

Article by Sarah Williams, Legal Director and Head of Surrogacy, Fertility, Adoption & Modern Family in the Family department at Payne Hicks Beach, first published online in Family Law LexisNexis on 6 January 2021 and reproduced with kind permission

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Childhood vaccination disputes – where does the law stand in public and private law proceedings?

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Sarah Williams

Head of Surrogacy, Adoption, Fertility & Modern Family

As the vaccinations against COVID-19 begin to be administered, it is worth revisiting recent judicial approaches in vaccination disputes concerning children in both public and private law proceedings.

In the very recent case of *Re H (A Child) (Parental Responsibility: Vaccination)* [2020] EWCA Civ 664 the Court of Appeal considered whether the routine vaccination of healthy children in care was a matter which a local authority can properly consent to and arrange pursuant to its powers under s.33 Children Act 1989 or whether, where a parent opposes it, the issue is of such magnitude, seriousness or gravity that it necessitates an application to the High Court for leave to invoke its inherent jurisdiction. Whilst the case concerned only public law proceedings under Part IV of the Children Act 1989, the Court also took the opportunity to comprehensively review the position in private law proceedings under Part II of the 1989 Act.

In *Re H*, both care and placement orders had been made in respect of the child in question and the parents objected to the child receiving routine vaccinations in line with the father's belief that neither the court nor the state could take decisions in relation to the child. The local authority made an application to the High Court and Hayden J ruled that the local authority could use their powers under s.33 (3) of the Children Act 1989 to consent to vaccinations and, in the event he was wrong, he would make the order under the Court's inherent jurisdiction. Given this decision was contrary to a previous decision by McDonald J, who believed the

decision was of such gravity the local authority could not properly use their powers under s.33 (3), Hayden J gave permission to appeal.

On appeal, Lady Justice King delivering the lead judgment observed “... *it cannot be said that the vaccination of children under the UK public health programme is in itself a ‘grave’ issue in circumstances where there is no contra-indication in relation to the child in question and when the alleged link between MMR and autism has been definitely disproved.*” Accordingly, the Court held that the local authority with a care order could appropriately use s.33 (3) CA 1989 and arrange and consent to a child in its care being vaccinated where it is satisfied that it is in the best interests of an individual child, notwithstanding the objections of parents. Whilst the Court acknowledged that parental views regarding immunisation must be taken into account, the matter should not to be determined by the strength of the parental view unless that view has a real bearing on the child’s welfare.

The fundamental difference between an immunisation dispute in private as opposed to public law proceedings, is that in private law proceedings, as neither parent has primacy over the other, the parties have no option but to come to court to seek a resolution when they cannot agree.

However, in public law proceedings when there is a care order in place, having been determined or conceded that pursuant to s.31 (2) CA 1989, the child has suffered or is likely to suffer significant harm attributable “to the care given to him or her not being what it would be reasonable to expect a parent to give” it is against that backdrop that the parent of a child in care holds parental responsibility. Parliament has specifically, and necessarily, given the local authority that holds the care order, the power under s.33 (3)(b) to override the views of a parent holding parental responsibility.

The Court of Appeal was not persuaded by the submission advanced on behalf of Counsel for the parents, namely that to allow the local authority to consent to the immunisations would amount to a disproportionate breach of their fundamental rights under Article 8 ECHR.

King LJ concluded her judgement with the following:

1. It cannot be doubted that it is both reasonable and responsible parental behaviour to arrange for a child to be vaccinated in accordance with the Public Health Guideline, but there is at present no legal requirement for a child to be vaccinated;
2. Although vaccinations are not compulsory, scientific evidence now establishes that it is generally in the best interests of otherwise healthy children to be vaccinated;
3. Available evidence supports the Public Health England advice that vaccinations are in the best interests of children and society as a whole;
4. The evidence with respect to MMR vaccinations overwhelmingly identifies the benefits to children;
5. Subject to any credible development in medical science or peer reviewed research to the opposite effect (along with the instruction of a jointly instructed expert), the proper approach to be taken by a court where there is a disagreement as to whether the child should be vaccinated is that the benefit in vaccinating a child in accordance with Public Health England guidance can be taken to outweigh the long-recognised and identified side effects;
6. Whilst parental views must always be taken into account, the matter is not to be determined by the strength of the parental views unless the view has a real bearing on the child’s welfare; and

7. Whilst the Court did not reach a definitive conclusion on whether, in private law proceedings, a dispute between the holders of parental responsibility over childhood vaccinations should require judicial adjudication, it stated, albeit strictly *obiter*, that it would be difficult to foresee a case in which a vaccination approved for use in children, including vaccinations against COVID-19, would not be endorsed as being in a child's best interests, absent a credible development in medical science or peer-reviewed research evidence indicating questioning the safety and/or efficacy of the vaccination or a well evidenced contraindication specific to the child in question.

