



## The Court's approach to disputes concerning the vaccination of children

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On 4 April 2022, the NHS extended its offer of Covid-19 vaccinations to children aged 5-11. Like all vaccinations in the UK, these are not mandatory; the decision of whether or not to vaccinate a child (i.e. under the age of 18) remains with their parents. Over the course of the pandemic there have been several important family law cases concerning vaccinations for children, of which the most recent deals with the Covid-19 vaccination specifically. It is worth reviewing at this juncture the approach that the family court takes to disputes concerning vaccination of children, and what impact, if any, the age of the child will have on the court's decision making.

### Mechanism for determining the dispute

The most likely context in which a dispute concerning vaccination will arise is between the parents of the child. In such cases, the court may make a specific issue order to determine the matter.

A specific issue order is "an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child" (s.8(1) Children Act 1989 ("CA 1989")). It can be made on a freestanding application or within existing family proceedings, in which case it may be made either on the application of one of the parties or on the court's own initiative (s.10(1)(a) and 10(1)(b), CA 1989).

In considering whether a specific issue order should be made, the child's best interests are the court's paramount consideration (s.1(1), CA 1989) and the court must have regard to the matters set out in the welfare checklist at s.1(3), CA 1989. Importantly, this includes "the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)".

A specific issue order cannot be made where a child is the subject of a care or interim care order. If a dispute about vaccination arises in these circumstances, the High Court may exercise its decision-making powers under its inherent jurisdiction.

A local authority does not need to seek permission from the High Court to arrange and consent to a child in its care undergoing standard or routine vaccinations as part of a national vaccination programme. Under its powers pursuant to s33(3)(b) CA 1989, it may do so where it is satisfied that vaccination is in the child's best interests, even if it is against the wishes of the child's parents. The onus is on the parents, if they object, to make an application to the court to determine the matter.

Where such an application is before the court, as in private law proceedings, s.1(1) and s.1(3) CA 1989 apply.

### The general approach

There is established case law setting out the court's usual approach to determining a dispute regarding vaccination. The leading case on vaccinations for children is the public law case, *Re H (a child) (parental responsibility: vaccination)* [2020] EWCA Civ 664 ("Re H"). These principles apply equally to private law proceedings, as confirmed in *M v H and others* [2020] EWFC 93 ("M v H").

The general principle arising from *Re H* is that it is in the best interests of otherwise healthy children to be vaccinated in accordance with Public Health England (PHE) guidelines and the NHS vaccination schedule unless:

- 1 Cogent evidence is raised that there are serious concerns about the efficacy/safety of the vaccination; or
- 2 The particular medical needs of the child means that vaccination is not in their best interests.

It is not necessary to produce expert evidence on the efficacy or safety of a vaccination on the routine immunisation schedule. This is unless the child has an unusual medical history and the court is required to consider whether the child's specific circumstances provide any reasons why vaccination might not be in their best interests.

### Covid-19 vaccination

When the judgment in *M v H* was handed down in December 2020, the Covid-19 vaccine rollout for adults in the UK was in its early stages and the question of whether vaccinations would be offered to children had not yet been determined by the government. MacDonal J declined to consider the issue of Covid-19 vaccinations for the children as it was not yet clear:

- 1 Whether or when children would be offered a Covid-19 vaccination; and
- 2 If vaccinations were approved for children, which vaccine(s) they would be offered.

Despite this, he commented 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 contraindication specific to that subject child".

This issue was revisited in November 2021 in *Re C (looked after child) (Covid-19 vaccination)* [2021] EWHC 2993 (Fam) ("Re C"), by which point the Covid-19 vaccination was being offered to children aged 12+ as part of a UKHSA (the successor organisation to PHE) national programme. The mother argued that it was not a "tried and tested" vaccine. Although the court was not required to exercise its inherent jurisdiction in that case, Mr Justice Poole stated that, had it been necessary, he would have had no hesitation in concluding that it was in the child's best interest to have the vaccination.

As such, it seems clear that the court's approach to Covid-19 vaccinations for children is consistent with its approach to all other vaccinations on the routine immunisation schedule.

### The views of the parents

Where a dispute concerning vaccination is brought before the court, the views of the parents must be taken into account. However, the court will ascribe weight to their views based on the substance of their argument, not the strength of their feeling. In practice, and applying the principles in *Re H*, the court will usually side with the parent who is pro-vaccination.

In public law cases, the court may determine that the child should be vaccinated even when this is against the wishes of both parents. This gives rise to an incongruence: in general, parents have the

right to choose whether or not to vaccinate their children and the state will not intervene in this decision. However, where parental responsibility for a child is shared with a local authority, parents lose this right. A local authority will usually arrange for an unvaccinated child to be vaccinated and, if a dispute is brought before the court, the court will usually approve the vaccination.

This is in contrast to the position in private law where, even if the court has previously ruled that a child should be vaccinated, such an order might be varied where both parents later unite against vaccination. In *BC v EF (In the matter of M and N) (No 2)* [2017] EWFC 49, the father had originally been in favour of vaccination whereas the mother was opposed. After a specific issue order was made for the children to be vaccinated, the father changed his mind and the matter was brought back to court for enforcement by the Children's Guardian. The court determined that the original declaratory judgment that it was in the children's best interest to be vaccinated should stand. However, after considering how a child might be vaccinated in circumstances where a local authority did not share parental responsibility for a child, it determined that the original order was essentially unenforceable. Bearing in mind public policy reasons, particularly confidence in the system and the effectiveness of orders, the court decided to discharge the order requiring the parents to arrange for the children to be vaccinated.

### The views of the child

As previously touched on, the wishes and feelings of the child are one of the matters to which the court must have regard in considering whether or not to make an order under s.8 or Part IV CA 1989.

In addition, where a child has achieved Gillick competence, i.e. sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision, they may consent to medical treatment (including vaccinations) without the approval of their parents (*Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 WLR 830). However, the decision of a Gillick competent child will not necessarily be determinative and the court may override it (*Re W (A Minor) (Medical Treatment: Courts Jurisdiction)* [1993] Fam 64).

In *Re C*, the child concerned was aged 12 and strongly in favour of having the Covid-19 vaccination. Since there was no conflict between him and the local authority, the court considered it unnecessary to undertake an assessment of his Gillick competence. Hypothetically, if an older child opposed vaccination, whether or not they possessed Gillick competence would likely be a central issue in their case.

It is unlikely that a child aged between 5 and 11 would have sufficient understanding and maturity to attain Gillick competence in relation to Covid-19 vaccinations, with that likelihood decreasing the younger they are. A younger child's wishes and feelings would similarly be difficult to determine; most children dislike the process of being vaccinated and would find it difficult to weigh up short term discomfort against the long term benefits.

### Conclusions

The family court has been consistent in its approach to vaccinations in children; where a child is otherwise healthy and the vaccine is approved for use by the UKHSA, it is likely that vaccination will be considered in their best interests. As the Covid-19 vaccine meets this criteria, it will be treated by the court like any other vaccination on the routine immunisation schedule. As such, the parent's views and the child's wishes and feelings will be taken into account by the court, but ultimately the court retains its discretion and it is likely that any dispute concerning vaccination will be resolved in favour of the pro-vaccination party.

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