



## Children, Access Arrangements & Covid-19

### Family Law Advice and Information Service Information Note 2 April 2020

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Access arrangements are undoubtedly affected by the current Covid 19 restrictions. Parents/guardians and children are dealing with practical difficulties that in some instances will be particularly challenging. Helpfully, family law practitioners have prepared some guidelines for this situation, guidelines that have been endorsed by the Family and Child Law Committee of the Law Society, the Family Lawyers Association and the Bar Council. The guidelines are reproduced in full in this information note on page 7. This note and the guidelines aim to provide assistance and do not purport to represent legal advice.

In this document we have summarised some legal commentary and information relevant to access arrangements/orders to assist parents and guardians when considering how to practically, safely and hopefully effectively sustain access during in these difficult times. This note considers:

- The best interest of the child;
- The practicalities and the Law;
- ‘Guidelines for Access during Covid – 19’,(Family Lawyers Association of Ireland, 5 April 2020)

### The best interests of the child

In meeting the current challenges the point of focus at the outset must be the fundamental rule of law that applies to children and proceedings concerning their welfare. Article 42A.4.1° of the Constitution provides that provision by law ‘in the resolution of proceedings’ shall be executed so as ‘the best interests of the child shall be the paramount consideration’.

Viewed from this constitutional nexus the relevant factors to determine a child’s best interests can be identified. In this regard reference should be made to s31 of the Guardianship of Infants Act 1964 (as amended by s63 of the Child and Family Relationships Act 2015)<sup>1</sup> which provides a comprehensive statutory framework setting out the relevant factors to be considered, including at s31 (1)(c):

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<sup>1</sup> The Children and Family Relationships Act 2015, s63, amended the Guardianship of Infants Act 1964 by inserting ‘Part V Best Interests of the Child’;  
<http://www.irishstatutebook.ie/eli/2015/act/9/section/63/enacted/en/html#sec63>.

[T]he physical, psychological and emotional needs of the child concerned, taking into consideration the child's age and stage of development and the likely effect on him or her of any change of circumstances;

Access arrangements and or orders are made in the child's best interests. The fact of Covid-19 does not suspend these arrangements. On the contrary, where an access order cannot be implemented in its entirety due to the current public health emergency the responsibility devolves to parents/guardians to continue access in a **safe alternative way**. In this regard it is nearly always preferable that solutions to any practical obstacles are found by parents themselves, cooperating so as to 'facilitate and encourage a close and continuing relationship between the child and the other parent, and to maintain and foster relationships between the child and his or her relatives' (s31 (2)(j) of the Guardianship of Infants Act 1964 (as amended)).

It is the recognition of the need for practical solutions and parental cooperation that is to the fore in the recent derogation by the President of the District Court from the legal requirement that court orders can only be varied by the Court. His Honour Judge Colin Daly, President of the District Court, in his statement of 26 March 2020 refers:

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The best outcome for children is for parents to contact each other to set out their concerns and suggest ideas for practical solutions that can be put in place. The health concerns of parents, their children and the extended family need to be considered when sorting out arrangements.

As parents, if you agree that the arrangements set out in a court order should be temporarily varied you are free to do so. Make a note of this agreement by way of email or text message.<sup>2</sup>

A similar approach has been advocated by the UK judiciary:

“

The **key message** should be that, where Coronavirus restrictions cause the **letter** of a court order to be varied, the **spirit** of the order should nevertheless be delivered by making safe alternative arrangements for the child. [Original emphasis]

The Rt. Hon. Sir Andrew McFarlane President of the Family Division and Head of Family Justice<sup>3</sup>

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<sup>2</sup> Statement by His Honour Judge Colin Daly, President of the District Court, 26 March 2020; <https://beta.courts.ie/news/president-district-court-family-law-statement>.

<sup>3</sup> Statement by the Rt.Hon.Sir Andrew McFarlane, President of the Family Division and Head of Family Justice, 24 March 2020; <https://www.judiciary.uk/announcements/coronavirus-crisis-guidance-on-compliance-with-family-court-child-arrangement-orders/>.

**In the country's public health emergency the risk to the health of the whole of the community as well as the child must be considered - nobody should be put at risk.**

### **Covid-19 Regulations 2020 and Access**

With effect from 8 April 2020 the Minister for Health enacted SI 121/2020 Health Act 1947 (Section 31A - Temporary Restrictions) (Covid-19) Regulations 2020.<sup>4</sup> These regulations were enacted having regard in particular to 'the immediate, exceptional and manifest risk posed to human life and public health by the spread of Covid 19'.

Regulation 4 provides:

4. (1) An applicable person shall not leave his or her place of residence without reasonable excuse.

What is a 'reasonable excuse' includes a number of circumstances which are set out at Regulation 4 (2); for example, exercise within 2km of a person's home, purchase of essential supplies, attending to the needs of a vulnerable person. Reasonable excuse also includes circumstances where a parent and or guardian with a right of access to a child needs to leave their residence in order to give effect to 'arrangements for access to the child'

Regulation 4(2)(n) provides:

(2) Without prejudice to the generality of what constitutes a reasonable excuse for the purposes of paragraph (1), such reasonable excuse includes an applicable person leaving his or her place of residence (in this paragraph referred to as the "relevant residence") to – ...

