

WEST LONDON FAMILY COURT

Case number: ZW21P01147

Neutral citation number: [2022] EWFC 112

In the matter of the Children Act 1989

Before HHJ Rowe QC

PERMISSION TO ARRANGE COVID-19 VACCINATION

Judgment 8 August 2022

Katie Wood (instructed by Osbornes Law) for the applicant father

Francis Hoar (instructed by Moore Barlow LLP) for the respondent mother

JUDGMENT

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

The Application

1. On 14 July 2022 the court determined a number of issues concerning the child arrangements for the parties' two daughters who are aged between 8 and 10. For reasons detailed below, this contested application by the father for an order permitting him to arrange Covid-19 vaccinations for the girls is being dealt with separately.

The chronology

2. For the circumstances and background of the family I refer to the Judgment of the court dated 14 July 2022.
3. In summary, this father and mother separated by late 2019 but remained living with the girls in the same house through lockdown until late 2020. The girls were not at school over that period and they were, therefore, exposed to the deterioration of their parents' relationship without respite. The emotional impact of that on these girls is a significant contributory factor to their current difficulties set out in the Judgment of 14 July 2022. The court made clear that although these parents have diametrically opposed personalities and diametrically opposed views on the parenting of their children, the main thing the girls urgently need is to see their parents managing to work together on parenting issues without strain and without conflict.

4. One of the issues on which the parents are diametrically opposed is the issue of vaccination which in principle the father supports and in principle the mother opposes, both because of her general suspicion of their effectiveness and/or necessity and because of her parenting approach that arrangements for the girls should be discussed with and agreed by the girls themselves before they can happen.
5. At the FHDRA on 14 October 2021, the parents had agreed that the children would be vaccinated with all vaccinations listed in the NHS “catch-up schedule” subject to three conditions
 - i. That the father will take the girls for all their vaccinations;
 - ii. The vaccines will be spaced apart; and
 - iii. The girls will not be vaccinated if they are unwell.
6. In correspondence the mother had indicated her agreement to the girls receiving the annual flu vaccine, however at the FHDRA the remaining issues identified for determination of the court included

“whether the court should make a specific issue order that the girls have the HPV vaccine, 3-in-1 teenage booster and annual flu vaccines.”

7. At that stage the Covid-19 vaccine was not available to children of this age, however the roll out to younger children was envisaged as coming shortly. The father was therefore given permission to restore the case to court for directions in the event that he issued an application for a specific issue order in this regard, at which point the court would consider whether to direct a separate hearing to deal with the issue.
8. In the 14 July Judgment the court dealt with the vaccination issues then before it and made a SIO in the following terms,

“Permission is given for each of the children to be vaccinated with the full range of vaccinations (as may vary from time to time) in accordance with the NHS vaccination programme for the remainder of their childhood. For the avoidance of doubt this includes, but is not limited to, the following:

- a. The 6-in-1 vaccine under the NHS catch-up schedule (to include Hepatitis B and Haemophilus influenzae type b/’Hib’;*
- b. The 3-in-1 teenage booster;*
- c. HPV;*
- d. Annual flu vaccines.*

On [the 3 conditions agreed at the FHDRA]

The father shall be responsible for arranging the vaccinations and ensuring that the children are taken to the GP for scheduled immunisations (unless they are administered within the school setting) ...

The father’s solicitors shall send a copy of this order to the children’s GP for it to be placed on each child’s medical records.”

