COVID-19 – The Law Un-Masked: Complicating Broken Families

In our ninth instalment of the Law Un-Masked, Jeremy Chan and Valerie Tang explore how the COVID-19 outbreak is generally affecting Family Law matters, from FDR to access arrangements and a rise in temporary removal and 'return' applications.

Introduction

It is perhaps no understatement to say that family matters – divorce, division of assets, child custody, care and control, access arrangements – are among the most stressful and intimately personal type of litigation an individual can face, where emotions often become embroiled within legal issues. This is not assisted by the existing backlog of delays in the court system, which often means that resolution of family matters can take up to years from start to finish.

With the current COVID-19 outbreak and intermittent closure of the Courts, the prospects of swift and smooth resolution of family matters will be further delayed. For financial matters, there are the options of Private Financial Dispute Resolution (Private FDR) or Private Financial Adjudication under Practice Direction SL-9 – both of which can continue to take place even during the COVID-19 period and could also be arranged for via the use of technology (such as video conferencing) so as to avoid gathering of persons. For children matters, there are also a number of options available, including mediation or engaging a parental coordinator. The available alternative dispute resolution processes should be strongly encouraged, and will assist families to resolve their differences notwithstanding difficulties in access to the Family Court right now.

Access Arrangements

One of the first aspects affected is the **execution of access arrangements.** With the latest government announcement deferring yet again class resumption for all schools, most schools have switched to online teaching and assessment. This however creates problems for parents and threatens to disrupt existing access arrangements: not only might there have been a change in the parents' own schedules, whether it be working from home, on shifts or otherwise, the change in the child's mode of education may necessitate reallocation of access time to cater for the same. This is notwithstanding the fact that these schedules and arrangements may change on short notice, and thus call for new access arrangements to be entered into from time to time. We have seen an influx of cases involving parental disputes concerning supervision of online classes and ensuring that online homework are completed and submitted on time. In extreme situations where parents are not able to resolve their differences, the Family Court may be prepared to treat these as "urgent and essential business".

Interim Financial Measures

The general economic downturn triggered by COVID-19 also means that there is likely to be an **increase in the number of interim financial applications**. While individual working parents

with stable jobs and sufficient savings may not be as affected, some cases may call for urgent applications, such as where the sustenance of a parent (and perhaps the child) may wholly depend upon the timely maintenance payments by the other. It is envisioned that in the short run, these "urgent" applications may increase in number as job losses and other financial downturns begin to impact personal finances. Parents and the Family Court will have to balance the welfare and best interests of children with the practical reality that income may have decreased (or ceased altogether) and savings built up in the past may be running dry.

Temporary Removal and "Return" Applications

These matrimonial troubles also have an international dimension. As is increasingly clear, the COVID-19 epicentre is changing by the minute. Having started in Mainland China and then spreading throughout Asia, USA has now overtaken the rest of the world with the most infection cases, with Italy and Spain not far behind. Europe, seemingly the 'safe haven' just months ago, sees most of its countries now in lockdown. During February, parents previously made applications for the temporary removal of their child out of Hong Kong (to perceived 'safe havens' such as Europe, UK or USA), but we are now seeing parents seeking the return of children back to Hong Kong as the situation in Europe, UK and USA have drastically worsened. In the past weeks, however, Hong Kong has seen new waves of infections with no signs of slowing down. Parents are having to struggle with the difficult question of – Where in the world is the safest for my child ? And does air-travel in and of itself pose dangers ?

The everchanging circumstances pose a slew of questions, of which the first and foremost is this: **where does the best interest of the child lie?** Being the paramount consideration in almost every aspect related to children matters, the assessment of a child's "best interest" becomes ever more elusive in these trying times of a global epidemic. The Courts will no doubt have to make more difficult and arguably somewhat subjective decisions concerning very real issues of a child's health and safety, and practitioners will have to be prepared to go through the latest updates on COVID-19 to argue their case.

The meaning of a child's "habitual residence" may also be put to the test. If COVID-19 continues long enough with the child removed from Hong Kong (or vice versa), could the "habitual residence" of the child change and thereby jeopardize a "Hague applications" for the child's return if he/she continues to be wrongfully retained in a foreign country thereafter?[1]

As recognized in **LCYP v JEK (Children: Habitual Residence)** [2015] 4 HKLRD 798 (CA), the issue of "habitual residence" is a question of fact, and the question to be asked is whether the residence of a particular person in a particular place acquired the necessary degree of stability to

[1] Under the 1980 Hague Convention on the Civil Aspects of International Child Abduction, effected through the Child Abduction and Custody Ordinance (Cap.512).

be habitual.[2] With the COVID-19 situation being anything but clear, there can simply be no telling how long a child's "temporary removal" may last, and granted a long enough period, it is a possibility that the intended "temporary removal" becomes something of a more permanent nature and it is not inconceivable that one of the parents may begin to argue that thereby a child's "habitual residence" has changed. This may have an unexpected effect on the making of "Hague applications", as one of the requirements for the Hague Convention to apply is that immediately before the child's removal, he/she has to be "habitually resident" in and under the law of that State.[3]

Observations

These are only a few of the many issues faced by broken families in the time of COVID-19.

Where the fine balance in these matrimonial matters is often hanging on by a thread, the inaccessibility of the courts created by COVID-19 can have a tremendous adverse effect, putting unnecessary stress on already litigating parties, and ultimately at the detriment of the child if one is involved. At the end of the day, the Judiciary must remain flexible with what they consider to be "urgent and essential" matters, particularly in the context of matrimonial cases where child custody, care and control, access and financial maintenance are involved. Recent experience has shown that the Family Court have these considerations well in mind, and comparison between the Family Court and other Courts appears to show that the Family Court has been far more active than other Courts in terms of the number of cases being permitted to be heard during the GAP period. This however, has further increased the workload of our Family Judges, who are already amongst the most heavily burdened Judges in our Judiciary system.

[2] §7.7 of **LCYP v JEK** (*supra*).
[3] Article 3 of the Hague Convention.

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