

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

**NOTE: PURSUANT TO S 437A OF THE ORANGA TAMARIKI ACT 1989,
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 MASTERTON**

**I TE KŌTI WHĀNAU
KI WHAKAORIORI**

**FAM-2016-020-000258
[2022] NZFC 1820**

IN THE MATTER OF	THE ORANGA TAMARIKI ACT 1989
BETWEEN	OPEN HOME FOUNDATION Applicant
AND	[PAMELA BUTLER] [CHRIS GOULD] Respondents

Hearing: 28 February 2022

Appearances:

G Freeman for the Applicant (via telephone)
C Leader for the Respondent [Butler]
No appearance by or for the Respondent [Gould]
B Inglis as Lawyer for the Child
M Vanos as Social Worker

Judgment: 28 February 2022

ORAL JUDGMENT OF JUDGE A R McLEOD

[1] This is the outcome of a short hearing in relation to the issue of whether or not [Kathleen Butler-Gould], born on [date deleted] 2012, should be immunised with the COVID-19 vaccination.

[2] I am issuing an oral decision at the conclusion of the hearing. Accordingly, I reserve the right to amend and edit my decision and to include any further reasons for my decision.

Hearing by AVL

[3] The hearing has proceeded by way of AVL. The reason for that is because I am currently sitting in the Porirua court this week. Attending by way of AVL today from the Masterton Family Court is Ms Leader, as counsel for Ms [Butler]; Ms [Butler]; Ms Inglis who is the lawyer for [Kathleen] and Ms Vanos, who is the Open Home Foundation social worker. Ms Freeman, who is counsel for the Open Home Foundation, has attended the hearing today by way of telephone.

Background information

[4] Briefly by way of background, [Kathleen] is in the custody of the Open Home Foundation by the way of a s 101 custody order. [Kathleen], who is referred to generally as [Kathy], has three guardians. She has two natural guardians, Ms [Butler], her mother, Mr [Gould], her father, and the Open Home Foundation, who are appointed as an additional guardian in conjunction with her two natural guardians.

The application

[5] On 16 February 2022 the Open Home Foundation applied on notice for a guardianship direction for [Kathy] to receive the COVID-19 vaccination. At the same time, they applied without notice to reduce the time for filing a defence to three days. That application was granted by the registry on 18 February 2022.

[6] Ms [Butler] was served and filed a notice of response and an affidavit in support on 22 February 2022. Mr [Gould] has not taken any steps in relation to the application, although I do not have confirmation on the court file as to whether he has been served or not. I will come back to address that issue in a moment.

[7] The current situation for [Kathy] is that she lives with caregivers, Mr and Ms [Keale]. She has lived with them for approximately one and a half years and she has known them throughout much of her life.

[8] Ms [Butler] is currently in the process of seeking the return of [Kathy] in her care. I think it would be fair to say, at this stage, it is a work in progress although Ms [Butler] is actively working towards achieving that goal.

[9] The Open Home Foundation want [Kathy] to be vaccinated and Ms [Butler] does not. Mr [Gould], I am told, consents to [Kathy] being vaccinated.

[10] The current proceedings in relation to [Kathy] were before the Court on 23 February 2022. I was invited to deal with Open Home Foundation's application on that date, essentially in the absence of Ms [Butler]. Ms [Butler] was at court but was outside the courthouse. Ms [Butler] was unable to be in court that day because she is not vaccinated with the COVID-19 vaccine and she had not undergone the requisite testing to enable her to gain entry to the courthouse.

[11] I declined to deal with the application without hearing from Ms [Butler] and set the matter down for urgent hearing today, primarily to give Ms [Butler] the opportunity to be heard in relation to the application. Ms [Butler] is one of [Kathy]'s three guardians and it is appropriate that she is heard in relation to this issue.

[12] The hearing proceeded by way of the social worker giving her evidence first. She was cross-examined by Ms Leader and by Ms Inglis. Ms [Butler] then gave her evidence. She was cross-examined by Ms Freeman, on behalf of the Open Home Foundation, and by Ms Inglis as well.