9. The father meanwhile issued this Covid-19 application on 12 May 2022, and on 6 June the mother applied for directions on that application. On 7 June 2022 on the papers and without a hearing, DJ Saunders directed the parents to file evidence, the mother by 23 June 2022 and the father by 3 July 2022. That order was available to the court and the parties on 9 June 2022. The father was keen that all matters could be dealt with together but the mother wished to file substantial evidence on the Covid-19 issue. At the start of that hearing I indicated that I would hear the parties' evidence and determine as many of the issues as I could, applying the Overriding Objective. In the event, the court could only get to the end of the evidence on 9 June before running out of time, despite sitting late.
10. I directed the filing of written submissions and reserved judgment to a date subsequently confirmed as 14 July 2022. There is a dispute, relevant now only as to costs, as to whether at the end of the hearing on 9 June 2022 the court indicated that the timetable for written submissions allowed time for the parties to file evidence and submissions on the Covid-19 issue as well, thereby allowing the court to deal with all issues in its Judgment unless an oral hearing was sought. The parties did file evidence as directed by Judge Saunders, the father did file submissions but the mother did not. The issue was listed for hearing on 25 July 2022 with a time estimate of two hours.

The hearing on 25 July 2022

11. This was a remote hearing. I read the evidence filed by both parents and heard the application on submissions. The hearing lasted closer to three hours than two, and I reserved judgment.

The law

12. The legal principles that I adopted into the 14 July Judgment were as set out in the opening note of the father's counsel at paragraphs 55 to 63. The principles were not controversial. Given the focus of this Judgment, I set out those principles in full.
13. *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 made pursuant to its jurisdiction under s8 of the Children Act 1989.*
14. *When considering whether to grant a specific issue order requiring vaccination as being in each child's best interests, those best interests are the court's paramount consideration pursuant to s1(1) of the 1989 Act and the court must have regard to the matters set out in the 'welfare checklist' contained in s1(3) of the Children Act 1989: Re C (Welfare of Child: Immunisation) [2003] 2 FLR 1095.*
15. *Pursuant to s1(5) of the 1989 Act the court should not make a specific issue order unless doing so would be better for the child than making no order at all.*
16. *In Re C (Welfare of Child: Immunisation) Thorpe LJ made clear that 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.*

17. *In Re B (A Child: Immunisation) [2018] EWFC 56* His Honour Judge Clifford Bellamy sitting as a High Court Judge observed as follows at [93] to [p94], in a passage expressly endorsed by the Court of Appeal in *Re H (A Child: Parental Responsibility: Vaccination)* at [74],

“[93] In making that order, like MacDonald J, I make it clear that my judgment is not a commentary on whether immunisation is a good thing or a bad thing generally. I am not saying anything about the merits of vaccination more widely. I do not in any way seek to dictate how this issue should be approached in other situations. I am concerned only to determine what is in B’s best welfare interests.

[94] That said, it is, in my judgment, appropriate to make the point that this is now the sixth occasion when the court has had to determine whether a child be vaccinated in circumstances where a birth parent objects. On each occasion the court has concluded that the child concerned should receive the recommended vaccine...With respect to the vaccines with which I am concerned, in the absence of new 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.”

18. *In Re H (A Child: Parental Responsibility: Vaccination) [2020] EWCA Civ 664* the Court of Appeal undertook a comprehensive review of this area. Whilst that case concerned public law proceedings under Part IV of the Children Act 1989, the Court of Appeal also reviewed the position in private law proceedings under Part II of the 1989 Act. Within the context of its meticulous and comprehensive review of the historical background and the case law, the Court of Appeal articulated the following conclusions with respect to children generally:

- (i) 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 Guidelines but that there is at present no legal requirement in this jurisdiction for a child to be vaccinated.*
- (ii) Although vaccinations are not compulsory, scientific evidence now establishes that it is generally in the best interests of otherwise healthy children to be vaccinated, the current established medical view being that the routine vaccination of infants is in the best interests of those children and for the public good.*
- (iii) All the evidence presently available supports the Public Health England advice and guidance that unequivocally recommends a range of vaccinations as being in the best interests of both children and society as a whole.*
- (iv) The specific immunisations which are recommended for children by Public Health England are set out in the routine immunisation schedule which is found in the Green Book: Immunisation against infectious disease, published in 2013 and updated since.*
- (v) The evidence base with respect to MMR overwhelmingly identifies the benefits to a child of being vaccinated as part of the public health initiative to drive down the incidence of serious childhood and other diseases.*
- (vi) The clarity regarding the evidence base with respect to MMR and the other vaccinations that are habitually given should serve to bring to an end the approach whereby an order is made for the instruction of an expert to report*

on the intrinsic safety and or efficacy of vaccinations as being necessary to assist the court to resolve the proceedings pursuant to FPR Part 25, save where a child has an unusual medical history and consideration is required as to whether the child's own circumstances throw up any contra-indications.

