

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

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**IN THE FAMILY COURT
AT NEW PLYMOUTH**

**I TE KŌTI WHĀNAU
KI NGĀMOTU**

**FAM-2018-021-000108
[2022] NZFC 4325**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[RUSSELL GIBBS] Applicant
AND	[TESSA GIBBS] Respondent

Hearing: (On the papers)

Counsel: R Webb for the Applicant
Respondent is self-represented
A Vickers as Lawyer for the Children

Judgment: 18 May 2022

JUDGMENT OF JUDGE L HARRISON

Introduction

[1] On 7 April 2022 Mr [Gibbs] made an application to the Family Court to settle a dispute between guardians.

[2] He and the Respondent, Mrs [Gibbs], are the legal guardians of their three children: [Sophie Gibbs], born [date deleted] 2018, [Maisie Gibbs] and [Keira Gibbs], twins born [date deleted] 2020.

[3] The children are the subject of litigation about their day-to-day care and contact arrangements.

[4] They are also protected persons under a protection order made by consent on 6 May 2021 in favour of their mother against their father.

[5] An issue arose prior to a contact visit between Mr [Gibbs] and the children whereby Ms [Gibbs] advised Mr [Gibbs] that [Sophie] had a fever and she had been given Pamol.

[6] Ms [Gibbs] used the My Family Wizard app to communicate this to Mr [Gibbs] and states:

If the girls is not well please let me know on Sunday night otherwise you cannot take the girls to kindy as the rules have been stricтен.

[7] Mr [Gibbs] responded:

Has [Sophie] been tested for covid?

[8] Ms [Gibbs] replied:

Kids cannot be tested for covid. If you are going to do this behind my back I will be taking it further as I have been clarified from the Plunkett Nurse.

As I and my Mother are essential workers we are tested every day and we are negative.

Please let me know if you are going to be taking the children or not?

[9] Mr [Gibbs] responded:

It was a simple question [Tessa] you might want to check your facts with a professional and not someone who is your friend.

Ill do what I need to do.

[10] Ms [Gibbs] replied:

She is the kids Plunkett Nurse. As this is a medical decision between parents you do not have my approval for the kids to be tested if you do this will be taken further.

[11] Subsequently, this application was set down for determination on the papers by way of a submissions only hearing.

[12] Submissions have been filed by counsel for the applicant, Ms [Gibbs], who represents herself, and Ms Vickers is the court appointed lawyer for the children. Various affidavits have been filed from the parties.

Legal issues

[13] Both parties now agree to their children being subjected to COVID-19 testing.

[14] The dispute has narrowed to the method of testing: The applicant wants to be able to subject the children to a Rapid Antigen Test (RAT); the respondent is only agreeable to the children taking a saliva test, as she considers that RATs are an invasive test for children so young as [Sophie], [Maisie] and [Keira].

[15] The respondent submits that Mr [Gibbs]'s application to determine this dispute between guardians is an abuse of the Family Violence Act 2018 and of the Crimes Act 1989. She alleges Mr [Gibbs] has fabricated evidence to vilify her and to mislead the Court.

[16] Furthermore, Ms [Gibbs] alleges that Mr [Gibbs] physically assaulted [Sophie] on 2 May, and therefore it shows Mr [Gibbs]'s propensity for ongoing family violence and is a demonstration of coercive and controlling behaviour.

[17] The legal issues are:

- (a) Whether the decision to subject a child to a COVID-19 test is a guardianship issue; and

- (b) Whether the method or manner of the COVID-19 test is a guardianship issue.

The law

[18] The relevant statutory provisions under the Care of Children Act 2004 are ss 15 and 16.

[19] Section 16, as it is relevant to the present case, states:

16 Exercise of guardianship

- (1) The duties, powers, rights, and responsibilities of a guardian of a child include (without limitation) the guardian's—
- ...
- (c) determining for or with the child, or helping the child to determine, questions about important matters affecting the child.
- (2) Important matters affecting the child include (without limitation)—
- ...
- (c) medical treatment for the child (if that medical treatment is not routine in nature); and
- ...
- (3) A guardian of a child may exercise (or continue to exercise) the duties, powers, rights, and responsibilities of a guardian in relation to the child, whether or not the child lives with the guardian, unless a court order provides otherwise.
- (4) Court order means a court order made under any enactment; and includes, without limitation, a court order that is made under this Act and embodies some or all of the terms of an agreement to which section 40(2) or section 41(2) applies.
- (5) However, in exercising (or continuing to exercise) the duties, powers, rights, and responsibilities of a guardian in relation to a child, a guardian of the child must act jointly (in particular, by consulting wherever practicable with the aim of securing agreement) with any other guardians of the child.
- (6) Subsection (5) does not apply to the exclusive responsibility for the child's day-to-day living arrangements of a guardian exercising the role of providing day-to-day care.

Analysis

[20] Counsel for the applicant submits a test for COVID-19 does not meet the definition of “medical treatment”, that a test for COVID-19 is simply a test not a treatment.

[21] Ms [Gibbs] agrees and submits that neither a RAT nor a saliva test are “medical treatment.”

[22] Lawyer for child also submits a COVID-19 test is not medical treatment. However, under s 16(2) the words “without limitation” appear and therefore it is open to the Court to find that the administration of a medical test is a guardianship issue.

