EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE FAMILY COURT
AT TE AWAMUTU

FAM-2015-070-000482
FAM-2015-070-000483
[2018] NZFC 6778

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[ZACHARY FARLEY] Applicant
AND	[BUNDARIK NANTAKARN] Respondent

Hearing:	30 August 2018
Appearances:	G O'Brien for the Applicant S Lister for the Respondent N Palmer as Lawyer for Child P Kunkulvoranunn - Interpreter
Judgment:	30 August 2018

ORAL JUDGMENT OF JUDGE R H RIDDELL

Introduction

[1] Mr [Farley] and Ms [Nantakarn] are the parents of [Alana] who will turn five on [in several months' time]. Mr [Farley] has filed an application in respect of a guardianship dispute asking that [Alana] not be immunised. That application was filed in November last year. Ms [Nantakarn] supports the immunisation. The matter has been the subject of a number of affidavits filed by both parties. Somewhat surprisingly neither party has elected to file any medical or specialist evidence about immunisation.

[2] Mr O'Brien is agent today for Mr [Farley]'s usual lawyer and while Mr O'Brien has filed some written submissions it is his overall submission that the proceedings should be adjourned to allow specialist medical evidence to be filed.

[3] After hearing the submissions of all counsel (including lawyer for child) I have determined that this matter should be heard by submissions today and that a decision must be reached. There is no question of a hasty decision since these proceedings have been before the Court since November 2017. Mr [Farley] in particular has had plenty of time to seek leave and to file specialist medical evidence in support of his position. He has not done so, however he has filed as part of his affidavit evidence the results of certain informal studies and surveys about immunisation which he wishes to put before the Court.

Objections

[4] Mr [Farley]'s objection to immunisation is founded on four different planks. Firstly, he says that their daughter [Alana] was immunised at the age of one in [an overseas country] and suffered a severe reaction. He is presumably fearful of a repeat of that same kind of reaction.

[5] Secondly, he has given evidence that there is rheumatoid arthritis in his family and he is concerned that condition may be associated with the medication contained in immunisations. He is also concerned that immunisation may lead to rheumatoid arthritis. He concedes that other family members have not developed that condition but his mother has.

[6] Thirdly, his other children who are half-siblings to [Alana] have been immunised and they have an assortment of health issues. They include eczema and asthma. He is concerned at the link between immunisation and his other children developing those ailments.

[7] Fourthly, Mr [Farley] relies on various research to support his position. In his affidavit of 12 March 2018 he has attached the findings of a survey carried out on children in the US who are aged between six to 12 years. That survey concluded that vaccination was significantly associated with various health problems.

In support

[8] Ms [Nantakarn] supports immunisation for the following reasons:

(a) Firstly, she says that [Alana] has already had two immunisations, one at birth and one when she was a year old.

(b) Secondly, she relies on the recommendation of the Ministry of Health that immunisation can protect a child against harmful infections.

(c) Thirdly, she disputes that [Alana] suffered a severe reaction to the immunisation when she was one. At worst [Alana] was stressed and had a 24-hour fever. She points to the Ministry of Health guidelines which notes that redness and soreness at the site of the injection are common.

(d) Fourthly, she notes that the respondent has not provided any proof of the existence of chronic health problems in his family and nor has he provided any causal link between immunisation and the chronic health problems that he alleges exist.

(e) Fifthly and finally, Ms [Nantakarn] notes that [Alana] will start school in December and if she is not immunised there may be some future implications for her. For example, if there is a measles outbreak [Alana] will have to be quarantined at home.

The law

[9] These proceedings are governed by s 46R of the Care of Children Act 2004. In that section where two guardians of a child are unable to agree on a matter concerning the exercise of their guardianship then either may apply to the Court for a determination. It is for the Court to determine how the hearing will be conducted based on the evidence provided. The Court must approach the dispute in an objective fashion and determine the outcome based on the evidence and using judicial discretion. Where possible it is always preferable for parents to determine a

guardianship issue and it is only when the dispute is such that there is no agreement that the Court is forced to step in and make a decision for the parents. In any proceedings concerning a child the most important consideration is found in s 4 which provides that a child's welfare and best interests are the most important consideration.

[10] Section 5 also sets out a number of principles to which the Court must have regard. Two of those principles relevant in this particular dispute and they are found at s 5(a) in that a child's safety is the paramount consideration and in s 5(d) that it is important for a child to have continuity in her care, development and upbringing. Section 6 deals with a child's views and where possible or practicable the Court will seek a child's view. It has not been sought in this case and neither parent is asking for [Alana]'s views to be obtained. It is accepted that this is an adult-based dispute. Every case must be determined on its own unique facts and indeed every child is unique as are the child's parents.