- (vii) Subject to any credible development in medical science or peer reviewed research to the opposite effect, 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.*
- (viii) 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.*
- (ix) This approach to the medical issues does not act to narrow the broad scope of the welfare analysis that is engaged when considering the best interests of the child with respect to the question of vaccination.*

19. *In M v H (Private Law Vaccination) [2020] EWFC 93, MacDonald J made a specific issue order pursuant to s8 of the Children Act 1989 requiring each of the children to be given each of the childhood vaccines that are currently specific on the NHS vaccination schedule with the father to be responsible for arranging the same and ensuring the children are taken to the GP for scheduled immunisations for the remainder of their childhood.*

20. *The judge declined in the case to decide the issue of covid vaccinations as it was unclear at that time (December 2020) what recommendations would be given about the vaccination of children and so was premature. He nonetheless went on to state:*

"...the observations of the Court of Appeal in Re H (A Child: Parental Responsibility: Vaccination) summarised at paragraph [40] of this judgment, whilst strictly obiter, make it very difficult now to foresee a case in which a vaccination approved for use in children, including vaccinations against the coronavirus that causes Covid-19, would not be endorsed by the court as being in a child's best interests, absent a credible development in medical science or peer-reviewed research evidence indicating significant concern for the efficacy and/or safety of the vaccine or a well evidenced medical contraindication specific to the subject child."

21. *In Re C (Looked After Child)(Covid-19 Vaccination) [2021] EWCA 2993 (which concerned the covid-19 vaccination and winter flu vaccination for a 13-year-old) Poole J determined that "the principles set out by the Court of Appeal in Re H apply equally to both Covid-19 vaccinations for 12-15 year olds and winter flu virus vaccinations for children in school years 7-11". In that case the child was Gillick competent and consented to vaccinations – it was the parents who opposed the vaccines and thus the onus was on them to bring the matter to court [25].*

22. *For this current judgment, the following conclusions of Poole J in Re C are (at least potentially given the mother's case) relevant.*

- a. *"I do not consider it appropriate for this court to embark on an investigation into the merits of any competing theses as to whether national programmes of vaccination of 12-15 year olds for Covid-19...are justified as being generally in the best interests of children in those age ranges. In cases that concern vaccines that are part of national programmes, the question of whether expert evidence is necessary will only arise if there is an identifiable, well-evidenced, concern about whether, due to their individual circumstances, a vaccine is contraindicated for a particular child, or if there is, as MacDonald J put it in M v H, "new peer-reviewed research evidence indicating significant concern for the efficacy and/or safety" of one or more of the vaccines that is the subject of the application..."[19]*
- b. *"Even if such new research were available, I have serious reservations about whether an individual expert or individual judge could or should engage in a wholesale review of the evidence behind an established and continuing national vaccination programme. However, perhaps an expert could assist the court as to the quality and relevance of such new research." [19]*
- c. *"...mere assertion that a vaccine is unsafe, however strongly expressed, does not meet either of the conditions under which expert evidence might be considered necessary to assist the court." [19]*
- d. *In my judgment, the principles set out by the Court of Appeal in Re H (above) apply equally to both the Covid-9 vaccination for 12-15 year olds and the winter flu virus vaccination for children in school years 7-11, as they do to the specific childhood vaccinations considered in that case. Like the standard vaccinations for infants, the Covid-19 and winter flu virus vaccinations are now part of national programmes of vaccination for children approved by the UK Health Security Agency, the successor body to Public Health England. The court can be satisfied, without the benefit of expert evidence, that the decisions to include the vaccinations in national programmes are based on evidence that they are in the best interests of the children covered by the programmes." [20]*
- e. *"Given the oral submissions that I received from the mother, it is worth emphasising that vaccination programmes may be in the best interests of children even though administering the vaccines is not free from risk. Very few activities in medicine or life more generally are free from risk. Administering a vaccine gives rise to a risk of harm to a child. Voluminous evidence establishing the extent and balance of risks and benefits needs to be obtained before a decision is made to roll out a national programme of vaccination for children" [20]*
- f. *"In the absence of any factors of substance that might realistically call into question whether the vaccinations are in an individual child's best interests, decisions for the child to undergo standard or routine vaccinations that are part of national vaccination programmes are not to be regarded as "grave" decisions having profound or enduring consequences for the child". [21]*

