

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

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**IN THE FAMILY COURT
AT HAMILTON**

**I TE KŌTI WHĀNAU
KI KIRIKIROA**

**FAM-2020-019-000621
[2022] NZFC 3250**

IN THE MATTER OF THE CARE OF CHILDREN ACT 2004

BETWEEN [BRIAN CANTRELL]
 Applicant

AND [ELYSE CANTRELL]
 Respondent

Hearing: 11 April 2022

Appearances: Applicant appears in Person
 S Fox for the Respondent
 M Roots as Lawyer for the Children

Judgment: 11 April 2022

ORAL JUDGMENT OF JUDGE N J GRIMES

[1] The parties are the parents of four children, [Tobias] aged 19, [Rhys] 16, [Tyler] 14 and [Maisy] 12. This decision relates to [Rhys], [Tyler] and [Maisy].

[2] Mr [Cantrell] has applications before the Court to:

- (a) admonish Mrs [Cantrell] for her unilaterally allowing [Rhys] and [Tyler] to be vaccinated against COVID-19 against Mr [Cantrell]'s wishes;

- (b) obtain an order that [Rhys], [Tyler] and [Maisy] not be further vaccinated against COVID-19.

[3] Each party has filed two affidavits and on 23 December 2021, his Honour Judge Collin set the applications down for a half-day hearing.

[4] Mr Roots represents the three children as he has done for some time. He met with the children separately in advance of the hearing. All three advised Mr Roots they wished to receive the vaccination with [Tyler] and [Maisy] keen to meet me as the decision maker. That occurred at the commencement of this hearing with my issuing a separate minute as to the discussions and the children's comments.

The position of Mr [Cantrell]

[5] Mr [Cantrell]'s position in relation to vaccination is:

- (a) The parties had an agreement that the children would not be vaccinated.
- (b) That contrary to the agreement, [Rhys] and [Tyler] had their first COVID-19 vaccination in October 2021 which was a breach of guardianship rights given his consent was required, and it had not been sought; and
- (c) He does not agree to the children being further vaccinated or [Maisy] being vaccinated as he is concerned at the risks of doing so, in particular from Myocarditis, outweigh the benefits.
- (d) Mr [Cantrell] does not believe that vaccination of children against COVID-19 is necessary or beneficial. Rather than relying on the New Zealand Government COVID-19 website, Mr [Cantrell] has referred in his affidavits to other studies and provided website links for the same suggestive that the risks of vaccinations including developing Myocarditis outweigh the risks of contracting COVID-19. He has also provided a graph of weekly adverse events as opposed to numbers jabbed.

[6] With respect to admonishment of Mrs [Cantrell], Mr [Cantrell] identifies in his evidence that;

- (a) Mrs [Cantrell] has previously been warned for breaching the parties parenting order.
- (b) Mr [Cantrell] is upset that their previous decision not to have the children vaccinated has been ignored by Mrs [Cantrell]. In particular he noted that this decision was made after [Rhys] had been immunised as a [toddler] for MMR and DTP and was subsequently diagnosed with autism. At that point the parties considered there was a link between immunisation and autism and decided against the younger children being immunised.
- (c) There is a lack of other medical information being provided to him in a timely fashion including [Maisy] spraining her wrist and [Tyler] fracturing his leg.
- (d) [Tyler] changed secondary schools to [School A] without his father's knowledge or consent, this year.

The position of Mrs [Cantrell]

[7] Mrs [Cantrell] is apologetic for the boys being vaccinated not appreciating this was a guardianship decision. Mrs [Cantrell] had thought this was a decision that the children could make independently. She has accepted that it was silly of her, was not done maliciously and that the children had been very vocal about wanting to be vaccinated after family discussions regarding this.

[8] Mrs [Cantrell] has provided medical evidence from [Rhys]'s specialist paediatrician that as a result of his type 1 diabetes it is very important for him to have a full course of the COVID-19 vaccination as it is well known that diabetes increases the risk of getting severe COVID-19.

[9] Mrs [Cantrell] has exhibited information from the New Zealand Ministry of Health COVID-19 website supportive of the vaccination being safe for children. Mrs [Cantrell] says that whilst the parties previously agreed not to immunise the children, this was a long time ago and that times have now changed with her no longer believing that [Rhys]'s autism is as a direct result of being immunised as an infant. Mrs [Cantrell] is a trainee nurse and has been privy to research on this matter.

[10] Mrs [Cantrell] is not only worried for the children should they contract COVID, but that there have been many occasions when the children have been prevented from engaging in activities because of their vaccination status.