(n) if the applicable person is a parent or guardian of a child, or a person having a right of access to a child, give effect to arrangements for access to the child by –

- (i) the applicable person, or
- (ii) another person who is –
  - (I) a parent or guardian of the child, or
  - (II) a person having a right of access to the child

## **The practicalities and the Law**

The regulations are plain, a person may leave their residence in order to give effect to access arrangements. As a consequence a burden is placed on parents and or guardians to identify and consider the health risks, if any, in exercising this right. Once identified the issue is whether or not these risks can be mitigated in order to facilitate safe access. This may not be possible, and where it is not possible alternative arrangements will need to be put in place such as using technologies to ensure effective communication between parent/guardian and the child.

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<sup>4</sup> These regulations were enacted in accordance with the powers conferred on the Minister for Health by sections 5 and 31A (inserted by section 10 of the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020 (No. 1 of 2020)) of the Health Act 1947 (No. 28 of 1947). For the purpose of the regulations 'a child' is defined as a person who has not yet reached the age of 18 and a child also falls within the definition of a 'vulnerable person'.

Recognising that in some instances there is now a need to deviate from the *prima facie* position that it is in the child’s best interest that the terms of an access order be executed, Barrister Adrian Barnett-Thoung-Holland refers to a very practical scenario:

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The first way to consider this might be through travel time; a short walk across the road for an overnight is unlikely to be impacted in any way at all. A two- hour journey by public transport via Central London (burdened already with its own issues for smaller children) would raise more issues.’<sup>5</sup>

### A case study

A recent case reported in The Irish Times highlights the ‘default’, that access orders remain in place and it is parents who need to find safe solutions.<sup>6</sup> The Mother in this instance was reported as having acted in breach of an existing access order by denying the Father access to his son. The Mother was reported as stating that her reason for doing so was because “the HSE is telling us not to mix with other people – that is why I am protecting my family from people coming into my house from other houses”. The woman also referred to having an older family relative in her home. The Father was reported as having told the Court that he lives by himself and has been self-isolating during the coronavirus pandemic.

Before adjourning the matter to another date to allow the parties to resolve the issue Judge Larkin was reported as stating:

“

I don’t accept that the child is any safer in your house than his father’s house.

I have no difficulty sending someone to jail for breach of access. This is a breach of a court order and you have to comply with court orders.

[The Law] is not based on HSE directives . . . The law in Ireland is based on what the law is and there is a court order in place.

You are going to have to come to terms with managing this access.

In view of the above it is worth considering the post-Covid litigation scenario where parties will potentially be held to account for their actions to the extent that a Court may want to consider whether an individual acted reasonably when varying an access order. The President of the Family Division and Head of Family Justice in the UK considered this precise situation in his statement a few weeks ago:

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<sup>5</sup> Adrian Barnett-Thoung-Holland, (Barrister ) Coram Chambers, ‘Demystifying Guidance for Separated Parents in the COVID-19 Environment’, *Family Law Week*, 29 March 2020.

<sup>6</sup> Gordon Deegan, ‘Mother tells court she is denying ex-partner access to son over Covid-19 fears’ *The Irish Times*, 3 April 2020.

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Where parents do not agree to vary the arrangements set out in a CAO [Child Arrangement Order], but one parent is sufficiently concerned that complying with the CAO arrangements would be against current PHE/PHW advice, then that parent may exercise their parental responsibility and vary the arrangement to one that they consider to be safe. If, after the event, the actions of a parent acting on their own in this way are questioned by the other parent in the Family Court, the court is likely to look to see whether each parent acted reasonably and sensibly in the light of the official advice and the Stay at Home Rules in place at that time, together with any specific evidence relating to the child or family.

The Rt. Hon. Sir Andrew McFarlane  
President of the Family Division and Head of Family Justice<sup>7</sup>

### **Cooperation and common sense**

Parents need to cooperate, comply with public health advice and act reasonably to achieve a best case scenario. There is no prescriptive set of instructions or ‘rules’ to achieve this outcome. It is suggested that at the most basic level a framework for agreement requires the parties to:

- Contact the other parent/guardian
- Communication concerns
- Listening to concerns
- Suggest practical solutions
- Consider all health concerns and risks

In many instances existing arrangements will be disrupted. The question is to what extent and if disruption is necessary what alternative arrangements can be put in place to facilitate access. This might be indirect access; for example, dedicated time on Facetime/Whatsapp/Zoom/Skype. Something as simple as

arranging a socially distanced walk might be an option. The key is flexibility, communication and clarity for the child. The Child’s best interests central in the deliberations between the parties.

