

## CONTENTS

What to Consider: COVID-19  
and International Custody Cases  
By Melissa A. Kucinski . . . . . 1

CASENOTES  
Oregon Court of Appeals . . . . . 3

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## What to Consider: COVID-19 and International Custody Cases

By Melissa A. Kucinski<sup>1</sup>

In April 2020, a Florida mother made national headlines after a trial court judge temporarily placed custody of her 4-year old daughter with the child's father.<sup>2</sup> The mother is a doctor who had been helping patients who suffer from the coronavirus. COVID-19, the virus that swept the globe, closing borders and halting air travel, has had a significant impact on parents whose children split time between their two households. Parents have expressed concerns over the other household's social distancing practices, exposure of the child to the virus, ability of the other parent to supervise the child while working remotely, ability to facilitate the child's remote learning environment, and a variety of other, at times, well-founded concerns. For parents who were already unhappy with sharing their child on a particular schedule, the virus gave them an excuse to withhold access of the child from the other parent. Family courts throughout the world all but shut down, at times, only resolving the most urgent of complaints, leaving parents with little recourse but to try to work out some ad hoc resolution with the other parent. The problems that were created between domestic households were amplified when it came to children who split their time with parents who live in different countries. What are the implications of a pandemic like this on an international parenting schedule?

### Court and Resource Closures

U.S. courts have, for the most part, closed to all but urgent issues. In some countries, the court systems are closed completely, leaving parents virtually no recourse to solve problems with their co-parent. In addition, other resources are scarce, including domestic violence resource centers, child therapists, and passport offices. In fact, U.S. consulates in foreign countries closed but for emergency passports (in other words, life or death

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2 <https://www.miamiherald.com/news/coronavirus/article241974676.html>, last accessed 8.25.20

situations).<sup>3</sup> This perfect storm has left some parents who may have to travel with their children unable to secure the necessary travel documents, or unable to get a court order clarifying their legal rights.

### Border Closures and Immigration Impediments

In addition to the general travel concerns of being on a long-haul international flight with others who may be asymptomatic and spreading a deadly virus, international travelers have also been met with border closures and immigration restrictions. In late January 2020, the White House issued a Presidential Proclamation that suspended and limited the entry of immigrants and nonimmigrants who had been physically present in China. In late February, the president extended this to Iran. On March 11, 2020, he then extended this to the Schengen area (which includes most of Europe).<sup>4</sup> The U.S.-Canada border shut to non-essential travel.<sup>5</sup> The U.S. -Mexico border followed suit.<sup>6</sup> When the United States began a soft re-opening of businesses and offices in early summer 2020, virus numbers began climbing, and the European Union then listed the United States as a country whose travelers were not permitted entry.

### International Child Abduction

There is a real possibility that a child will be stranded in another country, out of concern for his or her health, because a border crossing is closed, or because all flights are cancelled. There is a sincere concern that this reality is presenting more opportunity for a parent to use the virus as a means of wrongfully retaining their child overseas, for example, at the end of the child's spring break. There are also concerns that parents will use this as an excuse for refusing to send their child on a court-ordered trip because that child may be unable to return home at the trip's conclusion. This has led to parents claiming, rightfully or wrongfully, that the other parent is abducting their child.

There are some significant legal implications that relate to a parent's actions or inaction in these circumstances. For example, is a parent needlessly risking their child's safety and wellbeing to insist on the child's travel? Would it present a grave risk to a child to send a

3 <https://travel.state.gov/content/travel/en/traveladvisories/ea/passport-covid-19.html>, last accessed 8.25.20

4 <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-2019-novel-coronavirus/>, last accessed 8.25.20

5 [https://www.theglobeandmail.com/politics/article-canada-us-border-expected-to-stay-closed-to-non-essential-travel-to/?fbclid=IwAR3Axv1HEnnDzgmOSqWRqhv1\\_18K8pZ\\_vLPdRF7SRw58b5vopqKvYAOVhU](https://www.theglobeandmail.com/politics/article-canada-us-border-expected-to-stay-closed-to-non-essential-travel-to/?fbclid=IwAR3Axv1HEnnDzgmOSqWRqhv1_18K8pZ_vLPdRF7SRw58b5vopqKvYAOVhU), last accessed 8.25.20