The law

[11] Sections 15 and 16 of the Care of Children Act 2004 ("The Act"), first define guardianship and set out more particularly in s 16 what the exercise of that role involves. As part of the duties, powers, rights and responsibilities of the guardian is to determine for or with the child or help the child to determine questions about important matters affecting that child. One of these includes medical treatment. No one has disputed vaccination is medical treatment.

[12] Section 46R of the Act provides the jurisdiction for this court, once an application has been filed, to make any order relating to the matter at issue that it thinks proper.

[13] In making my determination the overriding welfare principle as set out in s 4 means this must be a child focused enquiry with the welfare and best interests of each child as the paramount consideration. Each particular child must be considered rather than a generalised decision for the children as a group.

[14] I must have regard to the principles in s 5 of the Act and the advice from the Supreme Court in *Kacem v Bashir*.¹ Section 6 mandates that I am required to have regard to the views of the children where expressed.

¹ *K v B* [2010] NZSC 112, BC201064340.

[15] Counsel have referred me to prior Family Court decisions concerning vaccination and there are others I note. For example it is worthwhile noting that Judge Burns in the *Lawson v Pugh* decision held that evidence from the Ministry of Health and applied by district health boards was that the general view of reputable medical opinion is in favour of vaccination on the basis that the benefits outweigh the risks.² In that case the opposing mother had not provided any medical evidence other than very general articles that her son had any risks outweighing the benefits of receiving the MMR vaccination.

[16] In *Stone v Reader*, Judge Otene held that a Family Court can take judicial notice of the fact that the government agency responsible for the management and development of the New Zealand health system recommends vaccination for all New Zealanders based upon a body of medical evidence.³ On that basis the best evidence before the Court of protection of the children from disease is by way of the Ministry of Health recommended immunisation schedule.

[17] In this case I find the most relevant COVID-19 information before the Court comes from the Ministry of Health. I also take note of two recent cases dealing with COVID-19 vaccination, namely a decision of Judge Coyle in *Long v Steine*, and his Honour Judge Flatley in *Holloway v Parsons*.⁴ There are a number of general principles that his Honour Judge Coyle set out including:

- (a) The welfare and best interests of the child and their particular circumstances must be the first and paramount consideration.
- (b) The views expressed by the child must be considered but also weighed against age and maturity.
- (c) Bill of Rights considerations in terms of s 11 of the New Zealand Bill of Rights Act 1990 have application, noting transmissibility and risks associated with COVID-19 fetters some of those rights. Having

² *Lawson v Pugh* [2019] NZFC 5092, BC201964707.

³ *Alex Stone v Sophie Reader* [2016] NZFC 6130, BC201665109.

⁴ *Long v Steine* [2022] NZFC 251, BC202260186; *Holloway v Parsons* [2022] NZFC 805, BC202260390.

particular regard to the decision in *Four Aviation Security Services Employees v Minister of COVID-19 Response* where Cooke J stated among other matters:⁵

- (i) The High Court accepted the Pfizer vaccine had been approved by Medsafe and used in New Zealand for therapeutic not experimental purposes.
- (ii) The Pfizer vaccination is likely to contribute to reducing the risk of transmission of the Delta variant and also likely to materially contribute to minimising the risk of outbreak or spread.
- (iii) The High Court also held the vaccine is safe and effective and was significantly beneficial in preventing symptomatic infection of COVID-19 including the Delta variant and that it significantly reduces serious illness, hospitalisation and death.

[18] In his decision Judge Coyle also noted a number of cases have made it clear that in relation to younger children vaccination was recommended by the Ministry of Health guidelines.

Discussion

[19] The current situation in New Zealand is that the Omicron variant of COVID-19 is spread throughout New Zealand with some 750,000 confirmed cases and 500 deaths according to the Ministry of Health statistics. There is a high number of persons fully vaccinated against COVID-19, as high as 95 per cent. This demonstrates a high acceptance of the efficacy, reliability and minimal risk of the vaccination.

[20] I have already referred to the Ministry of Health guidelines. For children aged 12 to 16 years, the advice of the Ministry of Health is that young persons in those age

⁵ *Four Aviation Security Service Employees v Minister of Covid-19 Response* [2021] NZHC 3012, BC202163751.

groups should be vaccinated. I note that there have been clinical trials of the paediatric formulation of the Pfizer dose showing this dose was safer and generally only had mild side effects in all children. Two doses are recommended, and this is seen as adequate in older children for vaccination purposes.