The parties' positions

Open Home Foundation

[13] The position of the Open Home Foundation is that the Court should adopt the recommendation from New Zealand health authorities and the government and make an order for [Kathy] to be vaccinated with the COVID-19 vaccine, which has now

been approved to be delivered to children in [Kathy]'s age group. [Kathy] is [nine] years old.

[14] As outlined in the written evidence of Ms Vanos, the application was advanced in response to a request by [Kathy]'s caregivers that [Kathy] receive the vaccination. The concern was to avoid [Kathy] catching COVID19 for her own health and wellbeing.

[15] However, there was also a concern by Mr and Mrs [Keale] to ensure that any risks associated with Mrs [Keale] and other family members catching COVID19 was mitigated as much as possible. Mrs [Keale] suffers from a number of chronic health conditions including asthma and atrial fibrillation. Mr and Mrs [Keale]'s son in law who regularly visits the home is immune compromised. Mr and Mrs [Keale] also have a number of grandchildren who suffer from asthma who are too young to receive the vaccination. Accordingly, Mr and Mrs [Keale] are taking every precaution they can to avoid catching COVID19.

[16] The concerns were such that Mr and Mrs [Keale] had considered whether [Kathy] should be removed from school and be home schooled to mitigate any risk of [Kathy] catching the virus. Mr and Mrs [Keale] did not believe that this would be in [Kathy]'s interests however it appears that they were having to weigh the risks with continuing to be able to care for [Kathy] vs [Kathy] not going to school.

[17] From the evidence that I heard from Ms Vanos under cross-examination, the Open Home Foundation have not done any independent research to obtain any specific medical advice in relation to whether there may be any consequences for [Kathy] specifically should she receive the vaccination. They are instead seeking to rely on the Ministry of Health information and advice, and the government position.

[18] The Open Home Foundation did not feel a need to obtain further and more specific information because they are not aware of any medical issues that present for [Kathy] that would warrant further exploration as to whether there would be any consequences specifically for [Kathy]. There is no evidence that the vaccination would be contraindicated for [Kathy].

Mr [Gould]

[19] In relation to Mr [Gould]’s position, Ms Vanos gave evidence that he was contacted by the practice manager as Ms Vanos was away on leave at the time. Mr [Gould] is reported to have replied to the practice manager by way of leaving a voicemail on the telephone saying that he consented to [Kathy] being vaccinated. The practice manager is then said to have contacted Mr [Gould] back and had a discussion with him following which he gave verbal consent to the vaccination. It was Ms Vanos’ evidence that his verbal consent to the vaccination was obtained on 1 February 2022.

[20] I have no reason not to accept the evidence of Ms Vanos despite the evidence on the face of it being hearsay. In any event, I would admit the evidence as I am satisfied that the evidence is relevant; I am satisfied that the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and further, it is not uncommon for evidence of social workers to come into court this way and to be admitted as a business record.¹ On that basis, I am satisfied that Mr [Gould] has provided his consent as a natural guardian of [Kathy] to her receiving the COVID19 vaccination and accordingly I dispense with service on Mr [Gould].

Ms [Butler]

[21] Broadly, what I understood Ms [Butler]’s position to be is that the Ministry of Health and the government cannot be relied on, nor can the World Health Organisation. It is Ms [Butler]’s understanding that those three agencies are withholding important information about what is in the vaccine.

[22] Ms [Butler] said that she had done her own research on the internet. She described herself as a “nerd” who likes to undertake research and gather information. Ms [Butler] is concerned to avoid her children being used as guinea pigs. She does not want them to be part of an experiment in relation to the vaccine, particularly in the context of the Ministry of Health, the government, and the World Health Organisation not being fully transparent about the contents of the vaccine.

¹ Evidence Act 2006, ss 7, 17, 18 and 19.

[23] Ms [Butler] said that she knew of people who had had some quite serious adverse side effects, and she believes that there are many people who do not want to get vaccinated.