M v H and P and T [2020] EWFC 93

The High Court was concerned with determining whether it was in the best interests of P (6 years of age) and T (4 years of age), to be vaccinated in accordance with the NHS vaccination schedule. The application for a specific issue order under s.8 of Part II of the Children Act 1989 requiring the children to be vaccinated was brought by the father of the children, M. The Guardian supported the father's application.

The father's application initially concerned the MMR vaccine, but ahead of the hearing he widened the scope to include each of the vaccinations currently on the NHS vaccination schedule, the vaccinations required for future travel abroad and vaccination against the coronavirus responsible for causing the COVID-19 infection. However, Mr Justice McDonald chose to define his decision to whether it was in the children's best interests to receive each of the vaccines currently included on the NHS vaccination schedule, including the MMR vaccine. McDonald J was at pains to explain that he was not prepared to make a specific issue order in relation to any COVID-19 vaccination although he went so far as to state "*it is very difficult to foresee a situation in which a vaccination against COVID-19 approved for use in children would not be endorsed by the court as being in a child's best interests, absent peer-reviewed research evidence indicating significant concern for the efficacy and/or safety of one or more of the COVID-19 vaccines or a well-evidenced contraindication specific to that subject child.*"

Although the mother was invited to make an application for a jointly instructed expert pursuant to Part 25 of FPR 2010, she did not and in any event, it was not deemed necessary where the vaccinations had been approved and recommended by the relevant public health authorities. Indeed, the father submitted it was appropriate for a parent to be guided by the recommendations of NHS and Public Health England in deciding whether or not to vaccinate the children.

The mother based her objections upon information she had gathered online, including material from an American paediatrician and an American nephrologist. She made the following submissions: vaccination is not inevitably immunisation, it does not prevent a person from carrying the disease, that as her children had the benefit of a strong immune system so that she did not see them as being in an "at risk" category for complications from childhood diseases, further research was required into the efficacy and probity of vaccinations for children generally, that the recommendations of Public Health England are falling behind the science, that the side effects of the vaccines are more detrimental to children than the diseases they are vaccinating against, that the children should be tested for their natural immunity before the court decides upon this issue, that a specific issue order requiring the children to be vaccinated would amount to an unnecessary and disproportionate breach of the children's right to a private and family life under Art 8 of the ECHR, and finally that this particular case is distinguishable from previously reported authorities, in particular from the Court of Appeal decision of *Re H (A Child: Parental Responsibility: Vaccination)* [2020] EWCA Civ 664 (cited above) as that case concerned public law proceedings.

Parental responsibility is defined in s.3 (1) of the Children Act 1989 as “all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and to his property.” It is axiomatic that such rights are inseparably connected with a parent’s obligation to meet the welfare needs of his or her children. In *Re D (A Child)* [2014] EWCA Civ 315, Lord Justice Ryder as he then was, reiterated that the concept of parental responsibility concerns an adult’s responsibility to secure the welfare of their child, which is to be exercised for the benefit of the child and not the adult.

S2(7) of the Children Act 1989 permits each holder of parental responsibility to act alone and without the other, but one party does not have priority over the other. Where there is a dispute over the exercise of parental responsibility regarding vaccination, that dispute should be determined by a court (per Thorpe LJ in *Re C (Welfare of Child Immunisation)* [2003] 2FLR 1095 and per Theis J in *F v F (MMR Vaccine)* [2013] EWHC 2683 (Fam) “As neither parent has primacy over the other, the parties have no option but to come to court to seek a resolution when they cannot agree.”

McDonald J took the opportunity to reiterate the conclusions of the Court of Appeal in *Re H* with respect to the vaccination of children generally and whilst he took into account the mother’s strongly held views, he did not attach determinative weight to them. Accordingly, the court found that it was in the best interests of the children to make a specific issue order pursuant to s.8 of the Children Act 1989 requiring each child to be given the vaccines as specified in the current NHS vaccination schedule. In addressing the mother’s assertions that the vaccinations would infringe the children’s fundamental human rights, the Judge found that the vaccination was “sufficiently important” to justify the limitation of a fundamental right.

