

THE  
**REVIEW**

# Vaccinating children: public and private law principles



*Emily Foy* Payne Hicks Beach

*Two recent cases have clarified the position where parents disagree on whether to vaccinate their children, and a local authority's position when considering children in its care*

After a bleak end to a bleak year, the news that a target had been set to vaccinate 22 million people in the UK against Covid-19 by Spring 2021 was recently heralded by Sir Simon Stevens (Head of NHS England) as the “fresh chink of hope” that was needed to battle through the long cold months of perpetual lockdown. Against this background, the cases of *Re H (A child) (Parental responsibility: Vaccination)* [2020] EWCA Civ 664 and *M v H (Private law vaccination)* [2020] EWFC 93 could not be more timely.

This article deals predominantly with private law disputes but the public law considerations were also recently considered in *Re H*, where it was debated whether the vaccination of healthy children in care (following the NHS vaccination schedule) was a matter which a local authority could consent to and organise under s33 of the Children Act 1989 (CA 1989) or whether the decision was of such magnitude that it must be allocated to the High Court with an invitation to invoke its inherent jurisdiction. Helpfully, the Court in this case also took the opportunity to analyse and clarify the position in relation to private law proceedings, which will be considered further below.

## Background

It is the right of any adult of sound mind to make a choice as to whether or not they wish to be vaccinated against a known disease. They weigh up the risks and benefits and come to an informed decision. However, it is a different matter if that objection to vaccination extends to their child, especially if the child's parents have differing views on the issue or if the child is in the care of the local authority.

In the event of such a dispute, the starting point for the court is who has parental responsibility (PR) for the child and what this permits them to decide on behalf of the child. PR is defined in s3(1) CA 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”. Furthermore, and importantly when considering this particular question, s2(7) CA 1989 provides 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...”.

Since 2003 it has been an accepted principle of private law proceedings that, where there is a dispute between parents as to whether a child should receive a vaccination, the correct procedural route remains to apply to the court for a specific issue order. This heralds back to the judgment of Thorpe LJ in *Re: C (Immunisations)* [2003] 2 FLR 1095, an appeal related to two cases with significant similarities where the father in each case wished for the child to be vaccinated and the mother did not. In this case, the judge held that where parents were embroiled in a dispute of this nature, neither had the right to make the decision alone and the immunisation should only be carried out if the court determined that this was in the best interests of the child, concluding that the case formed part of “a small group” of key decisions (following on from the President's decision in *Re J* [2000] 1 FLR 571 where this “small group of important decisions”, such as circumcision and change of surname, was first established and identified) which required the intervention of the court to settle a dispute between parents who could not agree on the appropriate course of action for their child.

In other words, if just one person holds PR then they can act alone, but if two (or more) hold PR and cannot agree as to whether a child should be vaccinated, and have exhausted all DR routes, then, 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...”

Either parent would therefore need to make a section 8 application to the court for a specific issue order. The court would consider the application following the section 8 criteria and what was in the best interests of the child.

As above, the issue of vaccinations and when they should or should not be given to a child has recently been considered in two cases, one founded in public law principles and one private law.

### ***Re H (A child) (Parental responsibility: Vaccination) [2020] EWCA Civ 664***

Care and placement orders had been made in relation to the child. The parents objected to the child receiving routine vaccinations. The local authority sought permission from the High Court to use its powers under s33(3) CA 1989 to consent to vaccinations. Hayden J ruled that the local authority could give such consent under the Act and, in the event he was wrong, that he would have made the order under the inherent jurisdiction of the High Court in any event.

The parents appealed and the matter came before the Court of Appeal, who held that a local authority could appropriately use its power under s33(3) CA 1989 to consent to a child being vaccinated if it was content that it was in the best interests of that child and taking into account parental views (which should not be determinative).

However, moving beyond the particular facts of the case, the court also gave a helpful overview of the law and medical research in this area and touched upon principles which would also affect private law proceedings. In delivering the lead judgment, King LJ made the following observations:

1. All the evidence presently available supports the Public Health England advice and guidance which unequivocally recommends a range of vaccinations as being in the interests both of children and society as a whole.
2. Although vaccinations are not compulsory, the scientific evidence now clearly establishes that it is in the best medical interests of children to be vaccinated, unless there is a specific contra-indication in an individual case.
3. The administration of standard or routine vaccinations cannot be regarded as being a “serious” or “grave” matter, except where there are significant features which suggest that, unusually, it may not be in the best interests of a child to be vaccinated.
4. That neither counsel could find any reported case (public or private law) concerning a child where a request for vaccination had been refused by the court.
5. Parental views regarding immunisation must always be taken into account but the matter is not to be determined by the strength of the parental view unless the view has a real bearing on the child’s welfare.
6. That, although declining to offer a view, it may be that time has moved on to the extent that Thorpe LJ’s categorisation of those “small group of important decisions” (including vaccinations) should now be revisited (in a similar manner as the Supreme Court recently did in *XX v Whittington Hospital Trust* [2020]

UKSC 14, citing developments in the law, medical science and social attitudes as reasons to depart from the previously established position regarding costs of surrogacy as part of a damages claim in medical negligence cases).