[23] “Treatment” is defined in the *Concise Oxford English Dictionary* as medical care for an illness or injury.¹ In *A v Council of the Auckland District Law Society*, Randerson J had “some difficulty” in accepting that medical examination which included diagnostic procedure was treatment.² However, his Honour accepted that urine tests, blood tests, liver function tests and hair follicle tests would fall under the protection of the right to refuse to undergo medical treatment under s 11 of New Zealand Bill of Rights Act 1990.³

[24] I find that administering a medical test is not “medical treatment” under s 16(2). However, I accept that in some instances whether to administer a medical test could be classified as a guardianship issue, such as those tests outlined above in *A v Council of the Auckland District Law Society*. I find it helpful to adopt the test in s 16(2) as to whether medical treatment is a guardianship issue, that is whether the treatment is routine in nature, in relation to testing.

[25] Medical treatment is only a guardianship issue if it is not “routine in nature”. If it is routine in nature then it will not constitute a guardianship issue and falls outside the purview of the Court. The *Concise Oxford English Dictionary* gives the meaning

¹ A Stevenson and M Waite (eds) *Concise Oxford English Dictionary* (12th ed, Oxford University Press, Oxford, 2011): “treatment”.

² *A v Council of the Auckland District Law Society* [2005] 3 NZLR 552 (HC) at [62].

³ At [62].

of the adjective “routine” as “a regular course of procedure; a more or less mechanical or unvarying performance of certain acts or duties.”⁴

[26] Applying this to medical testing, if the testing is “routine” in nature, it will not fall within the purview of the Court as a guardianship issue.

[27] Testing for COVID-19 in New Zealand is now routine in nature. However there was no specific evidence provided to the Court on whether or not testing is routine for children under the age of 5. Kids Health, which is supported by the Ministry of Health, states that if the child displays symptoms of COVID-19 or is a Household Contact, they should be tested for COVID-19.⁵ Parents of younger children can ring a dedicated phone line to establish which type of COVID-19 test would be most appropriate for their child.⁶

[28] According to the New Zealand government COVID-19 website, there are two types of tests “available to the general public in New Zealand”, these being RATs and PCR tests.⁷

[29] RATs are the “main testing method being used” for people with COVID-19 symptoms or Household Contacts.⁸ The results of a RAT take approximately 15 minutes. RATs are freely available from various locations in the community or alternatively can be purchased at minimal cost. RATs can be used for children under the Ministry of Health guidelines.

[30] A RAT is invasive in that it requires a swab to be inserted into the nostrils and rotated, albeit for a short period of time. However, it is not so invasive that it carries a real risk of injury or harm to the child and it can be undertaken safely.

[31] PCR tests are still being used, albeit more infrequently. PCR tests are similar to RATs in that they require a nasal swab to be inserted in the nostrils and rotated.

⁴ A Stevenson and M Waite (eds) *Concise Oxford English Dictionary* (12th ed, Oxford University Press, Oxford, 2011): “routine”.

⁵ KidsHealth “COVID-19 Testing – Rapid Antigen Tests (RATs)”.

⁶ KidsHealth “COVID-19 – What you Need To Know”.

⁷ New Zealand Government “How to get a COVID-19 test – Types of Tests” Unite Against COVID-19.

⁸ New Zealand Government “How to get a COVID-19 test – Types of Tests” Unite Against COVID-19.

However, they are somewhat more invasive than RATs in how far the swab is inserted into the nostril.

[32] Saliva testing can also be used, however this is not as common as RATs or PCR tests.

[33] Information put before the Court by Ms [Gibbs] from Ngāti Ranui, a South Taranaki iwi health provider, confirms that saliva testing is available for children as young as 18 months of age but that it can be difficult to get enough saliva for a valid test. Furthermore, saliva testing is ordinarily available only once a week on a Thursday from 10 am to 11 am, in South Taranaki. The results take 24 to 48 hours to be produced.

[34] Further, information provided on the Ministry of Health website states that “saliva testing is available as part of the public health response for certain settings, populations, and providers, such as in hospitals for people who cannot tolerate a nasal swab”.⁹ Saliva testing is also available from private providers for international pre-departure tests and surveillance testing, however this comes at considerable cost.

Conclusion

[35] A decision to subject a child to a COVID-19 test is not a guardianship issue that requires consultation and co-operation with the other legal guardian or guardians of the child for the following reasons:

- (a) Medical testing for diagnostic purposes does not constitute medical treatment under s 16(2). However, medical testing could constitute a guardianship issue in certain circumstances. I find that the test applied to medical treatment, that is whether it is routine in nature, is useful when looking at medical testing.

⁹ Ministry of Health “How COVID-19 testing works” Ministry of Health New Zealand: COVID-19.

- (b) Therefore, whether medical testing constitutes a guardianship issue, and therefore whether it is in the purview of the Court, depends on whether the testing is routine in nature.
- (c) Testing a child for COVID-19 is now routine in nature, including for children if they are symptomatic or a Household Contact. Therefore, it meets the definition of a routine medical test and cannot be considered an important matter affecting the child under s 16(2).

[36] Therefore, the manner or method of COVID-19 testing is not a guardianship issue that requires consultation and co-operation with the other legal guardian.

[37] The parties are entitled to decide where, when, and how to subject the children to COVID-19 testing without the requirement for consultation and co-operation with the other legal guardian.

[38] Mr [Gibbs] has appropriately brought this application to the Court for determination. I do not consider it to have been an abuse of the Court's process nor an act of family violence as defined under the Family Violence Act 2018 with regards to Mr [Gibbs]'s response to the respondent's unwillingness to permit the children to have a COVID-19 test when he replied "I'll do what I need to do; nor in bringing the application per se."

Outcome

[39] The application to determine the dispute between guardians about COVID-19 testing is dismissed.

Judge L Harrison
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 18/05/2022