Despite these differences, this article will address some general trends in family law to provide a context in which to examine the impact of the COVID-19 pandemic on the practice and application of family law across the country.

Child custody orders address *multiple* components of the parent-child relationship.<sup>20</sup> Traditionally, child custody was divided into physical custody and legal custody.<sup>21</sup> Physical custody included providing physical day-to-day care of the child.<sup>22</sup> Legal custody, by contrast, focused on the ability to make larger decisions regarding the child, including decisions related to healthcare, education, religious training, and others.<sup>23</sup> Courts have awarded custody in a variety of ways. For physical custody, courts may award sole custody to one parent and some type of visitation to the other parent.<sup>24</sup> Courts may also award joint custody to the parties where the parents share equal, or close to equal, parenting time.<sup>25</sup> Legal custody may also be awarded on a

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31, 35–40 (1998) (discussing the variation in family law in the states and the adjudicatory systems created to resolve family law matters).

<sup>16</sup> *Id.* at 42–44.

<sup>17</sup> *Id.* at 42–43.

<sup>18</sup> *See id.* at 47.

<sup>19</sup> *See, e.g.*, 750 ILL. COMP. STAT. ANN. 5/600(g) (West, Westlaw through P.A. 102-1102 of 2022 Reg. Sess.).

<sup>20</sup> *See Child Custody*, N.C. JUD. BRANCH, <https://www.nccourts.gov/help-topics/family-and-children/child-custody> (last visited Dec. 23, 2022).

<sup>21</sup> 24A AM. JUR. 2D *Divorce and Separation* § 792 (2022) [hereinafter *Divorce and Separation*].

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *See* OLIPHANT & VER STEEGH, *supra* note 7, at 142 (discussing a "continuum of typical parenting arrangements" that provide for a variety of levels of contact and interaction between a parent and child).

<sup>25</sup> *See* 67A C.J.S. *Parent and Child* § 58 (2022) [hereinafter *Parent and Child*] ("Generally, a father and mother, as against each other, are regarded as having equal rights in the custody and control of their minor children."); *see, e.g.*, *Rivero v. Rivero*, 216 P.3d 213, 224 (Nev. 2009), *overruled on other grounds by* *Romano v. Romano*, 501 P.3d 980, 982 (Nev.

sole or joint basis.<sup>26</sup> The courts may even divide legal custody on particular matters, awarding one parent sole legal custody on one matter while awarding joint custody on all other matters.<sup>27</sup> There has been a trend for courts to award joint custody to parents unless safety concerns would not permit such an arrangement or the parents have an acrimonious relationship such that this is not feasible.<sup>28</sup>

Some jurisdictions have moved away from the terminology of "physical custody," "visitation," and "legal custody," finding these terms stigmatizing to parents.<sup>29</sup> Instead, they have opted for language like "parenting time" to describe the time a parent is responsible for the day-to-day care of the child.<sup>30</sup> This eliminated any pejorative connotation that might be connected to the term "visitation" and its minimization of the visiting parent's responsibilities.<sup>31</sup> "Decision-making" has, in some jurisdictions, replaced the term "legal custody."<sup>32</sup> Because many of the cases that involved custodial disputes and were decided during the pandemic originated in jurisdictions that used the terms "physical custody," "visitation," and "legal custody," this article will use those terms.

#### A. Initial Custodial Decisions

Child custody decision-making can be grouped into two different macro-decisions: the initial custody determination and any subsequent decisions for modification of either physical or legal custody.<sup>33</sup>

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2022) (defining joint custody as at least each parent having 40% of the time with the child).

<sup>26</sup> *Rivero*, 216 P.3d at 218, *overruled on other grounds by* *Romano v. Romano*, 501 P.3d 980 (Nev. 2022).

<sup>27</sup> See *Divorce and Separation*, *supra* note 21, at § 793.

<sup>28</sup> See *Parent and Child*, *supra* note 25, at § 58; OLIPHANT & VER STEEGH, *supra* note 7, at 142.

<sup>29</sup> Merle H. Weiner, *Thinking Outside the Custody Box: Moving Beyond Custody Law to Achieve Shared Parenting and Shared Custody*, 2016 U. ILL. L. REV. 1535, 1543 (2016).

<sup>30</sup> See, e.g., 750 ILL. COMP. STAT. ANN. 5/600(e) (West, Westlaw through P.A. 102-1102 of 2022 Reg. Sess.).

<sup>31</sup> See Cynthia R. Mabry, *Indissoluble Nonresidential Parenthood: Making It More Than Semantics When Parents Share Parenting Responsibilities*, 26 BYU J. PUB. L. 229, 231-32 (2012).

<sup>32</sup> See, e.g., 750 ILL. COMP. STAT. ANN. 5/602.5 (West, Westlaw through P.A. 102-1102 of 2022 Reg. Sess.).

<sup>33</sup> See *Divorce and Separation*, *supra* note 21, at § 849. In addition to meeting the substantive legal requirements to establish or modify custody, the court must also have

Historically, child custody disputes were resolved using presumptions, typically along gender lines.<sup>34</sup> Initially, fathers enjoyed a historic presumption as the proper custodian of children due to patriarchal views of the family.<sup>35</sup> This presumption was replaced by the Tender Years Doctrine, which presumed that mothers should receive custody of children due to their maternal skills.<sup>36</sup> Today, these presumptions have been replaced by the more modern Best Interest of the Child (BIOC) approach, which focuses on the individual needs and interests of the child.<sup>37</sup>

It is presumed that fit parents act in the best interest of their children.<sup>38</sup> For this reason, parents are encouraged to create their own parenting plans to establish a workable custodial arrangement for their children.<sup>39</sup> Alternative dispute resolution methods such as mediation or negotiated settlements have been instrumental in assisting parents to resolve their conflicts and agree to a parenting plan.<sup>40</sup> In most states, judges review parenting plans to ensure that they are in the best interest of the children.<sup>41</sup>

When parents are unable to resolve their disagreements and arrive at a custodial arrangement, the court is tasked with engaging in a highly individualized assessment of the family and the child's needs to determine the proper custodial arrangement under the BIOC

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jurisdiction over the case. See Sandie McCarthy-Brown & Susan L. Waysdorf, *Katrina Disaster Family Law: The Impact of Hurricane Katrina on Families and Family Law*, 42 IND. L. REV. 721, 758–60 (2009) (discussing challenging issues that arose under the UCCJEA after family displacement caused by Katrina). This article will not address jurisdictional challenges, though large-scale destabilizing events might cause children and families to move to other states, making jurisdictional questions more challenging.

<sup>34</sup> OLIPHANT & VER STEEGH, *supra* note 7, at 149.

<sup>35</sup> Ramsay Laing Klaff, *The Tender Years Doctrine: A Defense*, 70 CAL. L. REV. 335, 337 (1982).

<sup>36</sup> *Id.* at 340–41.

<sup>37</sup> OLIPHANT & VER STEEGH, *supra* note 7, at 162–63 (noting that the BIOC approach is "widely adopted and remains the dominant legal standard today" and that state statutes are modeled after the Uniform Marriage and Divorce Act § 402).

<sup>38</sup> Parham v. J. R., 442 U.S. 584, 604 (1979) (recognizing the "traditional presumption that the parents act in the best interests of their child").

<sup>39</sup> LINDA D. ELROD, CHILD CUSTODY PRAC. & PROC. § 1:4 (2022) (discussing how many states require parents to submit a parenting plan).

<sup>40</sup> See McWilliams & Dankel, *supra* note 2, at 44.

<sup>41</sup> ELROD, *supra* note 39 ("The court has the *parens patriae* power to review the agreement of the parents to ensure that it meets the best interests of the child.").

approach.<sup>42</sup> The family court judge has a great deal of discretion to make these determinations.<sup>43</sup> This is to ensure that the award is uniquely fitted to the child's own best interest.<sup>44</sup> While the judge enjoys discretion, most state statutes *require* the judge to consider a series of "best interest" factors in making a custodial award.<sup>45</sup> Failure to make a finding on any "best interest" factor is often a reversible error.<sup>46</sup> Most jurisdictions do not ascribe the weight to be given to any one factor, allowing the judge to give more or less weight to an individual factor in a specific case (so long as each factor is considered in making the custodial award).<sup>47</sup> Additionally, some states have an open-ended factor which allows the judge to consider an issue that is truly unique to a particular child or their circumstances.<sup>48</sup>

These decisions are highly fact-intensive inquiries.<sup>49</sup> The child's wishes and interests are protected through the process, often through the appointment of a guardian ad litem or child's attorney.<sup>50</sup> Additionally, custodial evaluations and expert reports are typically ordered by the court or proffered by the parties.<sup>51</sup> While the factual findings of the judge made in the context of the initial custody proceeding are *res judicata*, the order is subject to modification in certain situations.<sup>52</sup>

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<sup>42</sup> See, e.g., 750 ILL. COMP. STAT. ANN. 5/602.10(e)-(g) (West, Westlaw through P.A. 102-1102 of 2022 Reg. Sess.).

<sup>43</sup> *Divorce and Separation*, *supra* note 21, at § 811.

<sup>44</sup> *Grissom v. Grissom*, 586 S.W.3d 387, 391 (Tenn. Ct. App. 2019) (quoting *Reeder v. Reeder*, 375 S.W.3d 268, 278 (Tenn. Ct. App. 2012)).

<sup>45</sup> See OLIPHANT & VER STEEGH, *supra* note 7, at 162-63.

<sup>46</sup> ELROD, *supra* note 39, at ¶ 4:3 n.12.

<sup>47</sup> *Id.*

<sup>48</sup> See, e.g., 23 PA. STAT. AND CONS. STAT. ANN. § 5328(a)(16) (West, Westlaw through 2022 Reg. Sess. Act 114) (permitting the review of "any other relevant factor" when considering the best interest of the child).

<sup>49</sup> See *id.* § 5328(a) (instructing courts to consider fifteen different factors when awarding custody).

<sup>50</sup> See ELROD, *supra* note 39, at § 4:11 (discussing the role of the child's preference in reaching a best interest determination); Diane Somberg, *Defining the Role of Law Guardian in New York State by Statute, Standards and Case Law*, 19 *TOURO L. REV.* 529, 533-34 (2003) ("[C]hild advocates consisting of volunteers, attorneys and guardian ad litem are appointed by courts to focus on the child's needs and wishes and to see that pertinent information critical to making decisions about the child, reaches the judge.").

<sup>51</sup> ELROD, *supra* note 39, at § 4:13.

<sup>52</sup> *Divorce and Separation*, *supra* note 21, at § 849.

### *B. Modification of Custodial Awards*

States have a strong desire to preserve stable environments for children.<sup>53</sup> Additionally, there is a reluctance to permit the re-litigation of disputes between parents, some of which were highly contentious in the first place.<sup>54</sup> For these reasons, most states significantly limit the modification of custodial awards.<sup>55</sup> However, because children's needs and the ability of their families to best meet those needs may substantially change over time, sometimes a modification may be necessary.

There are several instances in which a family court judge may modify an initial custodial award. The first such situation is when parents mutually consent to the modification.<sup>56</sup> Even if parental consent is provided, the modification is still subject to a finding that the modification is in the child's best interest.<sup>57</sup>

Secondly, a party may petition the court to modify custody if there is an emergency situation or if the child is endangered.<sup>58</sup> Typically, this includes serious endangerment to the child's "mental, moral or physical health or significant impair[ment] [of] the child's emotional development."<sup>59</sup>

Finally, many states allow a party to petition the court to modify custody if there has been a substantial change in circumstances *and* the modification would be in the child's best interest.<sup>60</sup> This basis provides the greatest threat to the balance between preserving stability to children and ensuring that the custodial award is meeting the needs of the child.<sup>61</sup> For this reason, most states include procedural mechanisms which limit petitions based on a change in circumstances.<sup>62</sup>

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *See id.*

<sup>56</sup> *See, e.g.*, 750 ILL. COMP. STAT. ANN. 5/610.5(e)(4) (West, Westlaw through P.A. 102-1102 of 2022 Reg. Sess.); UNIF. MARRIAGE AND DIVORCE ACT § 409(b)(1) (1970).

<sup>57</sup> 750 ILL. COMP. STAT. ANN. 5/610.5(e)(4) (West, Westlaw through P.A. 102-1102 of 2022 Reg. Sess.).

<sup>58</sup> *Id.* at 5/610.5(a).

<sup>59</sup> *Id.*; *see also* OLIPHANT & VER STEEGH, *supra* note 7, at 240–41.

<sup>60</sup> *See* Lizzio v. Jackson, 640 N.Y.S.2d 330, 331 (N.Y. App. Div. 1996); OLIPHANT & VER STEEGH, *supra* note 7, at 239.

<sup>61</sup> *See* OLIPHANT & VER STEEGH, *supra* note 7, at 239.

<sup>62</sup> *Id.*

One example is a moratorium on modification petitions for a set period of time, such as two years from the custodial order.<sup>63</sup> Moratoriums allow the parties a chance to "settle into" the ordered arrangement during a time period where drastic change is not likely.<sup>64</sup> If litigation were to occur before the moratorium period, it would more likely be re-litigation of the same issues already disputed and ruled on in the initial custodial order.<sup>65</sup>

Other limitations on modifications based on a "substantial change in circumstance" place burdens on the petitioner seeking to modify the order. For example, the petitioner often bears the burden of proof on the issues of "substantial change" and the "best interest" factors.<sup>66</sup> Some states also require the petitioner to prove these facts by a clear and convincing standard of proof rather than a preponderance of the evidence standard, especially if the result would be termination of contact with the parent.<sup>67</sup> Others require a clear and convincing standard when the parent seeks to modify custody "from one parent to the other, or from joint custody to sole custody."<sup>68</sup>

Some jurisdictions recognize certain events as presumptively constituting a "substantial change in circumstances."<sup>69</sup> For example, the relocation of the parent with primary physical custody of the child may constitute a presumed change in circumstances warranting a review of the initial custody order.<sup>70</sup> While some jurisdictions address this under a separate part of their family law code, others consider it to be a type of custodial modification.<sup>71</sup> Even in jurisdictions that do not require a showing of substantial change in circumstances,

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<sup>63</sup> See, e.g., 750 ILL. COMP. STAT. ANN. 5/610.5(a) (West, Westlaw through P.A. 102-1102 of 2022 Reg. Sess.); OLIPHANT & VER STEEGH, *supra* note 7, at 239.

<sup>64</sup> See Graner v. Graner, 738 N.W.2d 9, 17-18 (N.D. 2007).

<sup>65</sup> See OLIPHANT & VER STEEGH, *supra* note 7, at 241.

<sup>66</sup> *Parent and Child*, *supra* note 25, at § 145.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* (footnotes omitted); see also *Divorce and Separation*, *supra* note 21, at § 850.

<sup>69</sup> Eg., 750 ILL. COMP. STAT. ANN. 5/609.2(a) (West, Westlaw through P.A. 102-1102 of 2022 Reg. Sess.) ("A parent's relocation constitutes a substantial change in circumstances . . .").

<sup>70</sup> *Id.*; see also Sally Adams, *Avoiding Round Two: The Inadequacy of Current Relocation Laws and a Proposed Solution*, 43 FAM. L.Q. 181, 192 (2009) (discussing the variety of ways relocation is addressed in the states).