### ***M v H (Private law vaccinations) [2020] EWFC 93***

This private law dispute was heard before MacDonald J in December 2020. The father’s original application was for a specific issue order on the basis that it was in the best interests of the two children (aged 4 and 6) to receive specific vaccinations (initially limited to the MMR vaccine but later expanded to all normal childhood, travel and Covid-19 vaccinations).

The mother was opposed to the vaccinations, on the basis of information that she had gathered online, including from a paediatrician and a nephrologist in America, and argued 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 Article 8 of the European Convention on Human Rights. She also argued that the case was distinguishable from recently reported authorities, including *Re H* (above) as these concerned public law applications involving local authorities and this was a purely private law dispute between parents. The mother urged the Court to consider the matter in isolation from previous decisions.

The father’s application was, following the usual procedure, listed before a district judge but, with the consent of MacDonald J, had this part of the application transferred up to him to consider.

MacDonald J granted a specific issue order permitting the children to receive vaccinations in accordance with the normal NHS childhood schedule. He declined to consider the applications in relation to travel vaccinations (citing this as being too speculative) or Covid-19 vaccinations (as above, citing any such decision as being premature).

In his judgment, and heavily guided by the Court of Appeal in *Re H*, MacDonald J summarised the Court’s approach:

1. That “where two parents with parental responsibility disagree as to the proper course of action with respect to vaccination, the court becomes the decision maker through the mechanism of a specific issue order”.
2. The concept of PR describes an adult’s responsibility to secure the welfare of their child, which is to be exercised for the benefit of the child, not the adult – per Ryder LJ (as he then was) in *Re D (A child)* [2014] EWCA Civ 315.
3. In considering whether to grant a specific issue order requiring vaccination as being in each child’s best interests, the child’s best interests are the court’s paramount consideration and the court must have

regard to the matters set out in the welfare checklist contained in s1(3) CA 1989. Furthermore, pursuant to s1(5) CA 1989, the court should not make a specific issue order unless doing so would be better for the child than making no order at all.

4. It was *very* difficult (the judge's emphasis) 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 evidence indicating significant concern for the efficacy or safety of a particular vaccine or a contra-indication specific to a particular child.
5. That the instruction of an expert was not necessary where vaccinations had been approved and recommended by the NHS and Public Health England, save for in those cases where there was concern for the efficacy or safety of a particular vaccine or a contra-indication specific to particular child. If an expert was required it should be from a jointly instructed expert drawn from the field of immunity and not the use of "partial and partisan material gathered from the internet".
6. Absent special circumstances and peer-reviewed evidence it would be very difficult for a parent to successfully object to vaccination in accordance with the public health recommendations.
7. The strength of any parental objection to vaccination would not be determinative. Per Thorpe LJ in *Re C* [2003]: "There is no general proposition of law that the court will not order vaccination in the face of rooted opposition from the child's primary carer."

8. That the objective of vaccination, namely to protect the children from the consequences of the diseases vaccinated against and the population more widely from the spread of such diseases, is sufficiently important to justify the limitation of a fundamental human right.

Although MacDonald J expressly declined to make a specific issue order with regard to vaccinating the children against Covid-19 (there not yet being any formal guidance as to whether children should be vaccinated), he emphasised (obiter) that:

"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 contra-indication specific to that subject child."

Although children are not currently part of the government roll-out scheme to receive the Covid-19 vaccination, the case is a helpful summary of the factors that the court takes into account when addressing the issue of childhood vaccinations in general. In circumstances where a future roll-out of the Covid-19 vaccination programme to children cannot be ruled out, it appears from these recent cases that, in the absence of a change in peer reviewed evidence or a well-evidenced medical contra-indication specific to the child who is the subject of the application, it is in the best interests of the child to be vaccinated and a specific issue order is highly likely to be made in the event of a parental dispute.

[efoy@phb.co.uk](mailto:efoy@phb.co.uk)



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](http://www.phb.co.uk)

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