23. Before turning to the parties' individual cases, it is important to note that,

- a. Neither of the children has an unusual medical history;
- b. There is no well-evidenced medical contraindicator to Covid-19 vaccination specific to either of them;
- c. The mother made no application for permission to instruct an expert; and
- d. Neither party applied for a transfer of the case to the High Court.

The father's case

24. The father relies squarely on the published guidance from government and public bodies charged with implementing policy on children's health, specifically the publication of advice by the UK Health Security Agency.
25. He asserts that the offer of Covid-19 vaccinations to younger children, and the encouragement to parents to take up the offer, is of general interest to those children, their parents, and the public at large. The policy is constantly reviewed and despite that ongoing review the guidance issued in February remains unchanged. There is no concern as to the efficacy or safety of the vaccine for children aged 5-11 over and above those risks identified and considered by the JCVI prior to making its recommendation for them.
26. The court can be satisfied that the decision to offer the Covid-19 vaccine to younger children in the national programme is based on firm and well-researched evidence that this is in the children's best interests. The father is in a position to give informed consent to the vaccination of the children. The mother will not do this as she is opposed to vaccination in principle. Further, she prefers to leave decisions to the girls rather than taking them herself.
27. There is a positive health benefit to the girls in receiving these vaccinations, not just from the perspective of their health but also their education given the persistent difficulty with the girls' punctuality and school attendance.
28. The father's case is based not just on current infection data but on the risk of future increases and new variants.
29. For the father, Ms Wood submits that given the relevant legal framework, it is not for this court to investigate the science behind the government programme, but to approach the application on the basis that absent a new scientific development or peer reviewed research calling the efficacy or safety of the vaccination into question, vaccination of the children is in their best interests.

The mother's case

30. In her evidence, the mother attaches all of the pleadings from Judicial Review application CO/1738/2022 in which the Claimants seek a declaration that "...it is unlawful to offer the Vaccine to all healthy 5-11 year olds and to encourage vaccination for healthy children in that age-group".
31. In his skeleton argument before me Mr Hoar, counsel for the mother in this case and for the Applicants in the Judicial Review, advanced the mother's case squarely on the advice given by the JCVI up to and on 15 February 2022. He pointed in detail to factors including the following (which I do not set out in the detail contained in the Judicial Review pleadings and in the skeleton argument but which I have carefully considered),
 - a. On 19 May 2021, the JCVI concluded that naturally acquired immunity in children is expected to provide "robust and lifelong protection against severe disease".