6 <https://www.dhs.gov/news/2020/08/14/fact-sheet-dhs-measures-border-limit-further-spread-coronavirus>, last accessed 8.25.20

child to a country that has an extreme outbreak (and how does a judge weigh the severity of an outbreak)? Is a parent who acquiesces to the child remaining overseas for an undetermined timeframe relinquishing their legal rights to have the child return home? How is this impacting a child? Is the child distressed and anxious about international travel? How are the parents communicating about and with the child about the pandemic? Are the court closures creating the potential that a parent may be waiving certain legal arguments to ask for their child's return because they are unable to initiate a lawsuit? If a parent asks a court to intervene, and the court orders a child to be returned back to the other parent, what happens with the already taxed resources, if that parent refuses to abide by the return order?

While there are no clear-cut answers to these, and other, numerous questions, there are some significant legal concerns raised by the inadvertent retention of a child in one country and a parent's inability (or unwillingness) to abide by the terms of an existing parenting arrangement. Further, when more than one country and more than one legal system is implicated, the stakes are much higher, and the legal issues are much more complicated.

One of the key legal instruments used to secure a child's prompt return post-abduction is the 1980 Hague Child Abduction Convention, ratified by the United States in 1988.<sup>7</sup> While the volume of Hague Abduction cases going to trial has appeared to drop during the pandemic, there have been a few court opinions that show judges' views on the ongoing health emergency. A federal district court in Texas ordered a child returned to Mexico on April 30, 2020, but stayed the return indefinitely "until such time as the Court and the parties can be reasonably confident that the COVID-19 pandemic no longer renders international travel unsafe..."<sup>8</sup> In May 2020, a federal district court in California dismissed a Hague Abduction proceeding because a family court had already taken up the case sua sponte and scheduled a hearing, even though COVID closed down the court and it was not actually holding hearings (and the federal court was).<sup>9</sup> In June 2020, a federal district court in Oklahoma stayed a return order by consent of both parties, because they believed travel to be halted into Guatemala.<sup>10</sup> And, in July 2020, a federal district court in California ordered a prompt return of a minor child to Italy, but with the acknowledgment

7 <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24>, last accessed 8.25.20

8 Gallegos v. Garcia Soto, 2020 WL 2086554 (W.D. Tex. 2020)(case under appeal)

9 Barron v. Kendall, 2020 WL 2521915 (S.D. Cal. 2020)

10 Guerra v. Rodas, 2020 WL 2858534 (W.D. Okla. 2020)

that the return could not happen until Italy was again permitting travel from the United States into its country.<sup>11</sup>

### Flexibility, Creativity, and Planning for the Future

For those parents who can work together, or for those forced to work together because they have no legal options, it is becoming ever more apparent the need for communication. For now, parents have a variety of resources that are available, including online dispute resolution, virtual parenting coordination, and a variety of technology, like Our Family Wizard and Co-Parenter, to help them work through the minor challenges. With children engaged in remote learning environments, and being unable to interact directly with their peers, it may be less important where the child is physically sitting and more important that the people in the child's household are fostering a good environment for their well-being. Above all, however, is that parents should use this pandemic as a way to prepare for future crises. Parents should have discussions now for what things need to be put in place to address issues in the future. What happens when the school calendar is upended, and classes go online? What happens when school activities are canceled, and social distancing is put in place? How do the parents discuss making household rules and policies consistent?

<sup>11</sup> Sacchi v. Dervishi, 2020 WL 3618957 (N.D. Cal. 2020)

Parents should consider whether they need to revisit their existing written parenting agreements to address these situations in a way that protects their legal interests in the future and implements creative dispute resolution techniques for widespread court closures.