<sup>71</sup> See generally Jay M. Zitter, Annotation, *Custodial Parent's Relocation as Grounds for Change of Custody*, 70 A.L.R. 5th 377 (1999) (discussing the approaches states have taken while considering relocation in custody modification proceedings).

judges tend to be conservative in granting them out of desire to maintain stability for the child.<sup>72</sup>

If the court finds that there is a substantial change in circumstances, it must also find the modification is in the best interest of the child before granting any modification of the child custody order.<sup>73</sup> Typical "best interest" factors include:

- (1) the desirability of maintaining stability in the child's life.
- (2) the relative quality of the respective home environments.
- (3) the length of time that the present custody arrangement has been in place.
- (4) the moral fitness of the child's parents, including the parents' sexual conduct.
- (5) the relationship between the child and the parents.
- (6) the age, sex, and health of the child and the parents.
- (7) the parental capacity to provide physical care and satisfy the educational needs of the child.
- (8) the employment of the parent and the responsibilities of that employment.
- (9) a parent's move or relocation.
- (10) which parent has been the primary caretaker during the marriage or is the more nurturing parent.
- (11) the wishes of the child as to his or her custodian.<sup>74</sup>

In jurisdictions which do *not* require a showing of a substantial change in circumstances, the *sole* inquiry is whether the modification would be in the child's best interest.<sup>75</sup> However, because modifications are generally thought of as destabilizing to children, courts are

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<sup>72</sup> *Parent and Child*, *supra* note 25, at § 141 ("While child custody is always modifiable, the courts require a more rigid standard for custody modification than for initial custody determinations, in order to promote stability and continuity for the children and to discourage repeated litigation of the same issues.")

<sup>73</sup> *Divorce and Separation*, *supra* note 21, at § 849.

<sup>74</sup> *Id.* at § 795.

<sup>75</sup> See *Catherine D. v. Dennis B.*, 269 Cal. Rptr. 547, 551 (Cal. Ct. App. 1990) (explaining how the changed-circumstance test is an adjunct to the best-interest test).

reluctant to grant them without substantial proof that modification is necessary to meet the child's best interest.<sup>76</sup>

### III. THE IMPACT OF THE COVID-19 PANDEMIC ON CHILD CUSTODY MODIFICATION AND VISITATION DISPUTES

This part of the article will examine how courts weighed the impact of COVID-19 in resolving petitions to modify custody orders, altering the custodial arrangement between the parents on either or both physical or legal custody. Further, this part will address conflicts raised after a parent allegedly did not comply with a current custody order. Most of these conflicts arose when a parent refused to exchange the child with the other parent due to the risks associated with the COVID-19 virus, the need to comply with lockdown orders, or when a parent's request for additional safety precautions by the other parent was rebuffed.<sup>77</sup> In many of these cases, the court was asked to hold a parent in contempt of court for not abiding by the prior order.<sup>78</sup>

In this part of the article, attention will be given to national trends in the interpretation of legal and procedural standards in child custody modification, and the article will examine how these trends evolved during the course of the pandemic. This part will also examine the tensions between the policy supporting child custody modification law and the challenges associated with the COVID-19 pandemic. Further, it will address inconsistencies revealed in child custody modification decision-making that were not as recognizable before the pandemic.

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<sup>76</sup> See *Glover v. Singleton*, 598 So. 2d 995, 996 (Ala. Civ. App. 1992) ("[A] change of custody from one parent to another is not a decision to be made lightly. On the contrary, it may be granted only where the evidence discloses an obvious and overwhelming necessity for change of custody.").

<sup>77</sup> See, e.g., *S.V. v. A.J.*, 126 N.Y.S.3d 631, 632–33 (N.Y. Fam. Ct. 2020); *Jennifer R. v. Lauren B.*, 126 N.Y.S.3d 324, 326–27 (N.Y. Fam. Ct. 2020).

<sup>78</sup> See, e.g., *Lindsey v. Lindsey*, 174 N.E.3d 458, 461 (Ohio Ct. App. 2021); *In re Marriage of Craft*, 185 N.E.3d 151, 152, 176 (Ohio Ct. App. 2022).

A. *Proving a Substantial or Material Change in Circumstances During the Pandemic*

1. Is the Global Pandemic a *Per Se* Change in Circumstances?

For jurisdictions that required a substantial change in circumstances to modify a custodial order, a central question courts faced was whether a global pandemic constituted a *per se* substantial change in circumstances.<sup>79</sup> While not necessarily articulated this way, several parents petitioned the courts seeking modification to child custody orders on the grounds that the substantial changes to everyday life experienced on a regional, state, national, and global level should be considered material changes for the purposes of family law.<sup>80</sup>

In the spring of 2020, at the beginning of many state and local COVID-19 lockdowns, courts were reluctant to alter custodial arrangements simply due to the pandemic.<sup>81</sup> This is illustrated by *S.V. v. A.J.*, decided by the New York Family Court in May 2020.<sup>82</sup> In *S.V. v. A.J.*, the parents had filed cross-custody petitions, and the court had entered a temporary order providing Father with alternate weekend visitation with the children.<sup>83</sup> After the COVID-19 "stay at home" orders were issued by New York and New Jersey in March 2020, Mother stopped producing the children for visitation with Father.<sup>84</sup> Father moved to enforce the temporary custodial order.<sup>85</sup> Mother contended that it would be "irresponsible" to make parents comply with court-ordered, in-person visitation because it might impact [the childrens'] safety, and that during this pandemic another type of visitation may be appropriate.<sup>86</sup> The court rejected Mother's argument because it was not based on any "particularized health concern."<sup>87</sup> The court explained that "[a] generalized fear of the coronavirus crisis we all face is insufficient to severely limit and perhaps harm a child's relationship

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<sup>79</sup> See, e.g., *Rivas v. Arreguin*, No. 82508-COA, 2022 WL 214016, at \*2 (Nev. Ct. App. Jan. 24, 2022).

<sup>80</sup> See, e.g., *S.A. v. R.H.*, 306655/2011, 2020 WL 3089242, at \*1–2 (N.Y. Sup. Ct. June 5, 2020).

<sup>81</sup> See, e.g., *S.V.*, 126 N.Y.S.3d at 632, 634–35.

<sup>82</sup> See *id.* at 631–36.

<sup>83</sup> *Id.* at 632.

<sup>84</sup> *Id.* at 632–33.

<sup>85</sup> *Id.* at 631–32.

<sup>86</sup> *Id.* at 633.

<sup>87</sup> *Id.* at 634.

with a parent.<sup>88</sup> Further, the court chastised Mother, explaining that "should the mother plan to be the primary physical custodian of the children[,] she must fulfill her obligation to ensure the children have a meaningful relationship with their father."<sup>89</sup> While this case did not involve a petition to modify the custodial order, the court's reluctance to give weight to the risks posed by COVID-19 in ordering compliance with the initial temporary order and the emphasis it placed on the need to "ensure stability" for the children through adherence to the initial order informs our understanding of how courts viewed child custody modifications during the pandemic.<sup>90</sup>

In *Jennifer R. v. Lauren B.*, the New York Family Court denied Mother's petition for modification of custody.<sup>91</sup> Similar to *S.V. v. A.J.*, this decision was rendered at the beginning of the pandemic.<sup>92</sup> Mother and Ex-Wife, both legal parents of Child, had agreed to temporary modification of their custodial schedule to limit the number of transitions between homes during the pandemic.<sup>93</sup> However, when Child was with Mother in New Jersey, Mother moved for immediate temporary sole custody and final decision-making authority.<sup>94</sup> The basis for her motion was that New Jersey had "significantly less risk of infection and transmission than New York."<sup>95</sup> The court rejected Mother's argument, noting the lack of "anything specific" done by Ex-Wife to put Child at risk of exposure.<sup>96</sup> Moreover, the court recognized that while New York was a viral "hotspot," New Jersey was as well.<sup>97</sup> Ultimately, the court looked for more than the existence of the hardship being experienced by all families in its jurisdiction before finding a substantial change in circumstances.<sup>98</sup>

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 635.

<sup>90</sup> *Id.* at 633–35.

<sup>91</sup> 126 N.Y.S.3d 324, 327–29 (N.Y. Fam. Ct. 2020).

<sup>92</sup> *See id.* at 324.

<sup>93</sup> *Id.* at 325–27.

<sup>94</sup> *Id.* at 327.

<sup>95</sup> *Id.*; For further discussion of "hot spot" arguments and their success in custody disputes across the country, see N.Y. L. Sch. *Fam. L. Q.* Editors, *Co-Parenting During Lockdown: Covid-19 and Child Custody Cases Before the Vaccine*, 55 *FAM. L.Q.* 173, 179–87 (2022).

<sup>96</sup> *Jennifer R.*, 126 N.Y.S.3d at 328.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 328–29.

In *Rivas v. Arreguín*, a decision rendered much later in the pandemic, a Nevada District Court denied Father's motion to modify the custodial arrangement, which was based on his concern that the children's academic performance declined during the COVID-19 pandemic.<sup>99</sup> On appeal, the Court of Appeals of Nevada reversed and remanded the case for more specific findings on the issue of whether there was a substantial change in circumstances sufficient to support a modification of custody.<sup>100</sup> The appellate court noted that the district court's "order can be read both ways on this point insofar as the court expressed concerns regarding the children's academic performance, yet also indicated that it believed their situation was not unique under the circumstances of the COVID-19 pandemic."<sup>101</sup> Because the court excluded generalized impacts from the pandemic (e.g. those experienced by everyone in their community) in considering whether there was a substantial change in circumstances, it rejected a *per se* approach in favor of requiring proof of an individualized substantial change in circumstances.

However, in some decisions, courts considered the general risks associated with COVID-19 as sufficient grounds on which to alter custody or visitation.<sup>102</sup> Others used a slightly more specific scope, viewing COVID-19 risks which disproportionately impacted a region or state in modifying custody or visitation.<sup>103</sup>

The New York Family Court, in *CB v. DB*, considered the generalized risks associated with COVID-19 in altering parental access to Child.<sup>104</sup> While *CB v. DB* is not a decision modifying a final custodial order, it informs the greater understanding of decisions altering custody during the pandemic. In *CB v. DB*, the parties were in the process of divorcing.<sup>105</sup> While the court had entered a temporary custodial order awarding Mother primary physical custody and awarding Father supervised visitation, a final custodial order had not been entered.<sup>106</sup> In September 2021, the court entered a temporary restraining order (TRO), suspending Father's in-person access to the child unless

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<sup>99</sup> No. 82508-COA, 2022 WL 214016, at \*1 (Nev. Ct. App. Jan. 24, 2022).

<sup>100</sup> *Id.* at \*2.

<sup>101</sup> *Id.*

<sup>102</sup> *See, e.g., CB v. DB*, 155 N.Y.S.3d 727 (N.Y. Sup. Ct. 2021).

<sup>103</sup> *See, e.g., SA v. RH*, 306655/2011, 2020 WL 3089242 (N.Y. Sup. Ct. June 5, 2020).

<sup>104</sup> *See* 155 N.Y.S.3d at 729–31.

<sup>105</sup> *Id.* at 728.

<sup>106</sup> *See id.*

he "received a first dose of the COVID-19 vaccine or submitted to a COVID-19 testing regimen that included a PCR test once per week and a COVID-19 antigen test (AKA 'rapid test') within 24 hours of any in-person visit."<sup>107</sup> Notably, the court focused on the general concerns associated with COVID-19 and not any individualized or unique risks to the child or the parents from the virus.<sup>108</sup> While the court noted that the child's preschool required parents who participated in pick-up or drop-off of children to be vaccinated, it was not clear that Father had been engaged in this role prior to the TRO.<sup>109</sup> In fact, Father had supervised weekend visitation before the issuance of the TRO.<sup>110</sup> Additionally, the court's rhetoric made clear that it was focused on the *general* risks associated with COVID-19 and the ability of the parents (and court through its orders) to minimize these risks to the community at large as opposed to risks posed to the specific child.<sup>111</sup> For example, in framing the risk to the child, the court stated, "[t]he danger of voluntarily remaining unvaccinated during access with a child while the COVID-19 virus remains a threat to children's health and safety cannot be understated."<sup>112</sup> It continued,

New York is transitioning towards a 'new normal' where citizens are taking precautions to balance staying safe from COVID-19 and its variants alongside the desire to return to some semblance of regular life. The widespread availability of three different no-cost COVID-19 vaccines, with their continued, proven efficacy in preventing the spread of the virus and the development of serious symptoms in those who contract it, has resulted in the expectation that one must be vaccinated in order to participate meaningfully in everyday society.<sup>113</sup>

In *S.A. v. R.H.*, the court took a more generalized view of the risks associated with COVID-19 in altering custody.<sup>114</sup> Unlike the decision in *Jennifer R. v. Lauren B.*, the *S.A. v. R.H.* court gave weight to the risk associated with COVID-19 "hotspots."<sup>115</sup> Father was permitted to remove Child from New York to California for a visit with grandparents in June 2020.<sup>116</sup> While in California, Father moved to

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<sup>107</sup> *Id.* at 729.

<sup>108</sup> *See id.* at 729–31.

<sup>109</sup> *See id.* at 730.

<sup>110</sup> *Id.* at 728.

<sup>111</sup> *Id.* at 729–30.

<sup>112</sup> *Id.* at 729.

<sup>113</sup> *Id.* at 729–30.

<sup>114</sup> *See* 306655/2011, 2020 WL 3089242, at \*1 (N.Y. Sup. Ct. June 5, 2020).

<sup>115</sup> *See id.*

<sup>116</sup> *Id.*

modify custody to permit him to remain in California.<sup>117</sup> The court noted that the COVID-19 rates in California were better than in New York and New Jersey (e.g., a COVID-19 "hotspot").<sup>118</sup> The difference in rates was a key basis for the court's order to temporarily permit relocation of the child to California.<sup>119</sup> This decision was rendered in the late spring of 2020, and the court suggested in its opinion that the COVID-19 crisis might be resolved in the near future.<sup>120</sup>

In reviewing these cases, it is important to note the varied notions of whether the changes brought about by the pandemic itself should be viewed as a basis for modifying custody or whether something more unique to the individual child or family needs to be established. It is also interesting to note that there are decisions with seemingly divergent takes on this issue originating from the same jurisdiction.<sup>121</sup> Finally, it is significant to note that the course of the COVID-19 virus clearly impacted these decisions as evidenced in the discussion of vaccine availability and "hotspots";<sup>122</sup> however, the course of the virus did not seem to create a predictable resolution on the issue of whether the generalized impact of the pandemic could constitute a substantial change in circumstances. For example, at the outset of the pandemic, some courts rejected generalized evidence while others relied on it to reach their rulings during the same period.<sup>123</sup>

## 2. Specific Impacts from COVID-19 and Whether These Impacts Amounted to a Substantial Change in Circumstances

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *See id.* at \*1–2.

<sup>120</sup> *See id.* at \*2.

<sup>121</sup> *Compare id.* at \*1–2 (taking a more generalized view of the risks associated with COVID-19 in altering custody), *with* *Jennifer R. v. Lauren B.*, 126 N.Y.S.3d 324, 328 (N.Y. Fam. Ct. 2020) (taking a more narrow view of the risks associated with COVID-19 in altering custody).

<sup>122</sup> *See S.A.*, 2020 WL 3089242, at \*1; *see also Jennifer R.*, 126 N.Y.S.3d at 327; *C.B. v. D.B.*, 155 N.Y.S.3d 727, 729–31 (N.Y. Sup. Ct. 2021).

<sup>123</sup> *Compare Jennifer R.*, 126 N.Y.S.3d at 328 (rejecting generalized evidence), *with C.B.*, 155 N.Y.S.3d at 729–31 (relying on generalized evidence).