[21] The Ministry information also states that whilst children who acquire COVID-19 will commonly have no symptoms or only mild respiratory symptoms, it records that some children can become very sick with the illness. Their advice for all children now remains that immunisation helps keep them safe.

[22] In this case Mr Roots met with the children to ascertain their views as to receiving the vaccination. Those meetings took place at the children's respective schools. The children advised Mr Roots they were aware their father was not supportive of vaccination because of their discussions with him.

[23] [Rhys] who is in year 12 has autism. I have heard from his mother today that he has a reading level of a year 2. He reported to Mr Roots he had no particular difficulty with having the vaccination, that he understood it protected him against COVID-19 and that he would be having the next vaccination on "The right day."

[24] [Tyler] is in year 10 at [School A], described by his parents as mature, sporty and intelligent. He reported that he had only one dose of the vaccination and knew that a further dose was required to complete his vaccination status. He thought it made sense to have it because he was unable to do certain things and that he would feel unsafe if he was not vaccinated. [Tyler] had a good understanding of vaccination having had discussions with both of his parents, his friends and receiving information from the internet.

[25] [Maisy] is in year 8 at [School B] and met Mr Roots with the school principal. [Maisy] was clear that she wanted to be vaccinated. She was able to tell Mr Roots the symptoms of a person who might catch COVID-19 and understood that being vaccinated would protect herself and other people and stop COVID-19 from spreading. She thought she should be given a choice and that it should be up to her to decide if she had the vaccine or not.

[26] Mr Roots' position is that the children's view needs to be taken into account and should be respected.

[27] In my meeting with [Tyler] and [Maisy], which is recorded in a separate minute, [Tyler] again stated that he would feel unsafe without the vaccine while [Maisy] stated she was confused why she did not get control over her own body.

[28] Mr Roots has filed helpful submissions regarding the issue of the children's view and their competency to give them. Mr Roots has referred to Judge Coyle's decision of *Long v Steine* where Judge Coyle made particular reference to Gillick competency.

[29] That case related to Charlie who was 12 and has particular relevance. Judge Coyle concluded that Charlie had weighed and considered the views of his parents and had reached his own conclusion that he did not want to be vaccinated. The fact that Charlie's views were contrary to the mainstream societal and scientific views was not a reason for the Court to intervene and make orders under s 46R. In that case the application to have Charlie vaccinated was dismissed.

[30] In *Gillick v West Norfolk and Wisbech Area Health Authority*, the Court accepted that children with sufficient maturity and understanding may be capable of providing consent without requirement of their parent's consent.⁶ That was because those children were deemed responsible to make authoritative decisions about their own body and health. The relevance of Gillick in New Zealand has been affirmed by the High Court in *Moore v Moore*⁷ and the *District Health Board v Dee*.⁸

[31] In *Hawthorne v Cox*, reference was made by Heath J to the Gillick decision.⁹ At para [60] his Honour set out the principles to be considered as:

⁶ *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, [1985] 3 All ER 402, [1985] 3 WLR 830, [1986] LRC (Const) 715, [1986] 1 FLR 224, 2 BMLR 11.

⁷ *Moore v Moore* [2014] NZHC 231, BC201465170.

⁸ *District Health Board v Dee* [2019] NZHC 834.

⁹ *Hawthorne v Cox* (2007) 26 FRNZ 440, [2008] 1 NZLR 409, [2007] BCL 975, [2008] NZFLR 1, BC200762053.

- (a) The younger the child, the more likely it is that decisions about important matters will need to be made by his or her guardian.
- (b) As a child gets older and becomes more mature, the guardianship role changes to that of an advisor or a counsellor endeavouring to assist the child to make the decision.

[32] I earlier recorded what s 16 of the Act says regarding a guardian's responsibilities which includes making decisions for children or to determine those decisions with children or help children to determine them. I find that given the ages of [Rhys], [Maisy] and [Tyler] that it is very true that Mr and Mrs [Cantrell] are now in the role of advisor or counsellor and to help their children make decisions about important matters affecting them such as medical treatment as opposed to making the decision for them.

[33] Mr Roots also referred to *Holloway v Parsons*. This is a case where Judge Flatley considered whether Ivan, who was nearly 12, should be vaccinated against the COVID-19 virus. Judge Flatley's decision did not traverse the landscape of Gillick competency, instead relying on s 4 of the Act. It was noted that Ivan was engaged with mental health services. The Court noted the parties' respective positions and in that case his father opposed Ivan being vaccinated whilst his mother wanted him to be vaccinated. Judge Flatley determined Ivan was to receive the vaccination against COVID-19 and his reasonings included:

- (a) A vaccine to protect against COVID-19 in all of its variants has been developed by leading scientific and medical experts from around the world. It has been tested by independent drug testing agencies and has therefore been subject to rigorous standard testing regimes albeit fast tracked providing results as to efficacy and safety.
- (b) There has been ample time for assessment and research as to the impact of vaccination.