- b. On 15 July 2021, the JCVI expressly advised that the vaccine should not be given to children under 16, advising that “until more data became available, JCVI does not currently advise routine universal vaccination of children and young people less than 18 years of age”.
 - c. On 3 September 2021, the JCVI advised that given the minimal risk of Covid-19 to otherwise healthy children aged 12-15, the margin of benefit was too small to support universal vaccination of 12-15 year olds. On 13 September 2021 nonetheless the Secretary of State implemented a national rollout of such a programme.
 - d. On 16 February 2022 the JCVI advised the making of a non-urgent offer of vaccination to 5 to 11 year olds. Mr Hoar highlights that this advice came from the JCVI with relevant evidence and qualifications including the following,
 - i. Advice to deployment teams to maintain the programme of non-covid vaccinations.
 - ii. The advice was a “one-off pandemic response programme”.
 - iii. The vaccine was not to be distributed at school.
 - iv. The “offer” contrasts with the “encouragement” to older children to receive the vaccine.
 - v. The JCVI did not resile from its 19 May 2021 conclusion in respect of natural immunity and severe disease.
 - vi. Children in the 5-11 age group were at extremely low risk of developing severe Covid-19 disease, were likely to be asymptomatic or to have only mild symptoms, and were unlikely if infected to need a substantial admission to hospital.
 - vii. Vaccination was likely to offer only short term protection against non-severe infection.
 - viii. The impact of vaccination on school absences was indeterminate.
 - ix. Vaccination of this age group was not expected to have any impact on the current Omicron wave.
32. Mr Hoar submits that this is novel treatment which in any event is approved only on a temporary basis and which represents clinical trials carried out only a very short period. For younger children this is only an offer, in contrast to the programme of vaccination of older children.
33. Mr Hoar submits on behalf of the mother that the court should not accept that the government offer, which is not part of the government vaccination programme, and which is not evidenced as likely to benefit these children, is in their best interests. Indeed, he submits, the factors set out above should lead the court to the conclusion that for these girls the balance is plainly against vaccination given the lack of positive benefit set against the known risks which, albeit statistically unlikely, are extremely serious should they arise.
34. Mr Hoar submits that the issue of Covid-19 vaccination is, for these reasons, new territory for the Family Court.

35. The court should be cautious in applying the principles in Re H and in M v H, because those were cases in which the court was considering well established routine vaccinations which carried none of the above concerns that arise in respect of Covid-19 vaccination of younger children. In M v H, the paragraph in which MacDonald J opined that similar principles would be likely to apply to Covid-19 vaccination was obiter and is not binding on this court.
36. The court should be slow to treat the decision of Re C as binding in the instant case. That was a public law case in which there were not two competing best interests decisions (Mr Hoar conceded in submissions that there were two such decisions in Re C – that of the local authority and that of the mother) and the mother was unrepresented. Poole J therefore did not have sight of any of the material now placed before this court, but only what the Judge referred to as “internet propaganda”.
37. Mr Hoar very properly informed the court that the High Court had just refused permission on paper for the Judicial Review to proceed. He indicated that the Claimants were at that point considering whether to request an oral hearing.

The father’s response

38. The father submits that all of the factors cited above have been taken fully into account by the JCVI itself which nonetheless recommended that the offer was made, and by the government in accepting the recommendation.
39. This court has clear guidance as to the legal principles applying in this case.

Analysis and decision

40. I have come to the clear conclusion that the mother’s case must fail, indeed in my judgment it is quite simply a hopeless case.
41. The JCVI recommended that all children aged 5-11 should be offered the vaccine. They did not distinguish between healthy children or children with any unusual medical history. They did not distinguish between children who had, or may have had, or had not had Covid-19. They plainly concluded that they had sufficient data to make the recommendation. They took into account all of the individual factors cited by Mr Hoar and nonetheless concluded as they did.
42. The Government accepted that recommendation.
43. As already set out above, the law that I must apply as set out in Re H and summarised in M v H at paragraph 40 includes that,

“Although vaccinations are not compulsory, scientific evidence now establishes that it is generally in the best interests of otherwise healthy children to be vaccinated, the current established medical view being that the routine vaccination of infants is in the best interests of those children and for the public good.”

“Subject to any credible development in medical science or peer reviewed research to the opposite effect, 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.”

44. There are no relevant medical contraindicators personal to these girls, and there is no credible development in medical science or peer reviewed research to the opposite effect. Mr Hoar is in effect, therefore, submitting the JCVI was wrong to recommend and the government was wrong to offer the Vaccine to *all* healthy 5-11 year olds and to encourage vaccination for healthy children in that age-group because for the majority of that group the benefit does not outweigh the risk. It follows, he submits, that this court cannot proceed on the Re H basis 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”*.