Where cooperation is not possible mediation and or legal services might be appropriate if available. The Legal Aid Board are currently operating a national helpline and Ballymun Community Law Centre is available to provide information and advice.

Our Courts remain accessible for urgent cases particularly where domestic violence redress is required and people should make applications as necessary.

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<sup>7</sup> Statement by the Rt.Hon.Sir Andrew McFarlane, President of the Family Division and Head of Family Justice, 24 March 2020; <https://www.judiciary.uk/announcements/coronavirus-crisis-guidance-on-compliance-with-family-court-child-arrangement-orders/>.

# Guidelines for Access during Covid–19

The Family Lawyers Association of Ireland have produced guidelines as a practical aid to parents and practitioners during this crisis. These are set out in the following pages. It is important to stress that the guidelines aim to provide a level of practical assistance, guidelines do not purport to represent legal advice.

The guidelines have been endorsed by the Family and Child Law Committee of the Law Society, the Family Lawyers Association and the Bar Council.

## Contact details

Ballymun Community Law Centre Family Law Advice and Information: 01 862 5805

Legal Aid Board Legal & Mediation helpline. Lines open Monday to Friday 10.00am to 12.30pm and from 2.00pm to 4.00pm.: lo-call 1890 615 200 or 01 646 9600

Or request a call back email your contact details under the email heading - "Helpline Call Back" to [info@legalaidboard.ie](mailto:info@legalaidboard.ie) and we will get back to you as soon as possible

Ends: Frank Murphy, Solicitor, Ballymun Community Law Centre 20/04/2020.



## **Covid-19 Response Steering Group**

### **Guidelines for Access during Covid-19**

The following guidelines are to assist parents and practitioners in relation to access, in light of the restrictions brought in to tackle Covid-19.

These guidelines reflect the position of the Department of Justice and Equality, issued by Minister Charlie Flanagan yesterday, and endorse the practice direction of the President of the District Court, last week.

1. Court Orders in relation to access remain in place and should be complied with to the greatest degree possible in the circumstances. Children are allowed to move between parents' homes for access. Covid-19 cannot be used as an excuse to ignore a court order. Parents are advised to have a copy of the court order with them when travelling for access.
2. If there is no Court Order in place and an arrangement has been working between parents, this should continue, save in exceptional circumstances.
3. It is important that common sense prevails in relation to access, in the current climate. The best outcome for children is for parents to contact each other to set out their concerns and suggest ideas for practical solutions that can be put in place. The health concerns of parents, their children and the extended family need to be considered when sorting out arrangements.
4. Even if there is a Court Order in place, parents can come to their own arrangements for additional or alternative remote contact, such as telephone/Skype/Facetime/WhatsApp, to allow children to have extensive contact with the other parent. Parents should make a note of this temporary agreement by text or email. These current restrictions mean that the detail of every access order may not be fully implementable, but the responsibility and expectation of parents is to make every effort to allow children to continue to have access to the other parent in a safe, alternative way.
5. The health and safety of children and family members (especially the elderly, grandparents and those with an underlying medical condition) must be a priority. If one parent is living with his/her parents every effort should be made to ensure the grandparents are not put at risk.
6. Access with parents working in frontline services should continue as normal, except in exceptional circumstances. These parents will, of course, have received advice from their places of work in relation to contact with their families. This advice should be shared with the other parent and respected by all.
7. If a child has a compromised immune system, the health and safety of the child has to take precedence and all measures must be taken to protect the child. The best interests of the child must be the paramount consideration.

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Liaison: Sean O hUallachain SC (Bar Council), Helen Coughlan, solicitor (Law Society), Nuala E Jackson SC (FLA)



## **Covid-19 Response Steering Group**

8. Parents should both engage in social distancing, abide by the rules concerning non-interaction with third parties, and the stay at home direction, and be able to give clear assurances in this regard.
9. Parents should engage in mediation to resolve difficulties if they are unable to agree access during this time. If mediation is unavailable or unsuccessful, the assistance of solicitors may help in achieving a temporary agreement.
10. The Courts are still dealing with urgent cases involving domestic violence and vulnerable people. Applications for breach of access are not generally considered to be urgent, but there may be exceptional cases and your solicitor will advise you in this regard.
11. Additionally, the Practice Direction of the President of the District Court of 16 March, 2020, states that a case which does not come into the defined urgent category can be treated as urgent if a good case can be made. If you have a solicitor, you should contact him/her. If not, or if you cannot contact your solicitor, you can email your court office setting out the reasons why the case should be considered urgent. You, or your solicitor, should email the other side to let them know you have applied and they must be given a chance to set out their position. You will be notified of the Court's decision by email.
12. Contact details for offices are available on <https://beta.courts.ie/content/find-us>

This guidance has been prepared by family law practitioners and endorsed by the Family Lawyers Association Family and the Child Law Committee of the Law Society.

Practitioners will appreciate the guidelines are intended to constitute best practice guidelines rather than specific client advice.

Sunday 5 April 2020

Paul McCarthy SC  
For Covid 19 Response Steering Group

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