[11] I have been referred to a number of cases which contain judicial dicta about the principle of immunisation. I refer in particular to the decision of *Stone v Reader*[1] where Judge Otene noted that she was entitled to take judicial notice of the New Zealand Health system recommendations for vaccination. She noted too that that recommendation for vaccination is based upon a body of medical evidence. In another decision by Judge Druce in *Victor v Emmerson*[2] His Honour noted that immunisation was seen as customary, standard and usual.

Decision

[12] It would have been preferable for the Court to be provided with specialist medical evidence about immunisation where a party alleges it is not an entirely safe practice. Mr [Farley] has reproduced an article from the internet which has been attached to his affidavit and it is argued by counsel for Ms [Nantakarn] that that article has been retracted. That is because it consisted of an online survey to be carried out by various parents. It did not include a blind study, was not independently funded and has been discredited to the extent that it has been removed from the website of the

[1] *Stone v Reader* [2016] NZFC 6130.
[2] *Victor v Emmerson* [2015] NZFC 8612.

Journal of Translational Science. The party who wishes to advance what is a more unusual position has the onus of putting forward credible evidence. That article does not represent credible evidence.

[13] Mr [Farley]'s first objection is to the vaccinations carried out in [the overseas country] and his counsel initially submitted that it was without Mr [Farley]'s knowledge or consent and that Mr [Farley] had no information about that immunisation. That assertion is found at paragraph 1.4 of his submissions. Some time ago that objection was raised in Court by Mr [Farley] and I directed that he was to be provided with a copy of the [overseas country] document regarding immunisation so that he could have it translated for his own use. He was given that document and he did have it translated. That ground of objection has since been withdrawn.

[14] His second objection is the concern about his mother's condition of rheumatoid arthritis and whether that condition may have been caused by her having been immunised. No evidence has been provided of any suggested link.

[15] The third objection concerns his other children who have been vaccinated. One child has asthma and the other has eczema. Mr [Farley] is concerned that those conditions may have been caused by immunisation. That suggests that Mr [Farley] either consented to his other children being immunised or if he did not certainly did not file any proceedings in the Family Court regarding that immunisation.

[16] His fourth objection was founded on the surveys he has read, the research and the findings to which I have already referred. I have already indicated that the survey has been retracted and therefore has no medical basis by which any medical person would give the study validity.

Decision

[17] I have reached the conclusion that [Alana] should be immunised. There are a number of reasons which contribute to that finding and they are as follows:

(a) Mr [Farley] relies on what he describes as a severe reaction to [Alana]'s immunisation in [the overseas country]. In fact the reaction that he then

described could not be seen as severe or significant and it is in line with the reaction set out in the Ministry of Health guidelines for New Zealand children who are immunised.

(b) The article put forward by Mr [Farley] as supporting his opposition to immunisation has been discredited as detailed above.

(c) I am entitled to place weight on the Ministry of Health recommendations in the absence of any other specialist medical evidence.

(d) This child starts school in December this year. This matter has been before the Court for nine months. That is plenty time for all the evidence to be put before the Court and the matter must be determined without further delay.

(e) One of the reasons for seeking an adjournment today was that Mr [Farley] says he has not undertaken any investigation about genetic testing to eliminate the risks of genetically inherited diseases and he would like the opportunity to do so and would meet the cost of that. It is my view that if that were a serious and genuine concern on his part then he could have arranged for that to be undertaken at any time in the last nine months.

(f) Mr [Farley] has produced no medical evidence that is credible before this Court to demonstrate the degree of risk. Were there such evidence I would have certainly considered it. In its absence I am left with the Ministry of Health guidelines as recommendations for children being immunised.

(g) Immunisation protects children and the wider community from preventable diseases. If [Alana] were not immunised there would be consequences for her whenever there was an outbreak of a contagious disease.

[18] Accordingly, for those reasons and the discussion above I have reached the clear conclusion that [Alana] will be immunised. That should be undertaken by her doctor at the soonest possible opportunity to ensure it is completed by the time [Alana] starts school.

[19] Both parties are legally aided and so I make no order as to costs.

[20] The parties are currently awaiting a s 133 psychological report. When that is filed with the Court both parties will have an opportunity to discuss it with their lawyers. Thereafter counsel should be in a position to indicate what timetabling directions are required to progress all outstanding matters to a substantive hearing and there will be a judicial conference on 19 December 2018 at 10.00 am for that purpose. In the event that the report has not been received by then counsel should seek an adjournment.

R H Riddell
Family Court Judge