

The impact of COVID-19 on access/custody arrangements in Singapore

When the Singapore government introduced the COVID-19 (Temporary Measures) (Control Order) Regulations 2020 (the ‘**Control Order**’) in early April, speculation began as to what impact, if any, the Control Order would have on access and custody arrangements for children from separated or divorced families.

The Control Order was swiftly amended to clarify that it was permissible to leave the home in order:

to transfer temporary custody or care of a child pursuant to any agreement regarding the access rights of a parent of the child, or in discharge of a legal obligation.¹

While the amendment put to bed any speculation that court-ordered access arrangements were no longer legally permissible or enforceable, it left other questions unanswered.

For example, what are the rights of parents who had supervised access or supervised exchanges? Family Service Centres are closed now, and Divorce Support Specialist Agencies have suspended supervised access and supervised exchange services. Accordingly, existing arrangements for these parents are no longer possible. Affected parents have been invited to reach out to the Ministry of Social and Family Development for guidance (email: dssaprogrammes@msf.gov.sg or telephone: 6324 0024).

A material change in circumstance

For everyone else, it seems it is still possible (indeed mandatory) to continue to observe any access/custody arrangements ordered by court. However, realistically speaking, it may be necessary to adapt those arrangements somewhat in order to be workable under lockdown conditions. After all, when the court made the orders, such orders did not contemplate the lockdown conditions currently being imposed. These lockdown conditions arguably amount to the magic words that all family lawyers recognise: a material change in circumstances, albeit a temporary one.

What a material change in circumstances means in the family law context is that there is a basis on which to make an application to the court to vary its order. As always, the best interests of the child would be the basis on which the court would assess any such application.

Good faith

There are, broadly speaking, two kinds of parents who will be interested in varying custody and access arrangements during the lockdown period:

- 1) reasonable parents with legitimate concerns about risks posed by access or shared custody to their children’s health and safety; and
- 2) less than reasonable parents who may have no good faith concerns about their children’s health

¹ Control Order, reg 4(3)(e).

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and safety arising out of access or shared custody arrangements. Instead, their purpose might be to deprive the other parent of access to or shared custody of their children at any cost, and will exploit the present situation to try to do so.

Ultimately, the same broad parameters will be applied by the courts to both kinds of parents in assessing their reasonableness and the best interests of their children. However, from a parent's perspective, the tactical approach to dealing with each type of parent will be different.

When dealing with a reasonable parent with legitimate and rational concerns about the health risks associated with access or shared custody arrangements, the ultimate goal should be to consider those concerns in good faith and try to negotiate a mutually acceptable compromise that prioritises the best interests of the children without having to resort to legal action at all. If both parents have the best interests of their children at heart, this should be achievable.

When dealing with a less than reasonable parent, agreement is unlikely because that parent may not have legitimate concerns to address and little interest in reaching a compromise. Legal action will be unavoidable to enforce access and/or custody rights.

Legal action

Whether it will be possible to commence legal action during the lockdown period depends on the facts of each case. Most cases will, however, only be heard after the lockdown. For a case to be heard earlier, the case would need to be time-sensitive and/or involve the urgent needs of the family. A family matter will not be heard during the lockdown merely because it would be convenient for the parties. However, in certain cases where there is a legitimate risk to the health and safety of a child, it may be possible to argue that an application for a variation an access or shared custody order is an essential and urgent application that must be heard during the lockdown period.

All other cases will have to wait until after the lockdown, at which point parents should have resumed the previous access or shared custody arrangements, in the absence of any 'stay at home' restrictions, rendering any such applications unnecessary.

Varying existing access or shared custody arrangements

So what kind of relevant concerns might parents have that might necessitate adapting existing access or shared custody arrangements?

Perhaps a parent who wants to exercise access or shared custody is an essential worker or healthcare worker or lives with someone who is. Because these kinds of workers have to go out into the community and interact with other people in public who may be infected, the risk of them bringing the virus home and infecting the child is a legitimate concern that should be considered. If the child is infected through such exposure and then returns to the other parent's home, the child could infect that parent and any other family members living in that home.