45. This is, in my judgment, inviting this court to embark on the very exercise,

- a. That is contrary to the approach that the High Court and the Court of Appeal have determined the courts should take; and
- b. That drew express comment, albeit obiter, from Poole J in Re C when he said,

*“I do not consider it appropriate for this court to embark on an investigation into the merits of any competing theses as to whether national programmes of vaccination of 12-15 year olds for Covid-19...are justified as being generally in the best interests of children in those age ranges. In cases that concern vaccines that are part of national programmes, the question of whether expert evidence is necessary will only arise if there is an identifiable, well-evidenced, concern about whether, due to their individual circumstances, a vaccine is contraindicated for a particular child, or if there is, as MacDonald J put it in *M v H*, “new peer-reviewed research evidence indicating significant concern for the efficacy and/or safety” of one or more of the vaccines that is the subject of the application...”[19]*

“Even if such new research were available, I have serious reservations about whether an individual expert or individual judge could or should engage in a wholesale review of the evidence behind an established and continuing national vaccination programme.” [19]

46. I reject the submission that Covid-19 vaccination comes into a different category to other vaccines with different applicable law. Albeit obiter, I find persuasive the views of MacDonald J in the final paragraph of M v H, and of Poole J who applied existing principles to the very issue of Covid-19 vaccination in Re C, albeit to a different coterie of children.

47. I reject the submission that Re C can be distinguished from this case because it was a public law case. Re H was also a public law case, and in all of the cases cited, public and private law cases, the courts have applied the same principles. In both categories of case the welfare of the child is the court’s paramount consideration.

48. I reject the proposition that Re C can be distinguished from this case because the court was there considering the school roll out of the mass vaccination of older children, rather than the mere offer of vaccination to younger children. That is, of course, a factual difference which may lead to more parents of younger children deciding not to vaccinate their children, however I can see no reason why that should lead to the application of different legal principles in the event of a parental dispute or, indeed, if so, what those different principles should be. The JCVI would not have recommended the making of an offer of vaccination to *all* younger children aged 5-11, and the government would not have accepted that recommendation if either body doubted the efficacy and/or safety of the vaccine for *any* of that coterie of children.
49. Every parent will, of course, decide whether they think the vaccine should or should not be given to their young children. Vaccination is not mandatory. Any parent who wishes to look in detail at the science, available as it is for public consideration, is perfectly entitled to decide that in the case of their particular children they do not agree to vaccination. The factors cited by Mr Hoar have contributed to the mother's position although I have already determined that she struggles in principle with any decision about vaccination and she would prefer to leave every such decision to the children to determine. Nonetheless I accept that she is influenced by the factors cited in the Judicial Review and the factors cited before me. If both parents held same view it would be perfectly lawful for them to do so and for the girls not to be vaccinated.
50. The fact is, however, as current case law makes clear, whilst the views of parents are important, where two parents disagree – each entirely possibly with a reasoned and strongly held position – then the court has to make the decision.
51. The children are two healthy girls. They are both struggling with the emotional fall-out of their sustained exposure to their parents' relationship breakdown, but physically they are well. Nothing specific to them raises any specific individual concern or risk factor connected to vaccination. They are of an age where their parents or, in default of agreement, the court should bear the burden of making the decision and not the girls themselves, young as they are and more especially where they are living primarily with a carer with this mother's adverse views about vaccination in principle.
52. The science considered by the government may change. The legal principles applicable to vaccination may change. But on the basis of the current science and the current applicable law, I conclude that the father should have permission to arrange for the Covid-19 vaccination offered by the government for the children from time to time. This should be on the same 3 general conditions already in place for the rest of the programme of vaccination from time to time.

HHJ Rowe QC

8 August 2022