- (c) There are a number of research articles now published in accredited medical journals which establish that the available vaccines are safe and effective.
- (d) Mr Parsons had not presented any medical or scientific evidence.
- (e) The best evidence available to Judge Flatley was information from the Ministry of Health, New Zealand Government and the World Health Organisation about the efficacy, protection and safety of vaccination particularly in relation to percentage changes of becoming unwell, hospitalised or dying.
- (f) The fact that while some of the information might be deemed anecdotal the Judge saw no reason for it to be discredited.
- (g) The article that Mr Parsons presented specifically related to the Delta variant of the COVID-19 virus rather than the now prevalent Omicron variant.
- (h) The Court noted that it was not able to traverse all of the information referred to in other articles and resources considered and noted.
- (i) The Judge had met with Ivan and determined that Ivan had good understanding of the situation, how the vaccination process worked and why people were being vaccinated.
- (j) Judge Flatley took Ivan's views into account but noted that they were not determinative. In conclusion Judge Flatley stated:

In short, vaccination provides the best protection from transmission, illness, hospitalisation and death and it should be available to Ivan. That is what is in his best interests and best supports his welfare. This overrides any benefits or "interests" associated with the opportunity to consider information available or provided to him both for and against vaccination.

[34] His Honour directed that Ivan was to receive the vaccination.

[35] In applying the law and the matters raised in these cases I take the following into account in my determination:

- (a) [Rhys] is compromised in his Gillick competency given his autism however he did not rail against having the first vaccination and is not opposed to having the second. He informed his teacher he wanted to be vaccinated. He was able to give an understanding to Mr Roots of what having the COVID-19 vaccination meant for him. On this basis whilst he has provided perhaps an indifferent view, his view in this case is not determinative. What I do have in relation to [Rhys] is the specialist paediatrician's advice that [Rhys] must be fully vaccinated against COVID-19 because of the high risk of a severe reaction to COVID-19 because of his type 1 diabetes. Accordingly, in terms s 4 of the Act, vaccination is in [Rhys]'s best interests and welfare.
- (b) In relation to [Tyler] and [Maisy] they are seen by their parents as being articulate and intelligent. That has also been noted by Mr Roots and certainly in my discussions with them. I felt they were impressive young people. They have both expressed a clear wish to be vaccinated.
- (c) I accept Mr Roots' view that it is very unlikely that they will refuse vaccinations if given the opportunity to be vaccinated. I also find that [Tyler] and [Maisy] have made an informed decision in their minds after the discussions they have had with both of their parents, at school and accessed information from the news and internet. In terms of the Gillick competency I find that both [Tyler] and [Maisy] are showing sufficient maturity and understanding capable of providing their consent.
- (d) I adopt the factors taken into account by his Honour Judge Flatley in *Holloway v Parsons*. The best evidence this court has is information from the Ministry of Health in that the vaccine has been developed by leading scientific and medical experts from around the world.

- (e) I acknowledge Mr [Cantrell] has provided the Court with a number of website links and as an unrepresented party has perhaps not appreciated that the Court is unable to click onto those links. There is a dearth of information on the internet regarding COVID-19. However, I am satisfied that the Ministry of Health and New Zealand Government websites are the most appropriate for this Court to consider.

- (f) I appreciate that for Mr [Cantrell], his bringing these matters to the Court has been not without considerable thought on his part. As he described it to me, he is in a lose/lose position. He strongly feels that the vaccination is unsafe for the children and that the risks outweigh the benefits. He appreciates that this goes against the children's views. As he put it to me if the children do get vaccinated then he is worried about the risks of side effects for them but if they do not get vaccinated then he would be seen as the bad guy in his children's eyes. He reported that having a meaningful relationship with his children has felt compromised many times. Whilst I accept there is always risks associated with vaccinations there is no evidence of [Rhys] and [Tyler] being adversely affected by their first dose of the Pfizer vaccine.

[36] I have determined that considerable weight needs to be given to the children's views and that those views accord with their best interests and welfare. I have no evidence that the vaccination will pose a greater risk to the children and if anything, I am most compelled by [Rhys]'s specialist paediatrician's advice.

[37] Accordingly, I make a direction that the children are to be vaccinated.