In *Re C (Welfare of Child: Immunisation)* [2003] EWCA Civ 1148; [2003] 2FLR 1095, Thorpe LJ sitting in the Court of Appeal reminded the parties that “Where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility.” However, the apparent freedom of each to act alone is not, however unfettered. As the then President said in *Re J* [2000] 1FLR 57: “*There is in my view, a small group of important decisions made on behalf of a child which, in the absence of agreement of those with parental responsibility, ought not to be carried out or arranged by one parent carer although she has parental responsibility under s.2 (7) of the Children Act 1989. Such a decision ought not to be made without the specific approval of the court.*” In this case, the important decision was one of circumcision but the Court of Appeal in *Re H* added that the “*hotly contested issues of immunisation are to be added to that small group of important decisions*”.

In *re B (A Child: Immunisation)* [2018] EWFC 56, HHJ Clifford Bellamy, sitting as a District Judge of the High Court, ordered the immunisation of a five year old child with the combined diphtheria/tetanus/pertussis/polio vaccine, the MMR vaccine and the influenza vaccine against the father’s wishes in private law proceedings. In this matter, an eminent expert had been instructed and concluded that for the child in question, there were no contra-indications which militated against the child being vaccinated. The Judge summarised the recent judicial approaches with more than a hint of frustration: “... *this is now the sixth occasion when the court has had to determine whether a child should be vaccinated in circumstances where a birth parent objects. On each occasion that court has concluded that the child concerned should receive the recommended vaccine (save that in Re C and F (Children) Sumner J decided that the older child, aged 10, should not have the HIB vaccine, because the danger for her had passed, or the Pertussis vaccine, because there was no approved vaccine for a child her age). With respect to the vaccines with which I am concerned, in the absence of peer-reviewed research evidence indicating significant concern for the efficacy and/or safety of one of those*

vaccines, it is difficult to see how a challenge based on efficacy or safety would be likely to succeed.”

In the unusual private law matter of *Re M (Children) (Specific Issue Order: Guardian’s Application to Enforce)* [2017] EWFC 49 before HHJ Rogers, sitting as a Judge of the High Court, the children’s guardian (originally appointed under Rule 16.4 because of “very grave difficulties over child arrangements”) applied to enforce an order providing for the immunisation of two children. The question for the court was did the guardian have locus, and if he did, was it within the proper exercise of his powers to seek enforcement or should he, as mother’s Counsel asserted, just simply draw the issue to the Court’s attention in a neutral manner?

Axiomatically, it is usually the party obtaining an order in his or her favour who seeks to enforce an order not complied with. However, this unusual scenario where enforcement is brought by a third party who does not hold parental responsibility, required the Judge to consider Rule 16.4 whereby a guardian can be appointed in exceptional Private Law matters.

The Court found that whilst it was probable that the guardian had locus to enforce the order, that locus should not be invoked. Parents were urged to take decisions for their own children and the court or local authority were only to become involved if an intervention into family life was justified and proportionate. In care proceedings, the test for intervention is that the child is or is likely to suffer significant harm. Quite apart from the fact that the Threshold was not crossed, the Court found that it would be “wholly artificial” and a “wholly improper device” to use an interim care order in this matter, and in any event, this would not be a proper route to enforcement.

Further, the court was mindful that it was most undesirable and unrealistic to impose the obligation to vaccinate the child upon the unwilling parents – who, for example, would take the child to the clinic for vaccination?

Whilst the Judge shared the Guardian’s view that it was in the children’s best interests for them to be vaccinated and chose to leave the declaratory relief to this effect in his judgement, he did not take any steps to order enforcement of the original order and dismissed the Guardian’s application for enforcement.

Conclusion

In public law proceedings (where under s.33(3)(b) Children Act 1989, the local authority have the power to override the views of the parents) and private law disputes it is certainly difficult to foresee a case in which a vaccination approved for use in children, including vaccinations against COVID-19, would not be endorsed as being in a child’s best interests, absent a credible development in medical science or peer-reviewed research evidence indicating questioning the safety and/or efficacy of the vaccination or a well evidenced contraindication specific to the child in question.

10 New Square, Lincoln's Inn, London WC2A 3QG

DX 40 London/Chancery Lane

Tel: 020 7465 4300 Fax: 020 7465 4400 www.phb.co.uk

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