COVID-19 is a global pandemic. While some countries and regions have been hit more significantly, children and families are feeling its effects worldwide. The next crisis may impact different countries and regions disproportionately (like hurricanes or tsunamis) or have a more direct impact on families where they cannot be safe by simply remaining inside their house. The lessons that families take away from this crisis will help shape and better prepare them for future crises.

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## CASENOTES

### OREGON APPELLATE DECISIONS

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Editor's Note: these are brief summaries only. Readers should read the full opinion. A hyperlink is provided to the on-line opinion for each case.

### SUPREME COURT

There were no Supreme Court cases in family law during this period.

### OREGON COURT OF APPEALS

#### Custody

Carmen Yvonne Wanting and Derek Jones Wanting (Lagesen, P. J.) At mother's Informal Domestic Relations Trial, she presented evidence that she was the primary caregiver of her children. The trial court awarded custody to father and, in doing so, did not account for the statutory

primary-caregiver preference under ORS 107.137(1)(e). Mother appeals, assigning error to the court's award of custody to father. She contends that the court failed to properly account for the statutory preference afforded to a primary caregiver.

Held: The trial court erred in failing to account for the statutory primary-caregiver preference under ORS 107.137(1)(e) as required by *Nice v. Townley*, 248 Or App 616, 274 P3d 227 (2012). Custody award vacated and remanded; otherwise affirmed. COA 09.16.2020

#### Evidence – Recording

Thomas J. Garland and Katrina J. Garland (James, J.) Mother appeals from a supplemental judgment awarding custody of her minor children to father, raising three assignments of error. In her second assignment of error, mother contends that the trial court erroneously excluded evidence of telephonic and in-person conversations between father and their children, which mother had surreptitiously recorded using her home telephone, an invisible application

she had installed on a cell phone, and a handheld recording device she hid in her son's backpack.

Held: The trial court improperly excluded some, but not all, of the recordings, but mother has failed to establish that any evidentiary error was harmful. Affirmed. COA 09.16.2020

### **FAPA Restraining Order**

H. M. H. v. Jeromy Jay Hess (Aoyagi, J.) Under the Family Abuse Prevention Act (FAPA), petitioner obtained a restraining order against respondent, her soon-to-be-ex-husband, and the trial court continued that restraining order after a contested hearing. Respondent appeals, challenging the sufficiency of the evidence. Respondent admits that there is evidence that petitioner was the victim of abuse committed by him within 180 days preceding the filing of the petition, which is the first requirement for a FAPA restraining order. Specifically, respondent admits that there is evidence that he assaulted petitioner during an altercation about Christmas decorations on the day that he was moving out of the family home. Respondent argues, however, that the only evidence is that that event was an isolated incident in a lengthy marriage and that the evidence is insufficient to establish either of the other two requirements for a FAPA restraining order: that there is an imminent danger of further abuse to petitioner, and that respondent represents a credible threat to petitioner's physical safety.

Held: The trial court erred in continuing the restraining order. On this record, the evidence was insufficient to establish that there is an imminent danger of further abuse to petitioner, obviating the need to reach the credible-threat issue. Reversed. COA 08.12.2020

S. L. S. v. Kyle Robert Tippery (Lagesen, P. J.) Petitioner obtained a Family Abuse Prevention Act (FAPA) restraining order against respondent, her former boyfriend. At a contested hearing, the trial court continued the order because it found that respondent had choked petitioner shortly before petitioner moved out of respondent's home. Respondent appeals, challenging the sufficiency of the evidence supporting the order.

Held: The trial court erred in continuing the order. Under the totality of the circumstances and Court of Appeals case law, the record was not sufficient to support the trial court's finding that respondent presented an imminent danger of further abuse to petitioner at the time that the court continued the FAPA order. Reversed. COA 09.16.2020

### **Jurisdiction**

Madison L. H. Mayfield and Shane A. Mayfield (Aoyagi, J.) In this child custody case, the trial court made a child custody determination as part of a marital dissolution proceeding, and, two years later, mother filed a motion asking the court to decline further jurisdiction and to allow a Washington court to assume jurisdiction over custody matters. The trial court granted the motion on two grounds: first, under ORS 109.744(1)(a), on the basis that the children do not have a significant connection with Oregon and that substantial evidence is no longer available in Oregon, and second, under ORS 109.761, on the basis that Oregon is an inconvenient forum and that Washington is a more appropriate forum. Father appeals.