## Necessary to Petition for Modification of Custody

Many child custody modification petitions were founded on specific impacts to the child from the COVID-19 pandemic.<sup>124</sup> The most common ground asserted was the child's health or risks to the child's health and safety from the virus.<sup>125</sup> In addition, petitions asserted changes in education,<sup>126</sup> parental employment,<sup>127</sup> and parental acrimony<sup>128</sup> attributed to COVID-19. Finally, some petitions simply addressed the COVID-19 pandemic as part of the totality of changes that constituted a substantial change in circumstances to the child or family unit.<sup>129</sup>

COVID-19 presented novel and serious health risks.<sup>130</sup> Early decisions demonstrate an evolving understanding of these risks and their impact on children with pre-existing health conditions.<sup>131</sup> Many decisions, however, were based, at least in part, on whether the current custodial arrangement exacerbated the health risks associated with COVID-19 in children with no known pre-existing conditions.<sup>132</sup> Courts

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<sup>124</sup> See, e.g., *R.M. v. B.S.*, 36789/2015, 2020 NYLJ LEXIS 827, at \*1 (N.Y. Sup. Ct. Apr. 27, 2020).

<sup>125</sup> See *id.* (noting the child's respiratory illness); see also Tom S. Tanimoto, *Child Custody Considerations in a COVID-19 Era and Thoughts for the Future*, HAW. B.J., Sept. 2021, at 12, 15 (stating that a best interest analysis should include the physical health and safety of a child); Madison McBratney, *How to Stay-At-Home When You Have Two Homes: COVID-19's Effect on Co-Parenting and Child Custody*, 33 J. AM. ACAD. MATRIM. L. 225, 230–32 (2020) (discussing the need to examine health impacts of COVID-19 and balance those concerns with custodial time with both parents).

<sup>126</sup> See generally *Johnson v. Gyurisko*, No. COA21-86, 2022 WL 1314340 (N.C. Ct. App. May 3, 2022) (discussing a modification order prompted by education concerns).

<sup>127</sup> See, e.g., *Soddy v. Soddy*, No. 355212, 2021 WL 1706689, at \*5 (Mich. Ct. App. Apr. 29, 2021).

<sup>128</sup> See, e.g., *Bixler v. Hunt*, No. 20A-DR-1495, 2021 WL 3197757, at \*5–7 (Ind. Ct. App. July 29, 2021).

<sup>129</sup> See generally *Gulley v. Brinkley*, No. 0714-21-4, 2022 WL 451907 (Va. Ct. App. Feb. 15, 2022) (analyzing a parental dispute prompted by the pandemic's general impact on the original custody arrangement).

<sup>130</sup> See *Understanding Risk*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/your-health/understanding-risk.html> (last updated Aug. 11, 2022).

<sup>131</sup> See, e.g., *Alexander v. Alexander*, 256 A.3d 348, 352 (Md. Ct. Spec. App. 2021) ("[Father] also asserted that literature provided by the American Diabetes Association made 'it clear that a diabetic is not at a greater risk of having severe complications from COVID-19 than the general population if the diabetes is managed well.'").

<sup>132</sup> See, e.g., *Christensen-Byrns v. Byrns*, A20-0799, 2021 WL 567250, at \*2 (Minn. Ct. App. Feb. 16, 2021).

often included this discussion in the context of the evaluation of the best interest of the child rather than the context of whether there was a substantial change in circumstances sufficient to permit modification.<sup>133</sup> For these courts, the focus was on whether children were being unnecessarily subjected to an increased risk of exposure to the virus due to parental conduct.<sup>134</sup>

Some courts rejected the view that parental non-compliance with COVID-19 safety measures would automatically constitute a change in circumstances sufficient to warrant a change in custody.<sup>135</sup> In *Kapsokavithis v. Kapsokavithis*, the Circuit Court of Michigan denied Father's motion to modify physical custody.<sup>136</sup> Father raised Mother's conduct in March 2020 to support his motion, including her permitting a child to go to a coffee shop, taking the children with her to two real estate showings, and taking them somewhere that the children expressed to be a place "they did not feel comfortable [visiting] due to the COVID-19 pandemic."<sup>137</sup> The *Kapsokavithis* court reasoned that these breaches in safety protocol were "only occasional rather than consistent" and, therefore, "did not materially change the conditions surrounding the custody of the children."<sup>138</sup>

In addition to considering the direct risks associated with the virus, courts focused on derivative consequences from the COVID-19 pandemic, including the changes to education.<sup>139</sup> In *Johnson v. Gyurisko*, the trial court in North Carolina found that a move from

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<sup>133</sup> See 23 PA. STAT. AND CONS. STAT. § 5338 (West, Westlaw through 2022 Reg. Sess. Act 114). The jurisdiction of Pennsylvania did not have a substantial change in circumstances requirement, so the decision to modify was based entirely on the best interest of the child. *Karis v. Karis*, 544 A.2d 1328, 1332 (Pa. 1988); see also *Mercedes E.H. v. Dexter R.N.*, 154 N.Y.S.3d 48, 49 (N.Y. App. Div. 2021).

<sup>134</sup> See *Bixler v. Hunt*, No. 20A-DR-1495, 2021 WL 3197757, at \*5–7 (Ind. Ct. App. July 29, 2021) (ordering Mother and Child to return to Indiana to be near Father in part because Mother denied Father summer parenting time citing COVID-19, while Mother simultaneously engaged in behavior that did not show deep concern for COVID-19 affecting the child, including maskless birthday parties for children and allowing out-of-state guests to stay with her despite a state-mandated 14-day quarantine for travelers).

<sup>135</sup> See *Kapsokavithis v. Kapsokavithis*, No. 355579, 2021 WL 1941641, at \*4 (Mich. Ct. App. May 13, 2021).

<sup>136</sup> *Id.* at \*1.

<sup>137</sup> *Id.* at \*4.

<sup>138</sup> *Id.*

<sup>139</sup> See *Johnson v. Gyurisko*, No. COA21-86, 2022 WL 1314340, at \*1–2, \*5 (N.C. Ct. App. May 3, 2022).

a public school, which offered a hybrid learning format, to a private school, which offered a full in-person format, was a substantial change in circumstances.<sup>140</sup> Other courts considered the impact of remote learning on custodial exchanges and modified custody to permit for pick-ups and drop-offs at different times and places other than school.<sup>141</sup>

Parental acrimony was exacerbated by the COVID-19 pandemic and served as a basis for finding that a substantial change in circumstances existed sufficient to support a petition for change in custody.<sup>142</sup> In *B.S. v. A.S.*, the parents shared joint legal custody of their children.<sup>143</sup> When the pandemic began, they entered into a stipulation that they would each abide by New York State and New York City guidelines related to the pandemic.<sup>144</sup> Unfortunately, the parents' relationship deteriorated when they disagreed on the prudence of safety measures such as masking and social distancing.<sup>145</sup> Mother alleged, and presented text messages in support of her allegations, that Father used hostile and disparaging comments regarding their differences of opinion.<sup>146</sup> These texts all related to political views about the pandemic and the efficacy of pandemic safety protocols.<sup>147</sup> The *B.S.* court concluded that, if Father was unable or unwilling to conform his conduct to the parties' agreement and if his communications created a level of acrimony such that joint legal custody was not possible, there would be a change in circumstances sufficient to support a change in legal custody.<sup>148</sup> The *B.S.* court scheduled an evidentiary hearing on the issues of cooperation and acrimony.<sup>149</sup> The *B.S.* court limited this determination to the question on which the parties' disputed, namely whether the children should receive the COVID-19 vaccine, and not all legal medical decision-making as Mother had requested.<sup>150</sup>

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<sup>140</sup> *Id.* at \*1–2.

<sup>141</sup> See Mercedes E.H. v. Dexter R.N., 154 N.Y.S.3d 48, 49 (N.Y. App. Div. 2021).

<sup>142</sup> See *B.S. v. A.S.*, 160 N.Y.S.3d 802, 805–06 (N.Y. Sup. Ct. 2021).

<sup>143</sup> *Id.* at 804.

<sup>144</sup> *Id.*

<sup>145</sup> See *id.* at 806.

<sup>146</sup> *Id.* at 807–08.

<sup>147</sup> See *id.*

<sup>148</sup> *Id.* at 816.

<sup>149</sup> *Id.* at 816–17.

<sup>150</sup> *Id.* at 815.

In *Hussain A.R. v. Jennifer J.B.*, the Family Court of New York based its decision to modify the custodial award on Mother's antagonistic behavior toward Father and acrimony in their relationship.<sup>151</sup> In finding support for its decision, the court noted several instances in which Mother acted erratically and wrongly accused Father of misconduct.<sup>152</sup> Much of this behavior occurred before the pandemic began and continued or escalated during the pandemic.<sup>153</sup> However, the court acknowledged that Mother "most distressingly, repeatedly pressures the Child to 'bolt out' or leave [Father's] home without the Father's knowledge in the middle of the night and without protection of any facial covering in the midst of this Pandemic."<sup>154</sup>

The coupling of acrimony and the pandemic in these decisions highlights the impact of the pandemic on parental relationships and its tendency to inflame tensions between parents. In *Hussain A.R. v. Jennifer J.B.*, the parents were already involved in a contentious relationship;<sup>155</sup> however, in *B.S. v. A.S.*, the parents had been able to successfully navigate joint custody and had even entered into a stipulated agreement at the beginning of the pandemic.<sup>156</sup> In each case, the acrimony, whether introduced or exacerbated by the pandemic, demonstrated a substantial change in circumstances warranting possible modification of the custodial order.<sup>157</sup>

Finally, courts considered relocation of the child or custodial parent as a basis for modification of custodial awards.<sup>158</sup> While relocation, at least of a certain distance or with certain consequences, is traditionally considered a substantial change in circumstances, a family law court treated a move motivated by COVID-19 differently than one motivated by other reasons.<sup>159</sup> In *HK v. R.C.*, Mother petitioned the court to permit her to move with Child from New York City to Scarsdale.<sup>160</sup> Mother argued that

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<sup>151</sup> V-02341-18/18B, D, 2020 WL 3096584, at \*1 (N.Y. Fam. Ct. June 10, 2020).

<sup>152</sup> *See id.* at \*1, \*3.

<sup>153</sup> *See id.* at \*1.

<sup>154</sup> *Id.* at \*4.

<sup>155</sup> *See id.* at \*1, \*3.

<sup>156</sup> 160 N.Y.S.3d 802, 804 (N.Y. Sup. Ct. 2021).

<sup>157</sup> *Id.* at 814–16; *Hussain A.R.*, 2020 WL 3096584, at \*4–6.

<sup>158</sup> *See* *H.K. v. R.C.*, 151 N.Y.S.3d 836, 837–38 (N.Y. Sup. Ct. 2021).

<sup>159</sup> *See id.* at 839–41.

<sup>160</sup> *Id.* at 837–38.

[T]he COVID-19 pandemic "has devastated NYC" and that "thousands of families have already left the city, including more than 100 students from [the child's school] alone" . . . [and the] "exodus out of the city" would result in lasting damages to the public school system and otherwise "negatively impact [the child] and his future."<sup>161</sup>

The *HK* court rejected what it called the "COVID factor" as a basis for Mother's petition to modify custody.<sup>162</sup> Finding that Mother's "apocalyptic fears were transitory," the court reasoned that the reopening of New York City schools and businesses, along with the availability of mass vaccination and other safety measures, undermined COVID-19 as a basis for her petition to relocate.<sup>163</sup> While this discussion occurred in the context of the court's evaluation of the best interest of the child,<sup>164</sup> it is illustrative of how an uncertain and presumably temporary event may be treated by courts in the future in resolving whether there is a substantial change in circumstances sufficient to warrant a change in custody.

After rejecting the "COVID-19 factor," the *HK* court looked at the same request to relocate through the lens of what it labeled the "suburban factor," which it described as "the prospect of good public schools, backyard barbeques, bicycles in the driveway, and carpoos."<sup>165</sup> Under this "suburban factor," the court proceeded to review whether relocation was in the child's best interest.<sup>166</sup> What is particularly interesting from this treatment is how the *HK* court viewed the impact of COVID-19. For example, while the most restrictive aspects of the pandemic, like lockdowns, were certainly being lifted by the time the decision was rendered in July 2021, the pandemic was not over.<sup>167</sup> In fact, to date, the largest spike, in terms of cases, of the COVID-19 pandemic was in January and February of 2022.<sup>168</sup> Moreover, many of the consequences of the pandemic that motivated Mother to relocate, such as the impact on education, were not felt equally

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<sup>161</sup> *Id.* at 838.

<sup>162</sup> *Id.* at 840.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 839.

<sup>165</sup> *Id.* at 840.

<sup>166</sup> *Id.* at 840–41.

<sup>167</sup> See Megan Scudellari, *How the Pandemic Might Play Out in 2021 and Beyond*, NATURE (Aug. 5, 2020), <https://www.nature.com/articles/d41586-020-02278-5>.

<sup>168</sup> *United States of America Situation*, WHO, <https://covid19.who.int/region/amro/country/us> (last visited Dec. 23, 2022).

everywhere.<sup>169</sup> The ability to recuperate from those impacts is also likely to differ based on the locale and the availability of resources and support systems. Even the *H.K.* court recognized this possible inequity when stating that, during the pandemic, "people fortunate enough to have the ways and means to do so [are] fleeing the city in droves."<sup>170</sup>

*B. Proving Modification is in the Best Interest of the Child  
During the Pandemic*

After finding a substantial change in circumstances, a court must find that modification of custody or visitation is in the child's best interest before modifying the original court order.<sup>171</sup> In jurisdictions that don't require a showing of substantial change in circumstances, the decision to modify is based solely on the best interest of the child.<sup>172</sup> This section will address the application of the best interest of the child standard in child custody modifications and in determinations to alter or restrict visitation.

1. Health Risks Associated with COVID-19 and Enhancement of  
Those Risks Due to Parental Conduct

The increased health risks from the COVID-19 virus were the focus for most courts in assessing the best interest of the child during the pandemic.<sup>173</sup> One unique set of risks examined by the courts were those created by the parents' employment.<sup>174</sup> In *R.M. v. B.S.*, the court denied in-person visits on a temporary basis because Child had respiratory problems, and Father was employed as a firefighter.<sup>175</sup> The decision in *R.M. v. B.S.* was rendered in April 2020, early in the pandemic, and the court noted that it intended to monitor and adjust the visitation arrangement as the pandemic progressed.<sup>176</sup>

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<sup>169</sup> See *H.K.*, 151 N.Y. S3d at 838–39; see also U.S. DEPT OF EDUC., EDUCATION IN A PANDEMIC: THE DISPARATE IMPACTS OF COVID-19 ON AMERICA'S STUDENTS 13–14 (2021), <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf>.

<sup>170</sup> *H.K.*, 151 N.Y.S.3d at 840.

<sup>171</sup> See *Divorce and Separation*, *supra* note 21, at § 858.

<sup>172</sup> See, e.g., 23 PA. STAT. AND CONS. STAT. § 5338 (West, Westlaw through 2022 Reg. Sess. Act 114).

<sup>173</sup> See N.Y. L. Sch. *Fam. L. Q.* Editors, *supra* note 95, at 94.

<sup>174</sup> See, e.g., *R.M. v. B.S.*, 36789/2015, 2020 NYLJ LEXIS 827 (N.Y. Sup. Ct. Apr. 27, 2020).

<sup>175</sup> *Id.* at \*3, \*5, \*8.

<sup>176</sup> See *id.* at \*8.