Admonishment

[38] Mr [Cantrell] has sought for Mrs [Cantrell] to be admonished under s 68 of the Act. This provides that the Court may, if satisfied that another party to the order has contravened the order, do any of the following:

- (a) Admonish the party who has contravened the order.

- (b) Vary or discharge the parenting order under s 56, for example by reducing time during which the child is in the care of or has contact with the party who has contravened the order.

[39] When proceedings first started in 30 July 2020, Mr [Cantrell] applied for a parenting order and to settle a dispute between guardians.

[40] Mrs [Cantrell] has at all times been represented by Ms Fox and filed a response to the dispute between guardians. I have no evidence to tell me that Ms Fox did not satisfy her duties under s 7B of the Care of Children Act 2004 as a lawyer providing advice to a person about arrangements for the guardianship or care of the child or both, that she must ensure Mrs [Cantrell] is aware of certain matters including the types of directions and orders that the Court may make if a proceeding is commenced.

[41] Therefore, I am satisfied that Mrs [Cantrell] has known since early 2020 what guardianship means. There has been an interim and final parenting order and last year there was an admonishment hearing.

[42] The current parenting order dated 13 January 2021 has the statement as follows:

If you are a guardian unless your role or another guardians role is modified by a court order you must act jointly (e.g. consulting whenever practicable with the aim of reaching agreement) when making guardianship decisions for a child.

[43] I find Mrs [Cantrell] has ignored that statement. She has ignored it since 2020 when she, without Mr [Cantrell]'s knowledge had all children fully vaccinated for MMR and DTP, that having previously been decided against by both parents.

[44] Notwithstanding, Mr [Cantrell] bringing it to her attention that he wished to discuss the COVID-19 vaccination with her on at least six occasions she chose to ignore his messages. These were on My Family Wizard, a method of communication that I had directed in March 2021 because of the parents' poor communication and their high parental conflict that is placing their children at serious risk. MyFamilyWizard has a tone meter. Despite this, Mrs [Cantrell] in her own mind

considers that Mr [Cantrell]'s messages are designed to be aggressive and she therefore will not respond. This means that she, by choosing not to respond or indeed starting perhaps her own line of communication to discuss the vaccination, allowed [Tyler] and [Rhys] to have their first COVID-19 vaccination without their father's consent.

[45] Given what I stated above I find that she was well aware that these were matters that needed further consultation. A message was sent by Mr [Cantrell] on MyFamilyWizard on 4 November 2021 that specifically spelt out the guardianship matters that needed consultation and agreement. This included school. Notwithstanding this, Mrs [Cantrell] chose not to communicate with Mr [Cantrell] over [Tyler] changing schools which occurred at the end of January 2022.

[46] Furthermore, I find that Mrs [Cantrell] has not kept Mr [Cantrell] informed of the children's health, particularly when [Maisy] sprained her hand and [Tyler] fractured his foot. These are issues that go above and beyond routine medical matters in which medical treatment was sought and obtained. These are most certainly matters that should have been discussed with Mr [Cantrell].

[47] I am most definitely concerned at the course that these matters are taking and said so on 22 March 2021. This has been echoed again by Mr Roots. I find in this regard Mrs [Cantrell] is not taking her role as a guardian seriously by not consulting with Mr [Cantrell]. If she has particular struggles regarding her personal relationship with Mr [Cantrell] then there are other forums that she can work that through, in particular her own individual counselling. It should not be taken out on the children and that is what is currently happening.

[48] As I alluded to in my March 2021 decision, parental conflict is deemed as an adverse childhood event. It will create significant issues for the children in relation to their ongoing mental health, their personal development, brain development, their capacity to fully engage in school and in their adult lives if it does not stop. Both parents should now turn their minds to that particular issue.

[49] Accordingly, I formally admonish Mrs [Cantrell]. She is now very much on notice that the second part of s 68 could be implemented whereby there are changes in the care arrangements.

[50] Accordingly, against that background I make the following orders and directions:

- (a) I make an order that [Rhys], [Tyler] and [Maisy] are to receive the paediatric doses of the Pfizer vaccine in accordance with the Ministry of Health guidelines as well as any future booster doses against COVID-19 in terms of any Ministry of Health recommendations if that situation arises.
- (b) Secondly, I formally admonish Mrs [Cantrell] for not informing Mr [Cantrell] on the children receiving a COVID-19 immunisation, the children being sent to the doctor/hospital for care after injury and for [Tyler]'s unilateral enrolment in [School A].

Judge NJ Grimes

Family Court Judge | Kaiwhakawā o te Kōti Whānau

Date of authentication | Rā motuhēhēnga: 02/05/2022