Held: Father raised a meaningful question regarding the proper construction of ORS 109.744(1)(a), but the Court of Appeals did not need to reach that issue, because it concluded that the trial court had acted within its discretion in declining jurisdiction on inconvenient-forum grounds. Affirmed. COA 09.02.2020

### **Property Division**

Wanphen Muthukan and Paul Clarkson Easterbrook (Armstrong, P. J.) Husband appeals a judgment of dissolution, assigning error to the property division. He specifically assigns error to the trial court's award to wife of a commercial property in Roseburg, Oregon, that the parties refer to as "Hughwood." Husband contends that he has rebutted the presumption of wife's equal contribution to the acquisition of Hughwood and that the court therefore abused its discretion in awarding the property to wife.

Held: Because it is not possible to tell whether the trial court applied the presumption of wife's equal contribution to the acquisition of Hughwood, it is not possible to determine whether the trial court's "just and proper" distribution of the assets was within the court's discretion. Reversed and remanded. COA 09.23.2020

### **Spousal Support**

Jack Allen Minckler and Marlene Ellen Miler Minckler\* (Lagesen, P. J.) In this domestic relations case, wife appeals a supplemental judgment terminating husband's obligation to pay \$2,000 monthly, indefinitely, in maintenance support. Among the issues raised on appeal, wife contends that the trial court erred in finding a substantial change in economic circumstances after husband voluntarily retired.

Held: The trial court erred in failing to consider husband's potential earning capacity in determining whether husband had a substantial change in economic circumstances that

allowed for reconsideration of the spousal support award. Therefore, the trial court applied an incorrect legal standard in granting husband's motion to terminate. Reversed and remanded. COA 09.30.2020.

\*at time this went to press link to opinion not available.

**John Cargal and Kristina M. Long-Cargal** (Powers, P. J.) In this domestic relations case, husband seeks reversal of a supplemental judgment that denied his motion to modify spousal support, partially granted his motion to modify child support, and held him in contempt for nonpayment. Husband argues that the trial court erred in granting wife's motion to dismiss his spousal support modification claim under ORCP 54 B(2), because husband had not yet completed the presentation of his evidence to demonstrate a change in circumstances.

Held: The trial court prematurely granted wife's motion to dismiss before there was sufficient evidence to make an informed assessment on husband's alleged change in circumstances. Supplemental judgment vacated and remanded. COA 09.16.2020

## Stalking Protective Order

**J. S. E. v. Robert James Cubic** (Mooney, J.) This is an appeal from an order denying respondent's motion to terminate a stalking protective order (SPO) to which he had stipulated four and a half years earlier. Respondent assigns error to that denial, arguing that (1) he met his burden by the passage of time without SPO violations and his declaration that he desired no contact with petitioner and (2) petitioner's failure to offer any evidence at the hearing required dismissal.

Held: The trial court did not err in denying respondent's motion to terminate the SPO. Respondent did not carry his burden because he did not address the concerns that underlay the issuance of the SPO or why a four-year period of compliance with a legal mandate would sufficiently abate those concerns. Affirmed. COA 08.12.2020

## Note on Opinions Reviewed

The Editor tries to include all the Family Law related decisions of the Oregon Appellate Courts in these Notes. Some cases do not have holdings that have precedent significance however they are included to insure none are missed.

## FAMILY LAW NEWSLETTER

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The purpose of this Newsletter is to provide information on current developments in the law. Attorneys using information in this publication for dealing with legal matters should also research original sources and other authorities. The opinions and recommendations expressed are the author's own and do not necessarily reflect the views of the Family Law Section or the Oregon State Bar.

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### Publication Deadlines

The following deadlines apply if a member wants an announcement or letter included in the newsletter.

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11-15-2020	December 2020
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3-15-2021	April 2021
5-15-2021	June 2021
7-15-2021	August 2021
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