Other courts also considered the chance of transmission from a parent employed in a "high-risk" job later in the pandemic but before access to vaccinations.<sup>177</sup> In August 2020, the trial court in *LA. v. K.F.* denied Father's request to change custody.<sup>178</sup> One of Father's primary arguments to support his petition was that Mother's job as a nurse anesthetist placed her, and consequently the children, at a greater risk for contracting the virus.<sup>179</sup> In response, Mother presented evidence that she was not working on a COVID-19 unit, used full personal protective equipment (PPE), and socially distanced at work.<sup>180</sup> She also presented evidence that she had altered her work schedule to protect herself and the children, taken time off during the spring surge of COVID cases, and worked part-time while the children were in school.<sup>181</sup> The *LA. v. K.F.* court determined that these protections were sufficient to protect the children and that it was in the children's best interest to remain in the primary custody of Mother.<sup>182</sup>

Other courts focused on parental behavior which created increased risk of infection or transmission of the virus outside of the context of the parent's occupation.<sup>183</sup> For many courts, this became a sufficient basis on which to modify child custody.<sup>184</sup> In *M.D. v. J.C.*, Father moved to suspend Mother's visitation with the children because she had moved into a two-bed single motel room with three children and four adults, arguing this arrangement increased the risk of exposure to the virus.<sup>185</sup> While Mother admitted that her cousin lived at the motel with her family and would watch the children while Mother was working, she denied residing at the motel.<sup>186</sup> The court found that the evidence was sufficient to establish that Mother lived at the motel.<sup>187</sup> It also found that her living arrangement meant that

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<sup>177</sup> See *LA. v. K.F.*, No. 1723 EDA 2020, 2021 WL 832578, at \*6 (Pa. Super. Ct. Mar. 4, 2021).

<sup>178</sup> *Id.* at \*1, \*6.

<sup>179</sup> *Id.* at \*2–3.

<sup>180</sup> *Id.* at \*5.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at \*12.

<sup>183</sup> See *M.D. v. J.C.*, No. CN18-01765, 2020 WL 5230426 (Del. Fam. Ct. June 24, 2020).

<sup>184</sup> See *id.* at \*5; see also Jeffrey Sunshine, *COVID-19 and Future Custody Determinations*, N.Y.L.J. (Mar. 27, 2020, 10:30 AM), <https://www.law.com/newyorklawjournal/2020/03/27/covid-19-and-future-custody-determinations/>.

<sup>185</sup> 2020 WL 5230426, at \*1–2.

<sup>186</sup> *Id.* at \*2–3.

<sup>187</sup> *Id.* at \*3.

the children were eating only McDonalds' foods with Mother.<sup>188</sup> In restricting Mother's visitation to a location where there was no close proximity to others, the court explained that "Mother willingly exposed her Children to a heightened risk of exposure to a very serious and deadly virus" by visiting with them at the motel and that this was not in their best interest.<sup>189</sup>

In *Samantha G.S. v. Jonathan G.B.*, Father moved the court to relocate with the child to a different state.<sup>190</sup> During the hearing on the motion, the court heard from the attorney for the child who relayed the child's concerns with visiting Mother "because of her purported failure to comply with COVID precautions."<sup>191</sup> The child was especially concerned because Mother lived in Florida, which was a COVID-19 "hot spot" at the time of the hearing.<sup>192</sup> The court considered all of the best interest factors and many facts in rendering its decision, but it gave weight to the child's wishes because he was mature and his opinion was based on "reasonable logic."<sup>193</sup> While the *Samantha G.S.* decision did not rest on Mother's failure to comply with COVID-19 protective measures or any actions she did to increase the risk to the child,<sup>194</sup> it demonstrates an example of where even the perception of how a parent approaches the risks associated with COVID-19 impacts the custodial award.

The failure of a parent to take CDC and state health department recommended actions was the basis for suspending in-person visitation with the child in *C.B. v. D.B.*<sup>195</sup> Father did not want to receive the COVID-19 vaccine.<sup>196</sup> After expressing skepticism over Father's reasons for his choice not to vaccinate, the *C.B.* court ruled that Father could resume in-person visitation only after receiving the first dose of the

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<sup>188</sup> *Id.* at \*5.

<sup>189</sup> *Id.*

<sup>190</sup> 247639, 2020 WL 7550601, at \*2 (N.Y. Fam. Ct. Nov. 20, 2020).

<sup>191</sup> *Id.* at \*4.

<sup>192</sup> *Id.* The child was also concerned about maintaining a close relationship with Father and extended family, Mother's failure to deal with COVID, and her violent history with his aunt. *Id.* at \*7.

<sup>193</sup> *Id.* at \*7.

<sup>194</sup> *Id.* at \*6-7.

<sup>195</sup> See 155 N.Y.S.3d 727, 729-30 (N.Y. Sup. Ct. 2021).

<sup>196</sup> *Id.* at 730.

COVID-19 vaccine or if he submitted to an ordered COVID-19 PCR and antigen testing regime before visits.<sup>197</sup>

Aside from changing or limiting custody, some courts imposed conditions on exercising custodial time with the child.<sup>198</sup> In *L.D. v. K.R.*, the court ordered Mother to travel from Saint Croix to New York to visit the child because of the travel restrictions imposed in the summer of 2020.<sup>199</sup> The *L.D.* court presumed that travel restrictions would be lifted by the summer of 2021 and ordered that the child would visit with his Mother in Saint Croix at that time.<sup>200</sup> In *Nawaporn Pawanun v. Petit*, the court ordered Mother to take COVID-19 tests after traveling internationally before exercising her custodial rights with the children.<sup>201</sup> This was ordered even though her travels were to a destination that was experiencing low COVID-19 rates because the court agreed with CDC recommendations for testing after international travel and because one child suffered from asthma, placing the child at greater risk should the child contract COVID-19.<sup>202</sup> The court in *In re J.N.* took a more conservative approach.<sup>203</sup> Mother had requested that the court require Father to test for COVID-19 prior to visiting with the children because he was not vaccinated and did not take precautions to avoid exposure to COVID-19.<sup>204</sup> The trial court ultimately ordered Father to "wear a mask during parenting time when in close contact with the children" and additionally allowed the Father to choose, rather than be required, to test for COVID-19 prior to the visit.<sup>205</sup>

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<sup>197</sup> *Id.* at 730–31.

<sup>198</sup> See *L.D. v. K.R.*, 129906, 2020 WL 3968331 (N.Y. Fam. Ct. June 29, 2020); *Pawanun v. Pettit*, No. 1:20CV1081, 2020 WL 5494243 (N.D. Ohio Sept. 11, 2020).

<sup>199</sup> 2020 WL 3968331, at \*18.

<sup>200</sup> *Id.*

<sup>201</sup> 2020 WL 5494243, at \*2. Mother had asked the federal district court to enforce an order by a Thai court. *Id.* at \*1. The federal district court denied that request on the grounds that it lacked authority to reach the merits of the underlying custody claim, but it entered a visitation order under 22 U.S.C. § 9004. *Id.*

<sup>202</sup> *Id.* at \*2.

<sup>203</sup> See No. 2-21-0562, 2022 WL 473330 (Ill. App. Ct. Feb. 16, 2022).

<sup>204</sup> *Id.* at \*1.

<sup>205</sup> *Id.* at \*3. In reviewing the trial court's decision, the appellate court reversed on different grounds, holding that Father had not received fair notice before the court modified the custodial order on the issue of compliance with COVID-19 protocols. *Id.* at \*5–6.

Other courts took a very different view of the risks associated with COVID-19, downplaying the risks associated with the virus.<sup>206</sup> In *Bixler v. Hunt*, Father moved to change custody primarily due to parental alienation.<sup>207</sup> Father alleged Mother had been denying him access to the children during the summer, which was his scheduled time.<sup>208</sup> Mother explained that she did not provide access to the children due to concerns about COVID-19 exposure.<sup>209</sup> The court, however, found that Mother's behavior belied these concerns as she engaged in conduct that risked exposure to COVID-19.<sup>210</sup> For example, the court noted that Mother "stayed at two hotels for days at a time while visiting with others and not wearing a mask, she hosted her nephew's birthday party with several kids with no masks, and her sister visited from out of state and stayed with her."<sup>211</sup> Notably, the court did not evaluate the relative COVID-19 risks presented by awarding physical custody to Father or Mother.<sup>212</sup> Instead, it only addressed whether Mother's professed concerns regarding COVID-19 were *genuine* or whether they were evidence of her animosity towards Father.<sup>213</sup> This suggests the court missed the opportunity to *really* consider the risks of COVID-19 under the custodial arrangement (e.g., the extent to which the parental behavior and living arrangement actually increased the risk of harm from COVID-19).

Another example of a court minimizing the health risks attendant with COVID-19 is *Gross v. Gross*.<sup>214</sup> In this case, the court was rendering an initial custodial order.<sup>215</sup> While *Gross* is not a modification decision, it applies the same best interest of the child standard.<sup>216</sup> The *Gross* court considered the impact of the COVID-19 pandemic under a "catch-all" factor in the Pennsylvania child custody statute.<sup>217</sup> Under this factor, the court considered evidence that Father failed to follow

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<sup>206</sup> See *Bixler v. Hunt*, No. 20A-DR-1495, 2021 WL 3197757 (Ind. Ct. App. July 29, 2021); *Gross v. Gross*, No. 722 EDA 2021, 2021 WL 6110239 (Pa. Super. Ct. Dec. 27, 2021).

<sup>207</sup> *Bixler*, 2021 WL 3197757, at \*2.

<sup>208</sup> *Id.* at \*3.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at \*7.

<sup>214</sup> No. 722 EDA 2021, 2021 WL 6110239, at \*6–7 (Pa. Super. Ct. Dec. 27, 2021).

<sup>215</sup> *Id.* at \*1.

<sup>216</sup> *Id.* at \*4–7.

<sup>217</sup> *Id.* at \*6–7.

COVID-19 safety precautions while having custody of the child.<sup>218</sup> Father tested positive for COVID-19 the day before he exercised custodial time with the child, which the court described as "poor judgment in exercising custodial time."<sup>219</sup> Despite this highly risky behavior, the *Gross* trial court did not find that this action disfavored awarding custody to Father.<sup>220</sup> In fact, it concluded that the factor was "neutral" as each parent was "capable" of following COVID-19 safety protocols and "understood" the dangers of failing to follow them.<sup>221</sup> This decision is especially noteworthy given that it was rendered in December 2021, when more was known about the transmission of COVID-19 and variants of the initial strain caused cases to rise.<sup>222</sup> Similarly, in *Kapsokavithis v. Kapsokavithis*, the court determined that the "occasional" noncompliance with COVID-19 safety protocols did not "have a significant effect on the well-being of the children."<sup>223</sup>

The varied treatment of the inherent risks associated with exposure to COVID-19<sup>224</sup> demonstrates the lack of uniformity in child custody modification decisions. While child custody decisions are individualized and uniformity would not be expected in the same way as in other areas of the law,<sup>225</sup> this does not account for the type of variety observed in these cases.

## 2. Changes in Education due to COVID-19

The pandemic brought about seismic changes in education across the nation, with most school districts closing in-person education in the spring of 2020.<sup>226</sup> As the pandemic continued, a variety of

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<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at \*7.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at \*6–7.

<sup>222</sup> *Id.*; see also *Variants of the Virus*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/variants/index.html> (last updated Aug. 11, 2021).

<sup>223</sup> No. 355579, 2021 WL 1941641, at \*4 (Mich. Ct. App. May 13, 2021), *cert. denied*, 963 N.W.2d 363 (Mich. 2021).

<sup>224</sup> *Compare* C.B. v. D.B., 155 N.Y.S.3d 727 (N.Y. Sup. Ct. 2021), and *Bixler v. Hunt*, No. 20A-DR-1495, 2021 WL 3197757 (Ind. Ct. App. July 29, 2021), with *L.D. v. K.R.*, 129906, 2020 WL 3968331 (N.Y. Fam. Ct. June 29, 2020), and *Gross*, 2021 WL 6110239.

<sup>225</sup> See Rebecca Aviel, *A New Formalism for Family Law*, 55 WM. & MARY L. REV. 2003, 2013–14 (2014).

<sup>226</sup> Hoffman & Miller, *supra* note 3 (discussing the changes to education during the COVID-19 pandemic and the impact on children's wellbeing).

educational models were employed, including online, hybrid, and in-person.<sup>227</sup> Even within these models, there were often additional COVID-19 precautions in place that altered the traditional approach to education, such as social distancing, masking, and quarantining individuals exposed to the virus during school.<sup>228</sup>

A review of the case law shows some inconsistencies in how trial courts approached the merits of different educational models and the evidence necessary for changes in custodial orders.<sup>229</sup> In *Johnson v. Gyurisko*, Mother petitioned the court to modify legal custody so that she could have sole custody over Child.<sup>230</sup> The parents were conflicted over where to enroll the child in school.<sup>231</sup> Because of the pandemic, the child's school was moving to a hybrid schedule, which included partial in-person and partial remote instruction.<sup>232</sup> Mother wished to enroll the child in a private school that permitted full in-person instruction, the model the child enjoyed prior to the pandemic.<sup>233</sup> Father opposed this decision because of his concerns that the private school was not properly following CDC recommendations related to COVID-19.<sup>234</sup> The trial court granted Mother's petition and modified custody, granting her final decision-making authority over the child.<sup>235</sup> On the appeal, the Court of Appeals for North Carolina reversed this determination on the grounds that the trial court's findings did not support a conclusion that there was a "substantial

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<sup>227</sup> *Overview: Hybrid Learning Models*, NEA (Mar. 25, 2021), <https://www.nea.org/professional-excellence/student-engagement/tools-tips/overview-hybrid-learning-models>.

<sup>228</sup> See *CDC Updates Operational Strategy for K-12 Schools to Reflect New Evidence on Physical Distance in Classrooms*, CDC (Mar. 19, 2021, 12:00 PM), <https://www.cdc.gov/media/releases/2021/p0319-new-evidence-classroom-physical-distance.html>; see also *Operational Guidance for K-12 Schools and Early Care and Education Programs to Support Safe In-Person Learning*, CDC, [https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-childcare-guidance.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcommunity%2Fschoools-childcare%2Fk-12-guidance.html](https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-childcare-guidance.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcommunity%2Fschoools-childcare%2Fk-12-guidance.html) (last updated Oct. 5, 2022).

<sup>229</sup> See *Johnson v. Gyurisko*, No. COA21-86, 2022 WL 1314340, at \*1 (N.C. Ct. App. May 3, 2022); *Rivas v. Arreguin*, No. 82508-COA, 2022 WL 214016, at \*2 (Nev. Ct. App. Jan. 24, 2022); *Soddy v. Soddy*, No. 355212, 2021 WL 1706689, at \*1 (Mich. Ct. App. Apr. 29, 2021); *I.A. v. K.F.*, No. 1723 EDA 2020, 2021 WL 832578, at \*1 (Pa. Super. Ct. Mar. 4, 2021).

<sup>230</sup> *Johnson*, 2022 WL 1314340, at \*1.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at \*3.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at \*1.

<sup>235</sup> *Id.* at \*2.

change in circumstances" to support a change in legal custody.<sup>236</sup> As is apparent from the *Johnson v. Gyurisko* decision, the trial court appeared to give weight to Mother's desire to resume an educational model most similar to that which the child experienced pre-pandemic.<sup>237</sup>

In *Rivas v. Arreguin*, Father moved to modify to joint physical custody on the grounds "that the children's attendance at school and academic performance had declined during the COVID-19 pandemic."<sup>238</sup> The trial court denied Father's petition in favor of preserving the status quo, which the court viewed as being in the children's best interest.<sup>239</sup> This decision was also reversed for more specific findings related to the children's education.<sup>240</sup>

Other courts conducted a more individualized assessment of the child's educational needs in determining whether changes brought by the pandemic should result in a change in custody. In *Soddy v. Soddy*, the parents shared joint physical and legal custody of their children.<sup>241</sup> Mother, however, petitioned for primary physical custody and a reduction of Father's parenting time due to the children's move to online learning.<sup>242</sup> The trial court granted Mother's petition because she was able to work from home and make her own schedule, permitting her to assist with the children's online learning while Father lacked this flexibility.<sup>243</sup> In *LA. v. K.F.*, Father petitioned to modify a custodial arrangement where Mother had been awarded primary physical custody of the children, seeking primary physical custody of the children himself.<sup>244</sup> In denying Father's motion, the trial court considered, among other factors, the educational support provided by the parents.<sup>245</sup> The court noted that, prior to the COVID-19 pandemic, Mother had provided substantial support for one of the

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<sup>236</sup> *Id.* at \*1.