Many healthcare workers around the world are voluntarily choosing to stay apart from their families during this time as they do not want to risk bringing the virus home and infecting their children. If a parent is a doctor or nurse or even a cook, public transport worker or delivery worker, it would not be entirely unreasonable for the other parent to ask whether access or shared custody could be suspended temporarily until the government decides it is safe enough to lift the lockdown.

The distance between the parents' homes and whether they can afford to avoid using public transport to ferry the child to and fro is arguably another relevant concern. Any prior stipulations that access must take place in public is now no longer workable and parents should try to agree that access will take place only at a parent's home.

Any planned overseas access might be understandably objectionable at this time. Whilst it is still legal for people to leave their homes for the purpose of leaving Singapore, a parent who feels comfortable taking a child on a flight for the purpose of a holiday during a global pandemic might reasonably be accused of having failed to give sufficient consideration to the best interests of the child.

If a parent is known to be regularly flouting the rules on staying at home or avoiding socialising, and evidence of this is available, it could reasonably be argued that by putting him or herself at risk in this way, that parent also puts the child at risk. Therefore, they should arguably not be permitted to continue to have access or shared custody until the risk of infection decreases significantly.

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Conversely, opportunistic and unreasonable parents may use this pandemic to deny the other parent access out of selfish motives rather than for any real concern for the child's health. They may try to concoct disingenuous arguments that the scenarios above apply when they do not, exaggerate the real extent of the risk to the child, continue denying access on the same basis even after the lockdown has ended or may refuse to make any reasonable adjustments to access arrangements to mitigate the risk to an acceptable level.

For example, even where a parent is a frontline healthcare worker or another essential worker with a higher than average risk of being exposed to the virus such as a foreign worker dormitory cleaner, supermarket employee or a prison guard, some form of access could still take place over video conference. A parent who refuses to facilitate telephone or video access with a child in lieu of physical access during the lockdown would certainly be found to be unreasonably failing to comply with a court order for access.

Other jurisdictions

These kinds of arguments have yet to be canvassed in Singapore's courts, but they have been dealt with in the courts of other common law jurisdictions which are also dealing with lockdowns and/or the pandemic. Courts in Canada, Ireland and England & Wales have all weighed in on the relevance on the factors discussed above, with divergent approaches being observed.

One Canadian court has already held that a parent's 'lifestyle' or the extent to which he/she fails to comply with stay home or social distancing requirements/guidelines was a reason to deny access, but that in general, the mere existence of the pandemic should not interrupt ordinary access arrangements in the absence of other factors.

An Irish court has made similar remarks and has also stated that it was acceptable for parents to make necessary practical modifications to access arrangements temporarily during the lockdown. However, video access should be given whenever physical access is impracticable.

Meanwhile, lawyers in England have reported a surge in applications for variation of court orders on access, many of which are arguably unreasonable and opportunistic.

In conclusion

It remains to be seen how Singapore's courts will deal with these issues when such cases come before them. It suffices to say that the potential for these issues to be litigated exists and is likely to be exercised in due course. If and when they are exercised, litigants will have to present their positions as being reasonable and show how those positions are informed by the best interests of the child.

Should there be any concerns about your child's health and safety arising out of the issues discussed in this article or if the other parent of your child is denying access or shared custody on ostensibly spurious grounds, you should discuss this with a lawyer to determine the best course of action to protect your child's health whilst maintaining his/her relationship with both parents to the extent practicable at this time.

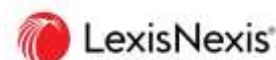
In light of the constantly changing circumstances, this is a general overview and should not be treated as legal advice. The information presented is correct to the date of its publication.



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Nadia Moynihan is a Director of August Law Corporation. Nadia's practice represents a broad cross-section of the kind of legal services that most businesses and individuals typically need, regardless of industry sector or client profile, with a particular focus on dispute resolution. Her expertise includes matters relating to schemes of arrangement, bankruptcy proceedings, trade disputes, employment disputes and a wide array of other contractual and tortious claims from fraud to defamation. She also practices family law and deals with non-contentious matters including the drafting of commercial agreements and personal legal instruments including those related to estate planning.

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