[24] Ms [Butler] confirmed under cross-examination that her children have all been immunised with the usual childhood vaccines, but that she has not consented to [Kathy] getting this particular vaccination because she does not believe that there has been enough research into the impact of the vaccination. Her perspective of her children getting the other immunisations when they were younger is that there had been years of research into those vaccinations and so she was entirely comfortable, at that stage, going along with the medical advice for her children to get vaccinated in the usual way and in line with the usual immunisation schedule.

[25] Ms [Butler] was clear, in response to questioning from Ms Inglis, that she did not accept that the risk of [Kathy] getting COVID, or not getting as sick if she did get COVID, would be lowered if [Kathy] was vaccinated. Ms [Butler] was clear that she does not accept the evidence that the Ministry of Health and the government are relying on in recommending that children over the age of five get vaccinated. Ms [Butler]'s position is that there is no benefit to getting the vaccine because it does not reduce the risk of getting COVID and does not reduce the risk of getting as sick if you do get COVID.

[26] Ms [Butler] was also clear that from her perspective parents should have the right to decide whether children get immunised or not, and they should not be forced into making the child get vaccinated just to avoid someone else from getting sick. Ms [Butler] is aware of the vulnerabilities of the [Keales]. She is aware that if COVID was brought into their home that it may negatively affect them, and in a reasonably serious way, but she does not accept that their vulnerabilities should be used as an excuse for [Kathy] to get vaccinated.

The legal position

[27] Ordinarily it is for guardians to make decisions about what is best for their children. However in this case Ms [Butler] as a guardian and the Open Home

Foundation as a guardian have been unable to agree on what is best for [Kathy], in which case it is for the Court to make a decision about what is best for [Kathy] in terms of the COVID19 vaccination.

[28] I accept what Ms [Butler] is saying, which is that any decision should be made about what is best for [Kathy], not what is best for the [Keales]. The law requires that at the forefront of my decision-making must be what is best for [Kathy]. What is going to advance her interests and welfare. My decision must be made in the context of [Kathy]'s particular circumstances.

[29] The law also requires that I consider the principles in s 5 and work out which ones are relevant to [Kathy]. I consider that of particular relevance to [Kathy] in her particular circumstances is her continuity of care, development and upbringing.

[Kathy]'s views

[30] In making a decision about what is best for [Kathy], I must take into account her views on the matter.

[31] Ms Vanos and Ms Inglis, in their respective roles as social worker and lawyer, have said that [Kathy] does want to get vaccinated. They say that [Kathy] understands that there is some benefit to receiving the vaccination. In Ms Inglis' most recent report she said that last year [Kathy] was not that keen on getting vaccinated, but that [Kathy] has recently changed her mind and does wish to receive the vaccination.

[32] I have two professionals who act as advocates for [Kathy] who are telling me that [Kathy] does wish to be vaccinated. Ms Inglis has set out at paragraph 10 – 12 of her report dated 23 February 2022 [Kathy]'s views.

[33] Ms [Butler] is concerned about [Kathy]'s view. Ms [Butler] believes that [Kathy] has been influenced in her views, and in particular by the [Keales]. Ms [Butler] is concerned that she herself has not had the opportunity to talk to [Kathy]. So, in effect, Ms [Butler] does not accept what [Kathy] is saying.

[34] At nine and a half years old [Kathy] is of an age where her views should be afforded reasonable weight but are unlikely to be determinative.

Decision

[35] The Open Home Foundation has brought this application under urgency, because Omicron is spreading throughout the community at a reasonably alarming rate. I understand that the number of cases today was somewhere around 12,000 cases. Under the circumstances, it is an appropriate application for the Open Home Foundation to have brought.

[36] After having heard the evidence today, I am satisfied it is in [Kathy]'s best interests and welfare that she does receive the COVID-19 vaccination.

[37] While I accept what Ms [Butler] is saying, which is that her decision for [Kathy] must be made in terms of what she believes is best for [Kathy], and that my decision for [Kathy] must be about [Kathy] and not the [Keales], [Kathy] does not live in isolation.