<sup>237</sup> *See id.* at \*1-2.

<sup>238</sup> No. 82508-COA, 2022 WL 214016, at \*2 (Nev. Ct. App. Jan. 24, 2022).

<sup>239</sup> *Id.* at \*1.

<sup>240</sup> *Id.* at \*2. On remand, the court was to make determinations on whether the change in education constituted a "substantial change in circumstances" and, if it did, whether a custodial modification was in the children's best interest. *Id.*

<sup>241</sup> No. 355212, 2021 WL 1706689, at \*1 (Mich. Ct. App. Apr. 29, 2021).

<sup>242</sup> *See id.* at \*1, \*5 (giving weight to plaintiff's ability to work from home and make her own schedule to be present during the children's remote learning).

<sup>243</sup> *Id.* at \*5.

<sup>244</sup> No. 1723 EDA 2020, 2021 WL 832578, at \*1 (Pa. Super. Ct. Mar. 4, 2021).

<sup>245</sup> *See id.* at \*5.

children that had special educational needs.<sup>246</sup> Father, however, had not supported the children in completing their homework while visiting him and had "been either slow to respond or non-responsive with the paraprofessionals providing [the child] with [special needs] support."<sup>247</sup> After the pandemic began, Mother assisted the children with online learning and met online with paraprofessionals, and the children were doing well in all academic areas.<sup>248</sup> For these reasons, among others, the court denied Father's petition to modify custody.<sup>249</sup>

### 3. Other Considerations in the Best Interest of the Child Analysis

In addition to the focus on health risks and educational changes, courts addressed other impacts from COVID-19 on children and families. This section covers a few of these considerations and examines trends among custodial decisions.

First, there was a common theme of modifying custodial or visitation arrangements because of the practical impossibilities associated with the original order given the limitations presented by the COVID-19 pandemic.<sup>250</sup> In *Mercedes E.H. v. Dexter R.N.*, the court explained that it was "nonsensical for an order directing respondent to pick up the child from 'school'" when the child was learning remotely.<sup>251</sup> As such, the court modified the order to conform to the realities where the custodial parent was now working from home and assisting the child with remote learning.<sup>252</sup> Additionally, courts recognized the impact of stay-at-home orders and other regulations that made visitations impossible.<sup>253</sup> In *S.C.S. v. K.N.M.*, the trial court altered the visit from an out-of-state parent over Child's birthday to a virtual visit because of travel and quarantine restrictions.<sup>254</sup> In *Robert H. v. Thurma S.*, the court had originally ordered visits with Grandmother

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<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at \*13.

<sup>248</sup> *Id.* at \*5.

<sup>249</sup> *Id.* at \*1, \*13.

<sup>250</sup> See *Mercedes E.H. v. Dexter R.N.*, 154 N.Y.S.3d 48, 49 (N.Y. App. Div. 2021); *S.C.S. v. K.N.M.*, V-18421/18, 2020 WL 4011919, at \*19 (N.Y. Fam. Ct. July 2, 2020); *Robert H. v. Thurma S.*, No. 157212, 2020 WL 7550643, at \*2 (N.Y. Fam. Ct. July 17, 2020).

<sup>251</sup> 154 N.Y.S.3d at 49.

<sup>252</sup> *Id.*

<sup>253</sup> See, e.g., *S.C.S.*, 2020 WL 4011919, at \*19.

<sup>254</sup> *Id.*

and Mother in a "community space."<sup>255</sup> This was to alleviate concerns raised by the children about being in Grandmother's home and being around some of the individuals with whom she associated.<sup>256</sup> The court explained that these visits were "de facto suspended" because there were "no community spaces open where they could safely spend time."<sup>257</sup>

Finally, there was a trend by some courts and family law scholars to promote a "status quo" approach, rejecting changes to custodial orders even in the face of the changes to everyday life brought about by COVID-19.<sup>258</sup> In *Rivas v. Arreguin*, the trial court took this approach on the basis that avoiding change was in the children's best interest.<sup>259</sup> Professor Soled also advocates for this approach, arguing that courts might be driven to make modifications because they are being "caught in the frenzy" of COVID-19 and recommends that "courts should uniformly refuse to alter custody solely because of fears regarding the virus."<sup>260</sup> Moreover, Professor Soled advocates that courts should "not readily chang[e] existing [custodial] arrangements . . . [to bring] a much-needed stability to families that are enduring the strain of divorce and the pandemic."<sup>261</sup>

### *C. Interference with Custodial Rights and Findings of Contempt During the Pandemic*

When the pandemic began, many parents exercised "self-help," modifying or limiting parental access to a child without moving for modification of a custodial order or getting consent to modify the parenting plan.<sup>262</sup> When this happened, the other parent moved to

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<sup>255</sup> 2020 WL 7550643, at \*1.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at \*2.

<sup>258</sup> *See, e.g., Rivas v. Arreguin*, No. 82508-COA, 2022 WL 214016, at \*2 (Nev. Ct. App. Jan. 24, 2022).

<sup>259</sup> *Id.* at \*1.

<sup>260</sup> Amy H. Soled, *Family Law Reform: A Needed Cure for the Effects of a Pandemic*, 72 RUTGERS U. L. REV. 1435, 1455 (2021).

<sup>261</sup> *Id.*

<sup>262</sup> *See In re Marriage of Johnson*, No. 21-0364, 2021 Iowa App. LEXIS 977, at \*10 & n.3 (Iowa Ct. App. Nov. 23, 2021) (explaining that the court could prevent self-help, and giving an example of self-help, as the parent not providing any access to the child, including virtually, by the other parent when that parent was being quarantined at home by his employer as a precaution).

enforce the prior order or plan and often moved to have the other parent held in contempt of court.<sup>263</sup> This section of the article examines the approaches taken by courts in reviewing challenges of visitation interference and requests to hold a parent in contempt of court.

Several courts chastised parents for resorting to "self-help," even early in the pandemic.<sup>264</sup> In *Lindsey v. Lindsey*, the court found Mother in contempt of court for unilaterally withholding visiting with the children in contravention of the custodial order.<sup>265</sup> Prior to March 2020, the start of the pandemic and the beginning of state stay-at-home orders, the parties had adhered to the custodial order.<sup>266</sup> Once the pandemic began, Mother argued that the children should not have been visiting with Father because of her good-faith concerns of risk to the children from transmission of the COVID-19 virus.<sup>267</sup> In reaching its conclusion to hold Mother in contempt of court, the *Lindsey* court considered that Mother lived with her parents and adult brother and that she babysat her young nephew in the house as well.<sup>268</sup> As such, the court held Mother's violation of the visitation order was inexcusable and informed Mother that she should have moved the court for modification of the visitation order.<sup>269</sup> In *S.V. v. A.J.*, Father moved the court to enforce the visitation order and to provide him with visitation make-up time with the children after Mother unilaterally ceased his in-person visits with the children in March 2020 and only permitted virtual visitation.<sup>270</sup> The *S.V.* court explained that a parent must "affirmatively move the court for emergency relief in order [to] suspend any visitation order and may not resort to self-help by failing to produce children for visits."<sup>271</sup> While the *S.V.* court did not hold Mother in contempt of court, it did state that "if mother does not comply with the visitation order, the Court may be forced to consider whether the mother should be

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<sup>263</sup> See *Lindsey v. Lindsey*, 174 N.E.3d 458, 462 (Ohio Ct. App. 2021), *appeal denied*, 176 N.E.3d 763 (Ohio 2021).

<sup>264</sup> See *id.* at 461; *S.V. v. A.J.*, 126 N.Y.S.3d 631, 632 (N.Y. Fam. Ct. 2020).

<sup>265</sup> 174 N.E.3d at 461.

<sup>266</sup> *Id.* at 462.

<sup>267</sup> *Id.* at 465.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 464–65, *aff'g Lindsey v. Lindsey*, No. 16DC000693, 2020 WL 13199529 (Ohio C.P. Nov. 25, 2020).

<sup>270</sup> 126 N.Y.S.3d 631, 632 (N.Y. Fam. Ct. 2020).

<sup>271</sup> *Id.* at 634.

the primary custodian, even during the pendency of [proceedings on custody]."<sup>272</sup>

In a particularly unusual decision, *In re Marriage of Craft*, the Court of Appeals of Ohio reversed the trial court's decision not to hold Mother in contempt of court for her interference with Father's ordered parenting time.<sup>273</sup> Contempt of court is a decision left to the discretion of the trial court, and the appellate court must find an abuse of discretion to reverse the trial court's determination.<sup>274</sup> In *Craft*, Mother had interfered with Father's visitation on multiple occasions, even before the pandemic.<sup>275</sup> Mother explained that visitation was denied because the "children were quarantined several times."<sup>276</sup> The guardian ad litem, however, testified that the children were only under quarantine orders twice.<sup>277</sup> For these reasons, the appellate court held that the trial court abused its discretion in not finding Mother in contempt of court and remanded for further proceedings.<sup>278</sup>

In *Chu v. Lin*, a case with a similarly contentious background as in *Craft*, Father moved to compel Mother to comply with the visitation order and to hold Mother in contempt of court.<sup>279</sup> In ordering compliance with the visitation order, the court required supervision when the transfer of the children occurred to facilitate that process and "help allay any concerns that either child might have . . . especially any COVID-19-related fears that defendant may have stoked."<sup>280</sup> This case is also illustrative of the skepticism some courts had about the concerns raised by parents who used COVID-19 as a basis for "self-help."

Some courts held parents in contempt for "self-help" even when there was an emergent situation related to the virus.<sup>281</sup> For example, in *Burrow v. Sieler*, Mother denied Father access to his scheduled visit with the child for Thanksgiving because of fears that he might

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<sup>272</sup> *Id.* at 635.

<sup>273</sup> 185 N.E.3d 151, 176 (Ohio Ct. App. 2022).

<sup>274</sup> *Id.* at 175.

<sup>275</sup> *Id.* at 176.

<sup>276</sup> *Id.* at 175.

<sup>277</sup> *Id.* at 175–76.

<sup>278</sup> *Id.* at 176.

<sup>279</sup> 2020 NYLJ LEXIS 949, at \*1, \*5–6 (N.Y. Sup. Ct. May 29, 2020).

<sup>280</sup> *Id.* at \*7.

<sup>281</sup> See, e.g., *Burrow v. Sieler*, 497 P.3d 921, 924 (Wyo. 2021).

have COVID-19.<sup>282</sup> The parties disputed many of the facts, but it was undisputed that Father told Mother that the week before Thanksgiving he felt tired and had a cough, but that he felt better by Friday.<sup>283</sup> It was Father's contention that he had a cold, his "personal belief about COVID-19 was not the same as Mother's[,] and he refused to be tested."<sup>284</sup> Because Father refused to get a COVID-19 test, Mother prevented the visit.<sup>285</sup> The trial court held Mother in contempt of court.<sup>286</sup> Upholding the trial court's decision, the appellate court explained that "[w]e have repeatedly disapproved parents taking unilateral action to deny visitation, even when they are concerned about their child's health and safety."<sup>287</sup>

By contrast, other courts were more forgiving to parents who used "self-help" early on in the pandemic.<sup>288</sup> In *Alexander v. Alexander*, Mother denied Father in-person access to Child in violation of the custodial order from March 2020 until May 2020.<sup>289</sup> Mother did permit virtual visitation with Father during this time.<sup>290</sup> Further, when the governor lifted the shelter in place order in May 2020, Mother informed Father that he could have 18 straight days of visitation with Child to make up for the 18 days of access he had missed during the shelter in place period.<sup>291</sup> Father denied this offer and moved the court to require Mother to comply with the original custody order and provide him with additional visitation make-up time.<sup>292</sup> In support of his motion, Father argued that Mother had attended Mardi Gras in New Orleans at the start of the pandemic, suggesting her concerns about the virus were not sincere.<sup>293</sup> The trial court denied Father additional visitation make-up time.<sup>294</sup> The trial

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<sup>282</sup> *Id.* The parents also disputed Father's rights to visitation in the summer, but for purposes of understanding the COVID-19 challenge, this article will focus only on the challenge related to the visit scheduled to take place over Thanksgiving. *Id.*

<sup>283</sup> *Id.* at 926–27.

<sup>284</sup> *Id.* at 927.

<sup>285</sup> *Id.* at 924.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 927.

<sup>288</sup> See, e.g., *Alexander v. Alexander*, 256 A.3d 348, 355 (Md. Ct. Spec. App. 2021).

<sup>289</sup> *Id.* at 353.

<sup>290</sup> *Id.* at 354.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 356.

court noted the "level of distrust and discord" between the parents.<sup>295</sup> The appellate court stated that "at the hearing, it was undisputed that Mother intentionally withheld visitation from Father for about two months."<sup>296</sup> However, the trial court found that while "Mother should have filed a motion and requested a modification of the final order[.] . . . Mother's actions were perhaps understandable because at the time she withheld visitation, the dangers posed by the pandemic were truly frightening and at that point, no one knew the dangers posed by the COVID-19 crisis."<sup>297</sup>

In *K.B. v. J.D.R.*, Maternal Grandmother had been granted third-party visitation with Child.<sup>298</sup> Father had not permitted visitation from March 2020 until July 2020 when Maternal Grandmother filed a petition to show cause.<sup>299</sup> In deciding not to hold Father in contempt of court, the *K.B.* court explained that "Father acted as a responsible parent in restricting the Child's contact with others outside of his household."<sup>300</sup> The court continued, however, to modify the visitation order to permit virtual visits with Maternal Grandmother and in-person visits on additional visits carrying forward.<sup>301</sup> In *Nelson UU. v. Carmen VV.*, the family court reached a similar determination.<sup>302</sup> Mother had withheld visitation from Father between March 2020 and May 2020.<sup>303</sup> In deciding not to hold Mother in contempt of court, the family court reasoned, and the appellate court affirmed, that Mother's:

actions were not in willful disregard of the visitation orders but premised on protecting the health of her children. Not to be overlooked is that these events took place at the inception of the pandemic when great uncertainty affected us all. Moreover, access to the court was restricted to essential matters during this period, making it difficult to fault the mother for not attempting to seek judicial intervention.<sup>304</sup>

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<sup>295</sup> *Id.* at 357.

<sup>296</sup> *Id.* at 355.

<sup>297</sup> *Id.*

<sup>298</sup> No. CN20-03062, 2020 WL 5228130, at \*1 (Del. Fam. Ct. July 31, 2020).

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at \*2.

<sup>301</sup> *Id.*

<sup>302</sup> 164 N.Y.S.3d 285, 288 (N.Y. App. Div. 2022).

<sup>303</sup> *Id.* at 286.

<sup>304</sup> *Id.* at 288.

Other courts came to similar results but focused on concerns about the pandemic in their state or region.<sup>305</sup> In *VanVlerah v. VanVlerah*, the trial court denied Father's motion for contempt following Mother's withholding of visitation with the children in the summer of 2020 when the visitation center had reopened.<sup>306</sup> In explaining its decision, the *VanVlerah* court reasoned that "fear [regarding the COVID-19 pandemic had] gripped a large portion of the Nation," and Mother's "concerns [were] realistic and *fueled by the media and guidelines in the State of Michigan*."<sup>307</sup> In *S.A. v. R.H.*, the court was especially forgiving of the parent's noncompliance with the court order.<sup>308</sup> Father had obtained permission to travel to California with the child for a temporary visit with extended family at the end of March 2020.<sup>309</sup> Despite the temporary nature of this order, Father packed all of the child's belongings for the trip.<sup>310</sup> Father moved to extend the relocation of custody in California.<sup>311</sup> Ultimately, the trial court granted Father's motion in June 2020 when it presumed that the risk would be sufficiently reduced in New Jersey to permit Father and Child to return at the expiration of the extension.<sup>312</sup> This decision is surprising because the court was aware of Father's misconduct, noting that it was "hesitant to reward [Father] for his apparent deception and less than forthright behavior."<sup>313</sup> Ultimately, however, the court believed that the risks posed by COVID-19 in New York and New Jersey, "hotspots" at the time, outweighed its concerns regarding Father's behavior.<sup>314</sup> Finally, the court noted that Mother's visitation would not be impacted dramatically because the custodial order required supervision for in-person visits, and that was not possible at that point in the pandemic.<sup>315</sup> Therefore, virtual visitation was the only option for visitation between Mother and Child.<sup>316</sup>

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<sup>305</sup> See, e.g., *VanVlerah v. VanVlerah*, 859 S.E.2d 546, 552 (Ga. Ct. App. 2021); *S.A. v. R.H.*, 306655/2011, 2020 WL 3089242, at \*1 (N.Y. Sup. Ct. June 5, 2020).

<sup>306</sup> 859 S.E.2d at 551–52.

<sup>307</sup> *Id.* at 552 (emphasis added).

<sup>308</sup> See *S.A.*, 2020 WL 3089242 at \*2.

<sup>309</sup> *Id.* at \*1.

<sup>310</sup> *Id.* at \*2.

<sup>311</sup> *Id.* at \*1.

<sup>312</sup> *Id.* at \*2.

<sup>313</sup> *Id.*

<sup>314</sup> See *id.*

<sup>315</sup> See *id.*

<sup>316</sup> *Id.*

#### IV. LESSONS LEARNED AND PROPOSALS FOR THE FUTURE

This part of the article will review what may be learned from custodial modification decisions made during the pandemic. It will examine possible inconsistencies in the application of family law and tensions between the application of family law and family law policy. Moreover, this part will consider whether the process for judicial review of child custody modification disputes exacerbated some of the challenges with the pandemic. Finally, this part will review possible approaches jurisdictions should consider taking to prepare for similar large-scale destabilizing events in the future, such as pandemics, natural disasters, or other major disasters.

##### *A. The Need for Family Stability and the Impact of Large-Scale Destabilizing Events*

Family law favors stability once a child custody decision has been made (either by party consent or through court order).<sup>317</sup> This is driven by the need to assist children who have been dealing with the uncertainty and destabilization often brought about by divorce or a challenge to the custodial arrangement.<sup>318</sup> Limiting the ability for court modification of custody removes continued uncertainty by reducing the likelihood the child's living situation will change and gives the child confidence that even a difficult adjustment will remain settled.<sup>319</sup>

This policy of promoting "stability" by limiting modifications was reflected in the decisions rendered during the pandemic in which the court did not find a substantial change sufficient to permit modification of the custodial order. Whether the court refused to find change when the parent articulated only "generalized fear" over the COVID-19 virus<sup>320</sup> or could not establish any "unique" impacts to the child from the COVID-19 virus,<sup>321</sup> there were several courts that refused to acknowledge that a global pandemic was a substantial

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<sup>317</sup> See *supra* Part II (discussing the policy behind child custody modification determinations).

<sup>318</sup> *Id.*

<sup>319</sup> See Soled, *supra* note 260, at 1455.

<sup>320</sup> *E.g.*, *S.V. v. A.J.*, 126 N.Y.S.3d 631, 634 (N.Y. Fam. Ct. 2020).

<sup>321</sup> *E.g.*, *Rivas v. Arreguin*, No. 82508-COA, 2022 WL 214016, at \*2 (Nev. Ct. App. Jan. 24, 2022).

change in circumstances sufficient on its own to support modification.<sup>322</sup>

However, this trend was not uniform. On the other end of the spectrum, some courts found a substantial change in circumstances whether it arose from the risks associated with COVID-19, changes in how to avoid those risks, or impacts from COVID-19 on everyday life in the community.<sup>323</sup> These varied rulings on very similar risks and disruptions posed by the COVID-19 virus reveal the uncertainty parents and practitioners found themselves in (and will likely find themselves in should there be a spike in COVID-19 or other variants) while navigating how to handle the exercise of designated custodial time.

Some courts and advocates have argued that there is a benefit to keeping as much stability as possible during events like the COVID-19 pandemic.<sup>324</sup> There is some appeal to this argument, as it recognizes the need for continuity for children. However, when there is a large-scale disruption to a community (and, even more so, to the state, the nation, or the world), there *will* be changes to a child's life and family. For example, most families found themselves dealing with stay-at-home orders, online education, and even remote working for at least part of the pandemic.<sup>325</sup> The fact that these events were not unique to any particular family does not diminish the magnitude of change that the COVID-19 pandemic wrought on families. While a particular family may have experienced little disruption, that does not support maintaining an approach that will result in the denial of many needed modifications. Rather, an approach should be pursued that reverses the traditionally accepted presumptions in modification disputes: that modifications are rarely needed because significant changes do not typically occur, and opening the dispute up again will create instability and vexatious litigation.

Additionally, the current approach to custodial modification did not give sufficient weight to community-based instability. Community-based instability, however, is significant and should be considered in determining whether there has been a substantial change in circumstances to support a modification in child custody. In the past, courts

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<sup>322</sup> See *supra* Part III.

<sup>323</sup> See *supra* Part II.

<sup>324</sup> See Soled, *supra* note 260, at 1448–49; Aimee Key & Lindsey Obenhaus, *COVID-19 and Family Law: What Every Attorney Needs to Know*, 83 TEX. B.J. 310, 311 (2020).

<sup>325</sup> See Hoffman & Miller, *supra* note 3, at 301, 303.

have considered destabilizing events like natural disasters to be a substantial or material change in circumstances.<sup>326</sup> However, unlike a natural disaster, such as storm destruction, which may displace only a segment of a community, the impact of the pandemic was much more widespread.

Community-based instability, whether it be through a natural disaster, non-natural disaster, or public health crisis, like the pandemic, has a real impact on children.<sup>327</sup> For example, the resources families once counted on may no longer be available or are available in significantly modified versions.<sup>328</sup> The support systems may be dysfunctional or overburdened by the new community need. A child's routines will be changed when educational institutions are closed or when the educational modality is significantly changed.<sup>329</sup> While some families and children may have coped better than others, this does not mean that they did not face substantial changes. In these families, the child's needs may be best met without altering their custodial plan. However, when the law prioritizes the "status quo" with the desire of achieving continuity in the face of overwhelming community instability and family-life disruptions, it risks that the very reason for custody modifications will be thwarted, namely that custodial awards should adjust to best meet the child's best interests when the dynamics have significantly changed.

Additionally, while many courts and advocates recognized the substantial mental strain induced by the pandemic, advocates for the "status quo" and courts that employed a high standard for proving a substantial change in circumstances tended to minimize the emotional toll the pandemic placed on parents and, consequently, the impact on children.<sup>330</sup> For example, courts referred to the "generalized fears"<sup>331</sup>

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<sup>326</sup> See generally McCarthy-Brown & Waysdorf, *supra* note 33, at 751–52 (discussing child custody modifications in the wake of Hurricane Katrina).

<sup>327</sup> McBratney, *supra* note 125, at 236–37 (discussing the health risks from COVID-19 to children); see Hoffman & Miller, *supra* note 3 (discussing the changes to education brought about by COVID-19 and the impacts on children); see also Kaushal Shah et al., *Impact of COVID-19 on the Mental Health of Children and Adolescents*, 12(8) CUREUS e10051 (2020).

<sup>328</sup> Hoffman & Miller, *supra* note 3, at 303–05 (discussing the changes to education brought about by COVID-19 and the impacts on children).

<sup>329</sup> *Id.*

<sup>330</sup> See *S.V. v. A.J.*, 126 N.Y.S.3d 631, 634 (N.Y. Fam. Ct. 2020); *H.K. v. R.C.*, 151 N.Y.S.3d 836, 840 (N.Y. Sup. Ct. 2021).

<sup>331</sup> *S.V.*, 126 N.Y.S.3d at 634.

or "apocalyptic fears"<sup>332</sup> of parents seeking modification of custody when rejecting their petition for modification.<sup>333</sup> Advocates, while recognizing the legitimacy of some petitions, referred to others as having "a genesis in pre-textual opportunism,"<sup>334</sup> arising out of a "frenzy,"<sup>335</sup> or demonstrating an "exploiting of the pandemic to obtain an advantage in long-term and ongoing custody."<sup>336</sup>

Parental stress related to COVID-19, however, did play a significant role in the health and welfare of children.<sup>337</sup> A study published in *Child Abuse & Neglect: The International Journal* on parental perceived stress from the COVID-19 pandemic and the impact on child abuse concluded that:

Greater COVID-19 related stressors and high anxiety and depressive symptoms are associated with higher parental perceived stress. Receipt of financial assistance and high anxiety and depressive symptoms are associated with higher child abuse potential. Conversely, greater parental support and perceived control during the pandemic are associated with lower perceived stress and child abuse potential.<sup>338</sup>

What is notable from this study is that even the parent's "perception of control" in the pandemic was associated with lower stress, less potential for negative impact to the child, and increased use of available resources.<sup>339</sup> For these reasons, family law should not be rigidly applied to reject emotionally charged parental perceptions during highly destabilizing events like a pandemic. While there are parents who will exploit the vulnerabilities of a more flexible approach to child custody modifications, there are other ways to ensure that

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<sup>332</sup> *HK*, 151 N.Y.S.3d at 840.

<sup>333</sup> *See id.*; *see also S.V.*, 126 N.Y.S.3d at 634.

<sup>334</sup> Tanimoto, *supra* note 125, at 2.

<sup>335</sup> Soled, *supra* note 260, at 1454.

<sup>336</sup> McBratney, *supra* note 125, at 233.

<sup>337</sup> *See* Samantha M. Brown et al., *Stress and Parenting During the Global COVID-19 Pandemic*, 110 CHILD ABUSE & NEGLECT, at 1 (2020).

<sup>338</sup> *Id.*

<sup>339</sup> *Id.* at 11 ("Specifically, parents' present perceived control over the COVID-19 situation decreased their perceptions of stress and risk of child abuse potential. A large body of research examining perceived control shows that parents with higher perceived control over life events are more likely to be able to use available resources to manage stressors. Despite limited existing research of perceived control during the COVID-19 pandemic, research shows that with regard to health-related outcomes, in general, levels of perceived control predict changes in health over time (internal citations omitted).").

children's best interests are served without taking a rigid approach to finding a substantial change in circumstances.<sup>340</sup>

Finally, the "substantial change in circumstances" requirement was created to prevent a specific type of destabilization in family units.<sup>341</sup> The concern was that parents would continue to relitigate issues or would use minor disputes to carry on their challenges to the custodial order.<sup>342</sup> This would result in uncertainty for the child and be detrimental to the child's wellbeing. Notably, in traditional cases, the challenge to stability arises from conflict within the family and is inherent in divorce.<sup>343</sup> The same concerns are not present when the instability arises from a large-scale event like a pandemic because the event is not of the parents' making or control. There is not the same need to disincentivize litigation by parents who are motivated to find new ways to relitigate continuing disputes. Therefore, providing some flexibility to the "substantial change in circumstances" requirement will not disrupt the policy behind child custody modification family law.

*B. Presumptions and Burdens of Proof: Alternative Approaches to  
Establishing a Change of Circumstances in Child Modification  
Petitions*

One way to achieve more continuity in child custody modification decisions and to ensure courts are able to properly review orders when there has been meaningful change is to adjust the standard used in reviewing these petitions. Judges should interpret the "substantial change in circumstances" provision generously to include impacts from large-scale destabilizing events, even if those impacts don't *uniquely* impact the particular family. While this article does not advocate for a total removal of this requirement, it does advocate that family court judges should err on the side of finding a change after such types of events. Approaches which require an extremely individualized assessment of "substantial change in circumstances" or would disregard changes experienced by the family that are also being experienced on a larger community-scale should be rejected.

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<sup>340</sup> See *infra* Part IV.B (discussing ways to limit abuse of a more flexible approach to child custody modification disputes).

<sup>341</sup> *Divorce and Separation*, *supra* note 21, at §§ 849–50; see *supra* Part II.B (discussing the policy behind child custody modification law).

<sup>342</sup> *Divorce and Separation*, *supra* note 21, at § 850.

<sup>343</sup> Soled, *supra* note 260, at 1437.

States should also consider modifying their family law statutes to include a presumption of a substantial change in circumstances when there is a large-scale event that causes community disruption, like a natural or other disaster, public health crisis, or other similar event. Some jurisdictions have legislatively carved out provisions for temporary modifications in custody for events such as the military deployment of a custodial parent, exempting these from the substantial change in circumstances requirement.<sup>344</sup> While these exemptions are not presumptions, the proposal set out in this article would operate in a comparable manner.

In creating a presumption for large-scale destabilizing events, each jurisdiction should consider *how* to define what would qualify as a triggering event. For example, in some states, the most appropriate mechanism would be to have the presumption operate when the state supreme court issues an emergency order impacting the courts.<sup>345</sup> This would have been beneficial during the COVID-19 pandemic as many state supreme courts issued emergency orders regarding the procedures for handling disputes during lockdowns and even after lockdowns were lifted.<sup>346</sup> The state supreme courts could also declare that the large-scale destabilizing event has occurred and define which aspects of the state it would cover, either state-wide, regional, or by county. Other states may find that a clear statutory definition would be the best way to provide guidance to the courts and would limit the application to truly impactful events. Finally, other states may consider the differences in the application of family law at the local level and provide for the presumption to operate in a manner that best reflects those differences.<sup>347</sup>

After determining how to go about instituting a presumption, the states should consider *what* would constitute a large-scale

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<sup>344</sup> ALASKA STAT. § 25.20.110 (LEXIS through 2022 legislation, Chapters 1–40).

<sup>345</sup> See McWilliams & Dankel, *supra* note 2, at 42 (discussing orders issued by the Colorado Supreme Court that impacted family law cases); Hon. Samuel A. Thumma & Mr. Marcus W. Reinkensmeyer, *Post-Pandemic Recommendations: Covid-19 Continuity of Court Operations During a Public Health Emergency Workgroup*, 75 SMU L. REV. FORUM 1 (2022) (discussing proposals for emergency court procedures in light of the pandemic).

<sup>346</sup> McWilliams & Dankel, *supra* note 2, at 42.

<sup>347</sup> See 750 ILL. COMP. STAT. ANN. 5/609.2 (West, Westlaw through P.A. 102-1102 of 2022 Reg. Sess.); 750 ILL. COMP. STAT. ANN. 5/600(g) (West, Westlaw through P.A. 102-1105 of 2022 Reg. Sess.) (applying a different definition for relocation for moves that are located near Chicago).

destabilizing event. States are in a good position to recognize the likely natural and non-natural disasters their populations may face. While some events have a less clear scope than others, states can attempt to give guidance to the courts. Moreover, judges should be able to make these determinations as they do other fact-based determinations in family law cases.

Jurisdictions should also consider making this type of presumption rebuttable. This would permit the trial judge the opportunity to deny modifications when the parties are relitigating the original dispute and are not affected by disruption due to a large-scale destabilizing event.<sup>348</sup> Regardless, removing the limitations imposed by a strict application of the "substantial change in circumstances" requirement enables parties to get to a best interest assessment when there is a substantial disruptive event, and this is advantageous to children and families.