[38] [Kathy]'s current circumstances are that she does live with Mr and Mrs [Keale]. [Kathy]'s living circumstances are inextricably linked to those of her caregivers. If there is any risk that [Kathy]'s placement with the [Keales] may be put at risk, or that [Kathy]'s ability to attend school is put at risk, then my view is that any such risk should be mitigated. It would not be in [Kathy]'s best interests and welfare that her placement is disrupted. It is also not in [Kathy]'s best interests that her ability to go to school is disrupted. This is particularly so when the context is that Ms [Butler] is working towards a return home goal. That may in and of itself bring about changes for [Kathy]. There is no advantage to [Kathy] in the meantime of either her care arrangements or schooling being interrupted pending possible further change.

[39] There is no evidence before the court that the vaccination is contraindicated for [Kathy]. Ms [Butler] has not put any evidence before the court to challenge the position taken by the Ministry of Health, the government and the World Health Organisation that the vaccination is important for personal and public safety,

particularly in regard to the current pandemic; and, that the vaccination is the best possible way to ensure as best as possible individual protection from infection or, if infected, to reduce the potential seriousness of the infection on the individual and the potential spread of the virus to other members of the public – and in particular in this case for [Kathy], to protect her from infection.

[40] The weight of the evidence in this country and throughout the world, and the stance taken by this government and the Ministry of Health is that vaccination is important. While I accept what Ms [Butler] says, which is that individuals are entitled to make choices, such choices are not made in isolation. Further, while children remain subject to guardianship decisions by their parents or, as in this case, the Open Home Foundation and Ms [Butler] as [Kathy]’s guardians, because [Kathy]’s guardians have been unable to reach agreement Ms [Butler] and the Open Home Foundation have abdicated their right to make the decision about this to the court.

[41] Ms [Butler]’s evidence was that there are more people in New Zealand who are opposed to being vaccinated than those in support. I find Ms [Butler]’s evidence in that regard difficult to reconcile with the information released from the Ministry of Health which is that New Zealand has a vaccination rate of approximately 94 per cent across the country. On that basis, those people who are opposed to getting the vaccination are well in the minority, not the majority.

[42] Again the only reliable evidence available to me, is that released from the Ministry of Health and the government around the efficacy of the vaccination and the ability of it to reduce the spread to keep everyone safe and to reduce the impact if you do get COVID-19. As I say, I have no evidence to the contrary that has been put forward by Ms [Butler], that would lead me to a different conclusion other than the information that we all have access to from the Ministry of Health and the government.

[43] In terms of [Kathy]’s views, they are set out clearly in particular in Ms Inglis report. I am satisfied that [Kathy] has been exposed to a number of different views about the vaccination. Ms Inglis has reported that [Kathy] knows people that have and people that haven’t been vaccinated. [Kathy] is aware that her siblings [Isaac] and [Jean] have received the vaccination. I have noted the comment in Ms Inglis report

about [Kathy] possibly being influenced by [Isaac] getting a hamburger voucher and therefore [Kathy] thinking that perhaps she may get McDonald's were she to get the vaccination. Whether that has influenced her decision or not, ultimately as noted above, [Kathy]'s views in relation to the issue before the court, at her age, are unlikely to be determinative.

[44] I have taken her views into account as I must. However, even were [Kathy] opposed to getting the vaccination, that would not have changed my decision.

[45] For [Kathy], in her particular circumstances, I am satisfied that it is in her best interests and welfare that she receives the COVID19 vaccination.

Order and Directions

[46] On the basis of the foregoing, the following orders and directions are made:

- (a) An order is made that [Kathy] is to receive the COVID19 vaccination.
- (b) There is a direction that once Dr [Donovan]'s report in relation to [Kathy] is available, Ms Inglis is able to sit with [Isaac] and go through that section of Dr [Donovan]'s report that relates to [Isaac] to ascertain from [Isaac] whether or not he is comfortable with his mother having access to that specific section of the report that relates to him.

Judge AR McLeod
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 14/03/2022