In addition to or in lieu of a presumption, states should consider reducing the burden of proof for an individual seeking to modify child custody during a defined destabilizing event. For example, in jurisdictions that traditionally use a clear and convincing standard,<sup>349</sup> a preponderance of the evidence standard should be used in custody modification cases. This would permit greater ability for the family court to make a fact-based determination on the focused issue of whether the destabilizing event has impacted the child's best interest. In jurisdictions that do not officially adopt a heightened standard of proof but in which judges tend to interpret the "substantial change in circumstances" as being difficult to establish, judges should consider viewing large-scale destabilizing events with a recognition of the change they bring.

Some might be opposed to these approaches out of a concern that they would create instability for children and would open the floodgates to child custody modification petitions. These concerns, however, can be addressed to minimize negative impacts on children and families. First, by controlling how the presumption is defined or

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<sup>348</sup> This will permit the court with an opportunity to limit the type of behavior observed in *S.A. v. R.H.*, 306655/2011, 2020 WL 3089242, at \*1–2 (N.Y. Sup. Ct. June 5, 2020), where Father flagrantly violated a temporary order to have a visit to establish a new residence in another state.

<sup>349</sup> See *Parent and Child*, *supra* note 25, at § 145; *Divorce and Separation*, *supra* note 21, at § 850.

applied, the state can necessarily limit the opportunity to automatically present a case for modification. Second, making any presumption rebuttable provides the opposing parent with the opportunity to show continued stability in the family and negate the finding of a substantial change in circumstances. Third, simply meeting this requirement does not require the court to grant an order modifying custody. The family law court would still be able to reject a petition to modify custody under the best interest of the child test—the more important inquiry for parties and courts. Finally, utilizing more focused best interest factors designed to address the concerns and needs that may arise in a large-scale destabilizing event would assist in making sure that the courts are not open to unnecessary re-litigation of already decided issues but are meeting the changing needs of children in times of crisis.

*C. Applying the Best Interest of the Child Standard in a Pandemic or Similar Destabilizing Event*

A presumption, like that suggested for the "substantial change in circumstances" requirement, is not necessary for the best interest of the child determination. Presuming that a modification in custody is in the child's best interest would undermine the purpose of custodial decision-making in that it would deprive the child of an individualized assessment made with the particular child's needs in mind.<sup>350</sup> A jurisdiction that uses a clear and convincing evidentiary burden, however, might find it advantageous to reduce the burden of proof to a preponderance of the evidence standard when there is a large-scale disruptive event. Further, to ameliorate the concern that the child's needs and interests might be in flux because of the disruptive event, a judge should consider making temporary orders or setting timeframes in which their decisions would be reviewed.

As other scholars have noted, a disruptive event like the COVID-19 pandemic presents a unique challenge to the application of the best interest of the child factors.<sup>351</sup> Attorney Madison McBratney noted that grounds typically considered sufficient bases for denying parenting time, such as putting a child in danger, "may look a little different" in the COVID-19 pandemic as "danger" takes on new

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<sup>350</sup> *Divorce and Separation*, *supra* note 21, at § 811.

<sup>351</sup> See McBratney, *supra* note 125, at 230.

meaning.<sup>352</sup> Professor Soled noted that COVID-19 made other "best interest" considerations "impossible for a court to accurately analyze."<sup>353</sup> Professor Soled explained that "it is hard to ascertain and measure the stability of the home environment since everyone's lives are unstable [due to the pandemic]" and "employment responsibilities might be unknown given closures, cutbacks, and ability to work online."<sup>354</sup> Examining child custody modification decisions following Hurricane Katrina, Professors McCarthy-Brown and Waysdorf noted the difficulties with applying the best interest factors.<sup>355</sup> They identified that:

[f]actors such as the length of time the child has lived in a stable and adequate environment, the mental health of each party, and the home, school, and community history of the child [prior to the event] all have very limited impact on the proposed change of custody. The length of time the child lived in a stable environment and the child's home, school, and community history is irrelevant if the child currently has no stable home, school, or community. The mental health of each party is important but only in the extremes. With the level of stress caused by the hurricane, most New Orleanians' mental health was at its breaking point, thus neither parent's mental health is likely more stable than the other parent's.<sup>356</sup>

Given the challenge in applying best interest factors when there is a large-scale destabilizing event, more guidance should be provided to family court judges. One of the hallmarks of child custody decision-making is the discretion afforded to the trial judges.<sup>357</sup> This discretion is well-placed as family law judges are in the best position to make important observations about the children and families before them, which are necessary to the custodial determination. However, the cases arising from the COVID-19 pandemic demonstrate a tremendous amount of inconsistency on how family law judges viewed the general impact of the pandemic on children and families.<sup>358</sup> These inconsistencies cannot be explained by individual differences in risk of exposure to the virus in the families at issue, nor can they be explained by the progression of viral infection as the pandemic continued. Rather, they are more likely explained by the differing views family court judges had on the risk posed by the virus and the uncertain

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<sup>352</sup> *Id.*

<sup>353</sup> Soled, *supra* note 260, at 1448.

<sup>354</sup> *Id.*

<sup>355</sup> McCarthy-Brown & Waysdorf, *supra* note 33, at 751–52.

<sup>356</sup> *Id.* at 752.

<sup>357</sup> *Divorce and Separation*, *supra* note 21, at § 811.

<sup>358</sup> See *supra* Part II (discussing child custody modification decisions during the COVID-19 pandemic).

and volatile environment in which they were required to make decisions. By giving more clear guidance to the family courts, we can offer children and families more predictability and assist courts in anchoring their decisions on what is most vital to children's best interest in a large-scale destabilizing event.

To begin, any application of the best interest of the child factors should stay true to the policy behind child custody law. Namely, the court should endeavor to cause as little additional disruption in the child's life as possible, ensure that the child's needs are being met, continue parental connections whenever possible, and reduce unnecessary risks of harm. While looking to the past arrangement to gain an understanding of the family's operation and the child's interests may not be as instructive as it once was, it is still informative.<sup>359</sup> The family court needs to distill more information than what is usually examined under the best interest factors. Several best interest factors are examined herein, and suggestions are made on how to view these factors when faced with a large-scale destabilizing event.

Courts should also consider ways to issue more constrained orders for modification. This can be accomplished through an order that is more limited in scope. For example, like the court in *B.S. v. A.S.*, which confined possible modification of legal custody only to the issue of vaccinations,<sup>360</sup> family law courts can limit their decisions to only those which are necessary to assist the family transition through the destabilizing event.<sup>361</sup> Additionally, the judge can consider the length of the possible disruption caused by the event and set appropriate temporary orders. Attorney McBratney noted the concerns with changing custody when the change might last for an indefinite and extended period of time.<sup>362</sup> For example, some courts suggested a change might happen through the "end of the pandemic."<sup>363</sup> Attorney McBratney rightly noted that the end of the pandemic is a difficult time to pinpoint, and it is unclear *who* would be empowered to determine when the pandemic ended.<sup>364</sup>

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<sup>359</sup> See McCarthy-Brown & Waysdorf, *supra* note 33, at 751–52.

<sup>360</sup> 160 N.Y.S.3d 802, 815 (N.Y. Sup. Ct. 2021).

<sup>361</sup> See, e.g., *id.*

<sup>362</sup> McBratney, *supra* note 125, at 239–41.

<sup>363</sup> *Id.* at 239, 241.

<sup>364</sup> *Id.*

While it is true that this type of uncertainty is detrimental to children, there are ways to achieve certainty and child safety through the issuance of temporary orders. Courts should not hesitate to issue a modification to a custody order when the destabilizing event presents serious health and safety risks. However, to balance the need for stability and contact with both custodial parents, courts should make clear periods for review of the temporary order, either by selecting a date to review the order or selecting the occurrence of a particular event (such as the lifting of stay-at-home orders) to terminate the order. Additionally, for orders which have more restrictions on the exercise of custody, the court should attempt to set the order for a shorter period of time. For example, in the COVID-19 pandemic, courts should have expeditiously reviewed modifications that limited in-person contact with a parent or changed custody from joint to sole legal custody on a specific matter or for purposes of physical custody. Orders which only required some limitation on the exercise of custodial time, such as requirements to mask during an in-person visit or changes in pick-up and drop-off routines<sup>365</sup> could have been set to terminate after longer periods of time, like the lifting of public health recommendations by public health agencies, because they are less impactful encumbrances on the custodial time.

It could be argued that temporary orders with shorter review periods will exacerbate family tension and litigation by encouraging parents to continue to fight over custody. However, review after a short period of time can also serve to provide the court with an opportunity to gather more information to make a better long-term modification determination. For example, the known health risks arising from the event may be more clear, and new preventive measures and treatment options may also be available. Information about these risks should be utilized by the court to alter the plan to ensure it remains in the child's best interests. Additionally, the parents and child can experience the modified custodial arrangement and have more concrete evidence on what is working and what is not. There will also be more opportunities to seek information from the child through a guardian ad litem.<sup>366</sup>

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<sup>365</sup> See *In re J.N.*, No. 2-21-0562, 2022 WL 473330, at \*3 (Ill. App. Ct. Feb. 16, 2022); *Mercedes E.H. v. Dexter R.N.*, 154 N.Y.S.3d 48, 49 (N.Y. App. Div. 2021).

<sup>366</sup> See *About Guardian Ad Litem (GAL)*, N.C. JUD. BRANCH, <https://www.nccourts.gov/programs/guardian-ad-litem/about-guardian-ad-litem-gal> (last visited Dec. 23, 2022).

### 1. Health and Wellbeing of the Child

As discussed in part III, courts had varied views of what constituted a health risk and whether to modify custody or visitation based on these risks.<sup>367</sup> Some courts and advocates concluded that "slight risks"<sup>368</sup> or "generalized fear"<sup>369</sup> of infection should not be the basis for a change in custody.<sup>370</sup> Others argued that the focus for the court should be on "concrete evidence of illness or danger to the child's or the family member's health, [because] custody or visitation should not change solely [when] the custodial parent is more likely to be exposed to the virus."<sup>371</sup> However, these views disregard the very real risks to a custodial parent from contracting a serious virus and the impact this has on the child or children in the custodial parent's care.<sup>372</sup> While those who argue for such an approach base their argument on the need to eliminate "abrupt changes" in the custodial arrangement,<sup>373</sup> not altering a custodial or visitation plan to minimize risks to the child and custodial parents could very well lead to significant and irreversibly disruptive results to the child. For example, should a custodial parent become critically ill, they may no longer be able to provide meaningful care for the child or may even succumb to the illness.<sup>374</sup>

When assessing health and wellbeing, the courts should focus on the risks inherent to the destabilizing event. This assessment should be informed by relevant agencies responsible for informing the community about health and safety, such as the CDC, state and local public health organizations, and FEMA.<sup>375</sup> Each destabilizing event will

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<sup>367</sup> See *supra* Part III (discussing the varied approaches courts took to consider COVID-19-associated health risks and custody modifications).

<sup>368</sup> *Kapsokavithis v. Kapsokavithis*, No. 355579, 2021 WL 1941641, at \*4 (Mich. Ct. App. May 13, 2021), *appeal denied*, 963 N.W.2d 363 (Mich. 2021).

<sup>369</sup> *S.V. v. A.J.*, 126 N.Y.S.3d 631, 634 (N.Y. Fam. Ct. 2020).

<sup>370</sup> *Id.*

<sup>371</sup> Soled, *supra* note 260, at 1448–49.

<sup>372</sup> See Tanimoto, *supra* note 125, at 14–15 (discussing the risks to a child when a parent is infected with COVID-19); see also McBratney, *supra* note 125, at 229–30 (discussing risks to the entire family when moving children between two households).

<sup>373</sup> Soled, *supra* note 260, at 1448.

<sup>374</sup> Hallie Levine, *When Parents Get Sick, Who Cares for the Kids?*, N.Y. TIMES (Apr. 9, 2020), <https://www.nytimes.com/2020/04/09/parenting/parents-coronavirus-kids-caregiver.html>.

<sup>375</sup> See McCarthy-Brown & Waysdorf, *supra* note 33, at 737, 765 (discussing the intersection of family law decision-making and federal agency intervention); cf. *I.A. v. K.F.*, No. 1723

have different considerations. Additionally, priority should be given to individual risk factors for the child, caregivers, and others with whom the child regularly interacts. Courts should also consider the emotional wellbeing of the caregivers and children. For example, some courts gave weight to the child's concerns about the health risks related to COVID-19,<sup>376</sup> where others did not consider these concerns or even rejected them (or the GAL's recommendation) when deciding whether to modify custody.<sup>377</sup> Courts should give more weight to children's concerns when there is a large-scale destabilizing event, especially when they are otherwise logical and based on the risks inherent in the event.

While avoiding disruption to the child is a clear goal for rejecting modifications in custody,<sup>378</sup> courts should resist an all-or-nothing preservation of the status quo and find ways to ensure safety while protecting the most important aspects of the child's contact with parents. Some courts did this very well in the pandemic, ordering virtual visitation in some situations and moving to in-person visits when possible.<sup>379</sup> Others, however, did not give weight to risky behavior, such as exercising custody after testing positive for COVID-19.<sup>380</sup> Still, others did not put in place ready protective measures such as the taking of a COVID-19 test before visits.<sup>381</sup> Courts should consider recommended preventive safety measures that would permit the best possible contact with both parents and address each parent's fears about the event.

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EDA 2020, 2021 WL 832578, at \*12 (Pa. Super. Ct. Mar. 4, 2021) (considering the parents' compliance with CDC guidelines).

<sup>376</sup> See *Samantha G.S. v. Jonathan G.B.*, 247639, 2020 WL 7550601, at \*4, \*7 (N.Y. Fam. Ct. Nov. 20, 2020).

<sup>377</sup> *Jennifer R. v. Lauren B.*, 126 N.Y.S.3d 324, 328–29 (N.Y. Fam. Ct. 2020) (stating that the child's wishes were not controlling); *Kapsokavithis v. Kapsokavithis*, No. 355579, 2021 WL 1941641, at \*4 (Mich. Ct. App. May 13, 2021), *appeal denied*, 963 N.W.2d 363 (Mich. 2021) (dismissing child's concerns about being comfortable on outings with parent because of COVID-19).

<sup>378</sup> *Divorce and Separation*, *supra* note 21, at § 849.

<sup>379</sup> *K.B. v. J.D.R.*, No. CN20-03062, 2020 WL 5228130, at \*2 (Del. Fam. Ct. July 31, 2020).

<sup>380</sup> *Gross v. Gross*, No. 722 EDA 2021, 2021 WL 6110239, at \*7 (Pa. Super. Ct. Dec. 27, 2021).

<sup>381</sup> *In re J.N.*, No. 2-21-0562, 2022 WL 473330 (Ill. App. Ct. Feb. 16, 2022).

## 2. Housing

When a large-scale destabilizing event occurs, many members of the community may find themselves needing to secure new housing.<sup>382</sup> For example, in the aftermath of Hurricane Katrina, many families were displaced, and children were living with different caregivers for extended periods of time.<sup>383</sup> In their article discussing the aftermath of Hurricane Katrina, Professors McCarthy-Brown and Waysdorf address these long-term consequences and the challenges presented to modification based on relocation, arguing that circumstances made it difficult for the court to resolve whether custody could be modified to permit permanent relocation.<sup>384</sup> They note that courts denied requests to modify custody permitting the relocation despite the fact that community resources had yet to return to the child's community.<sup>385</sup> Professors McCarthy-Brown and Waysdorf explained that in some cases the "desire to repopulate and rebuild the city may have shifted the focus" of the best interest analysis.<sup>386</sup>

The COVID-19 pandemic did not create as much threat to housing stability as other destabilizing events such as Katrina; however, in cases where housing stability was threatened, courts tended not to see the connection to COVID-19.<sup>387</sup> In some cases, the parent's choice to relocate could either be directly attributed to their inability to gain stable housing due to the pandemic<sup>388</sup> or to the macro-consequences of the pandemic (e.g., the loss of resources and opportunities by people leaving areas which saw more COVID-19 cases).<sup>389</sup> Courts should see the connection between the event and the potential for long-term impacts on the stability of the child's community. For example, in the

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<sup>382</sup> Sophia R. Fox-Dichter et al., *The Destabilizing Cost of a Pandemic: What COVID-19 Meant for Renters Already Getting Assistance*, BROOKINGS INST. (Nov. 23, 2021), <https://www.brookings.edu/blog/up-front/2021/11/23/the-destabilizing-cost-of-a-pandemic-what-covid-19-meant-for-renters-already-getting-assistance/>.

<sup>383</sup> McCarthy-Brown & Waysdorf, *supra* note 33, at 751–52, 754–55.

<sup>384</sup> *Id.* at 753–55.

<sup>385</sup> *Id.* at 755.

<sup>386</sup> *Id.*

<sup>387</sup> See generally J. Thomas Sullivan, *COVID-19's Complications for Family Law Counsel: Domestic Violence and Threats to the Well-Being of Children*, 10 ARK. J. SOC. CHANGE & PUB. SERV. 1, 19–22 (2020) ("Rising unemployment . . . has been evident and devastating for both the community generally and individuals who have lost jobs . . ."); M.D. v. J.C., No. CN18-01765, 2020 WL 5230426, at \*2–5 (Del. Fam. Ct. June 24, 2020).

<sup>388</sup> *M.D.*, 2020 WL 5230426, at \*2–4.

<sup>389</sup> H.K. v. R.C., 151 N.Y.S.3d 836, 840 (N.Y. Sup. Ct. 2021).

pandemic, while the lessening of COVID-19 restrictions allowed businesses to reopen and schools to resume,<sup>390</sup> it caused the departure of families from urban centers to suburban centers, altering the makeup of some communities.<sup>391</sup> It isn't clear that the child's community will return to pre-pandemic conditions simply because the more restrictive limitations associated with the pandemic are lifted. Therefore, courts should consider both the short-term and the long-term consequences of a destabilizing event when assessing the child's best interests.<sup>392</sup>

Specific considerations that might be most relevant to an emergency situation include: the availability of safe housing, continued community resources, connections to programs and community members, and access to the other parent or extended family.<sup>393</sup> As stated above, orders related to housing and primary custody can be made on a temporary basis and reviewed as the housing and community destabilization resolves.

### 3. Education

The COVID-19 pandemic significantly impacted education.<sup>394</sup> From the closure of schools to the movement towards online or hybrid education, children faced significant changes in education.<sup>395</sup> Large-scale destabilizing events will have the prospect of altering education.<sup>396</sup> When faced with assessing best interests, courts should focus on the following aspects of education and how they impact the child at issue.

Courts should consider the educational resources used by the child before the event. For example, if the child utilized specific educational resources or therapies, modifications that would permit

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<sup>390</sup> *Id.*

<sup>391</sup> *Id.*

<sup>392</sup> McCarthy-Brown & Waysdorf, *supra* note 33, at 723, 751–52, 764.

<sup>393</sup> *See id.*

<sup>394</sup> *See generally* Hoffman & Miller, *supra* note 3 (discussing the challenges children faced with educational changes in the pandemic).

<sup>395</sup> *See id.*

<sup>396</sup> *See, e.g., id.* (discussing the impact of COVID-19 on education across the nation and the adjustments necessitated by the pandemic).

access to similar educational resources should be prioritized.<sup>397</sup> Additionally, if the child was engaged in educational opportunities that occurred outside of the classroom, such as clubs, sports, or extra-curriculars, the court should consider how to safely maintain these opportunities.

Special attention should also be paid to the ability of each parent to support the child's education.<sup>398</sup> For example, the court should determine whether each parent is available to assist the child with assignments and with accessing educational materials and resources. Some of this inquiry will center around the parent's ability to supervise the child, should that be required, during school hours.<sup>399</sup> For other children, however, the focus might be on whether the parent is able to assist the child with educational technology or with the materials being covered (or at least assist the child in receiving help from a teacher).<sup>400</sup>

Finally, the court should make a specific inquiry into the modality of education (whether that be online, hybrid, or in-person) and make findings specific to the child about the impact of the modification on their ability to reach their educational goals with these modalities in mind. This inquiry might be linked to other inquiries related to housing and access to technology.

#### 4. Parental Employment

As others have noted, large-scale destabilizing events tend to impact parental employment.<sup>401</sup> Parents may be furloughed or terminated, others may be transitioned to a work-at-home model, and still others may be required to put in more hours at work.<sup>402</sup> These changes can be unpredictable, but that does not minimize the need

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<sup>397</sup> See Margaret "Pegi" Price & Jack Hamlin, *COVID-19 and Families with Special Needs*, AM. BAR ASS'N (March 16, 2022), [https://www.americanbar.org/groups/family\\_law/publications/family-law-quarterly/volume-55/issue-2/covid19-and-families-special-needs/](https://www.americanbar.org/groups/family_law/publications/family-law-quarterly/volume-55/issue-2/covid19-and-families-special-needs/) (discussing the unique needs of children with special needs in events like the pandemic).

<sup>398</sup> See *Soddy v. Soddy*, No. 355212, 2021 WL 1706689, at \*2, \*5 (Mich. Ct. App. Apr. 29, 2021) (discussing the ability of the parent to support the children during online learning).

<sup>399</sup> See *id.* at \*5.

<sup>400</sup> See Capistrant, *supra* note 4 (discussing the need for parents, children, and teachers to adapt new skills to be able to learn in new modalities).

<sup>401</sup> See *generally id.* (discussing the unemployment crisis that impacted parents across the country during the COVID-19 pandemic).

<sup>402</sup> Soled, *supra* note 260, at 1448.

to ensure that children's best interests are being met. Courts should consider the impact of the work arrangement on the parent's ability to provide childcare and support to the children as their needs evolve during the crisis.<sup>403</sup>

Jurisdictions may want to consider the employment of parents who are first responders or health care workers differently from other parents.<sup>404</sup> For example, depending on the crisis, these parents may need temporary changes in their custodial order to assist the community and to provide protection to their children.<sup>405</sup> They should be able to do this on a limited basis without worrying about losing custody on a more long-term basis.<sup>406</sup> By issuing temporary custodial orders, the court can better protect children and the community.

##### 5. Parental Willingness to Cooperate with Each Other

The courts have long favored the willingness of a parent to cooperate with the other parent.<sup>407</sup> Cooperation leads to joint decision-making by the individuals who, presumably, act in their child's best interests.<sup>408</sup> During the pandemic, courts and scholars emphasized the need for parents to work together.<sup>409</sup> Justice Sunshine, a Justice of the New York Supreme Court and the Statewide Coordinating Judge for Matrimonial Cases, offered a stern warning to parents during the pandemic.<sup>410</sup> Explaining that "actions [parents] take today and during this crisis could well be determinative or dispositive at the time of final decision by a judge," Justice Sunshine cautioned against non-cooperation.<sup>411</sup> Importantly, Justice Sunshine stated, "If parents do not

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<sup>403</sup> See, e.g., *Child Custody and Visitation*, LEGAL ASSISTANCE FOR MIL. PERS., <https://www.nclamp.gov/publications/take-1/child-custody-and-visitation/> (last visited Dec. 23, 2022) (highlighting parent questions and the court's willingness to take work schedules into consideration).

<sup>404</sup> McBratney, *supra* note 125, at 238–42.

<sup>405</sup> See *id.*

<sup>406</sup> See generally *id.* (highlighting several instances during the COVID-19 pandemic in which parents would seek custody of their children based on the child's other parent's risk of exposing the children to COVID-19, with orders lasting through the pandemic and some providing for make-up parenting time once the pandemic passed).

<sup>407</sup> ELROD, *supra* note 39, at § 4:3.

<sup>408</sup> Parham v. J.R., 442 U.S. 584, 602 (1979).

<sup>409</sup> E.g., Sunshine, *supra* note 184.

<sup>410</sup> See *id.*

<sup>411</sup> *Id.*

conduct themselves appropriately and sensibly, their children will remember throughout their lives how they acted and so will the judge deciding the case."<sup>412</sup>

While it is valid to encourage collaboration, destabilizing events can cause increased stress on parents and children.<sup>413</sup> All resources, such as mediation and settlement negotiation, should be explored to assist parents in reaching an agreement.<sup>414</sup> When that is not possible, however, it is important to consider some of the lessons learned from pandemic. The study conducted on parental stress is informative here.<sup>415</sup> If parents, in fact, have a reduction in stress, which in turn reduces negative impacts to children, when they have a "perception of control," judicial and alternative dispute resolution resources that assist in creating the perception of control should be provided.<sup>416</sup> Mediated and negotiated settlements can provide parties with the perception of control as they reach an agreed settlement.<sup>417</sup> For those who are unable to reach an agreement, having greater access to review of a modification petition vis  $\bar{o}$  vis the proposal discussed in this article would also, presumably, lead to a stronger "perception of control."

Another issue that arose in this context was parents' motivations for petitioning the court to modify custody.<sup>418</sup> Even in cases that were not acrimonious, the court considered the sincerity of the parents' proffered reasons for raising COVID-19 as a basis for modification.<sup>419</sup> In some cases, the court discounted a parent's argument that the exercise of custody by the other parent presented a risk of COVID-19 transmission when the petitioning parent had *any* conduct that also risked exposure to COVID-19.<sup>420</sup> Risks to the child associated with

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<sup>412</sup> *Id.*

<sup>413</sup> McWilliams & Dankel, *supra* note 2, at 41.

<sup>414</sup> *Id.* at 44–45 (discussing the benefits of using alternative dispute resolution when resolving family law disputes).

<sup>415</sup> *See generally* Brown et al., *supra* note 337 (finding that "stress and compromised parenting often place children at a risk of abuse and neglect").

<sup>416</sup> *See id.* at 3.

<sup>417</sup> McWilliams & Dankel, *supra* note 2, at 44.

<sup>418</sup> *See generally* Alexander v. Alexander, 256 A.3d 348, 354 (Md. Ct. Spec. App. 2021) (discussing how Father was motivated by what he found was Mother's inappropriate behavior during the COVID-19 pandemic).

<sup>419</sup> *See, e.g., id.* at 354–57.

<sup>420</sup> *See id.* at 355–57.

COVID-19, however, are not non-existent simply because a parent has engaged in some conduct that also risked COVID-19 exposure. Courts should consider the *willingness of a parent to ensure that risks associated with the pandemic (or another destabilizing event) are minimized as much as possible*, rather than dismissing the parent's concern simply because they have acted in a manner inconsistent with those concerns on prior occasions.

Finally, while it is helpful for courts to provide resolution to families when an event has created significant destabilization in the life of a child, there is a need to be aware of the potential for parents to use the event as an improper pretextual basis for modification. The trial courts should not assume improper motives, but they are in the best position to evaluate whether past acrimony observed before the event is the true cause of the current petition.

*D. Other Resources to Assist Family Courts in Meeting Needs for Resolution of Family Conflicts*

Others have argued for greater use of mediation, negotiated settlements, and other forms of alternative dispute resolution to assist families through large-scale destabilizing events like the COVID-19 pandemic.<sup>421</sup> The proposals in this article would be well-suited to work in tandem with those efforts. In fact, it might assist movement towards an agreement where there has been an impasse when the parties know that the court can be accessed more readily to offer temporary modification of child custody. Also, having clearer guidance for courts in applying the best interest of the child factors, including reliance on recommendations from relevant agencies (such as the CDC or FEMA), will allow the parties to better predict an outcome by the court and use this in reaching their mediated agreement or negotiated settlement.

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<sup>421</sup> McWilliams & Dankel, *supra* note 2, at 44–45 (discussing the benefits of using ADR when resolving family law disputes); Soled, *supra* note 260, at 1455 (advocating for online mediation services for parents); Joann Feld, *Mediation May Be the Best Option for Divorced Families Dealing with the Impacts of Covid-19*, N.Y. STATE BAR ASS'N (May 12, 2020), <https://nysba.org/mediation-may-be-the-best-option-for-divorced-families-dealing-with-the-impacts-of-covid-19/>.

Others have called for increased support for family courts, including the use of lawyers to assist with negotiated settlements.<sup>422</sup> Lawyers have often assisted communities through the provision of pro bono legal services after a disaster.<sup>423</sup> Jurisdictions should ensure that they are equipped to handle an increased load of family law matters during large-scale destabilizing events. For example, jurisdictions could create an online CLE for attorneys during a crisis that provides basic training in family custody modification, therefore enabling the volunteer attorney to assist with settlement negotiations. Jurisdictions can establish a network of family law attorneys in areas where there is a greater likelihood of natural disasters to coordinate these efforts when they are needed. Finally, jurisdictions should consider working in advance with law schools in their state to prepare students and recent graduates with training to assist in these efforts. With proper supervision and access to online training, law students or recent graduates might be able to aid volunteer attorneys or even assist with these efforts themselves.<sup>424</sup>

## V. CONCLUSION

The COVID-19 pandemic brought many changes to our everyday lives. The uncertainty experienced by many fell disproportionately hard on families that share custody of children.<sup>425</sup> Health risks created by a novel virus led many parents to renegotiate custodial and visitation arrangements.<sup>426</sup> While many were able to successfully arrive at creative and flexible solutions, other parents were not able to arrive at an agreement.<sup>427</sup> For those that sought assistance from the courts,

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<sup>422</sup> McBratney, *supra* note 125, at 247 (discussing the use of "current sitting judges, retired judges and practicing attorneys . . . as voluntary 'settlement officers' on virtual platforms to assist co-parents").

<sup>423</sup> See generally Linda Anderson Stanley, *How to Provide Pro Bono Assistance to Out-of-State Disaster Survivors*, AM. BAR ASS'N (Apr. 5, 2022), [https://www.americanbar.org/groups/gpsolo/publications/gp\\_solo/2022/march-april/how-provide-pro-bono-assistance-out-of-state-disaster-survivors/](https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2022/march-april/how-provide-pro-bono-assistance-out-of-state-disaster-survivors/) (highlighting several attorneys' pro bono experiences).

<sup>424</sup> See, e.g., 27 N.C. ADMIN. CODE 1C.0203 (2022).

<sup>425</sup> See Jhanice V. Domingo, *20/20 Hindsight on 2020's Coronavirus Pandemic and Its Effect on the Practice of Family Law: "Business As Usual" Took on a New Meaning in the Family Law Legal Arena Amid the Covid-19 Pandemic*, N.J. LAW., Apr. 2021, at 43, 44 (discussing the stresses on the legal system and on families during the pandemic); see also McWilliams & Dankel, *supra* note 2, at 41.

<sup>426</sup> McBratney, *supra* note 125, at 238–42.

<sup>427</sup> See *Alexander v. Alexander*, 256 A.3d 348, 357 (Md. Ct. Spec. App. 2021).

many were precluded from modification because of the "substantial change in circumstances" requirement.<sup>428</sup> At best, there were observable inconsistencies in the application of this standard when comparing similarly situated families.<sup>429</sup> Additionally, the best interest of the child standard was difficult to apply in the context of COVID-19 given its uncertain and evolving nature and its multitude of indirect impacts to everyday family life. This article proposes that we can seize on important lessons learned from the pandemic and consider altering the approach to child custody modification decision-making when there is a large-scale destabilizing event to provide greater opportunities to consider modification.

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<sup>428</sup> *Divorce and Separation*, *supra* note 21, at § 849; see Barbara Gonzo, *Modification of Child Support Awards Under New York Child Support Standards Act*, 11 *TOURO L. REV.* 485, 485–88 (1995).

<sup>429</sup> *Parent and Child*, *supra* note 25, at § 145.