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

NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

NOTE: PURSUANT TO S 437A OF THE ORANGA TAMARIKI ACT 1989, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE FAMILY COURT
AT MANUKAU

I TE KŌTI WHĀNAU
KI MANUKAU

FAM-2018-092-000170
[2020] NZFC 11597

IN THE MATTER OF	The Care of Children Act 2004
BETWEEN	CHIEF EXECUTIVE, Oranga Tamariki Applicant
AND	[WN] First Respondent
AND	[RP] Second Respondent

Hearing: 23 July 2020

Appearances: Roshni Bava for the Chief Executive
Paul Muller for [WN]
Annie Rakena for [RP]
Dr A Cooke as Lawyer for Children

Judgment: 23 December 2020

RESERVED JUDGMENT OF JUDGE A G MAHON

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[1] This case concerns the issue of the vaccination/immunisation of [AP], born [date deleted] 2014 (6) ([AP]) and [MP], born [date deleted] 2015 (5) ([MP]).

[2] [AP] and [MP] are in the interim custody of the Chief Executive under s 78 of the Oranga Tamariki Act 1989 ('the Act'). On 9 October 2018 their parents [WN] and [RP] consented to a declaration under s 67 that the children were in need of care and protection on the grounds established in s 14(1)(a) and (b) of the Act.

[3] Final orders have not yet been made and the issue for determination at this hearing was the issue of the vaccination/immunisation of the children. [RP] agrees to the children being vaccinated. [WN] is opposed to vaccination.

[4] The application is under s 31 of the Care of Children Act 2004 (COCA) for the children to be placed under the guardianship of the Court for the specific purpose of vaccination.

[5] The original application was for the wider purposes of ensuring the children attended their Gateway Assessment, addressing the referrals and recommendations made following that assessment, and implementing the treatment, educational supports and therapy to be put in place for the children.

[6] [WN] then consented to the Gateway Assessments taking place on 20 May 2019. However, she declined to consent to the children being vaccinated, a step the Chief Executive was anxious to take following last year's outbreak of measles.

[7] [WN] had not raised any objection to vaccination previously in the case and, when the issue arose in the hearing before Judge Moss on 9 October 2018, the Judge made the following comments on the positions of both parents as to the issue of vaccination:

> "[8] The parents both consent now to a Gateway Assessment. The mother assures us that the children's immunisations are up-to-date. [AP] will be due one around the time she goes to school, which is in the middle months of next year. [WN] has agreed to ask the GP to provide information confirming the immunisations".

[8] In her affidavit sworn 17 December 2019, [WN] gave the following reasons for her opposition to the children being vaccinated:

> "[11] Vaccines contain mercury. Mercury is damaging to brain and kidney function. I do not want my children exposed to the risk of mercury contamination.
>
> [12] Vaccines contained a [weakened] or dead form of the target disease. I do not believe there is any way to predict the exposure to the disease. I am concerned that immunisations can lead to a negative reaction.
>
> [13] I am concerned about the side effects and adverse events that may occur as a result of vaccination. I believe there is a risk of seizures or life-threatening allergic reactions. I have read the research that indicates that other reactions include congenital conditions, loss of vision, brain damage, death, disability, neurological diseases, gastro-intestinal diseases and paralysis. I do not want my children exposed to the risk of adverse reaction.
>
> [14] Declining to vaccinate the children has not led to the children contracting any of the target childhood diseases. On the other hand, vaccinating my children exposes them to the risk of adverse effects arising from the use of vaccines and the vaccination process. The risk of vaccinating the children is far greater than the risk of the children contracting any of the target childhood diseases.
>
> [15] I do not believe that a guardianship order is in the children's welfare and best interests. The children's interests are not served by vaccinating the children".

[9] The Chief Executive filed evidence from Dr Helen Petousis-Harris whose relevant qualifications an experience are as follows:

(a) She is an Associate Professor at the University of Auckland Medical School and an expert on immunisation.

(b) She was previously employed by the Immunisation Advisory Centre at the University of Auckland, primarily as Director of Immunisation Research since 2012. This Advisory Centre is the most reliable source of expert information in respect of the vaccination of children.

(c) She has approximately 22 years of experience in research, advice and communication on vaccines and vaccinations.

[10] Dr Helen Petousis-Harris filed an affidavit sworn 23 March 2020 and gave oral evidence at the hearing. Her qualifications and experience to give expert evidence on the issue were not challenged.

[11] It was the view of Dr Petousis-Harris that best practice for the protection of children from disease is prescribed by the Ministry of Health's National Immunisation Schedule of Vaccines for Children, which is an age-appropriate guide to immunisation for medical professionals.

[12] She described vaccination as "a corner-stone of public health" and concluded that at their ages, [AP] and [MP] were at risk of the following vaccine-preventable diseases:

(a) Tetanus
(b) Pertussis
(c) Hepatitis B
(d) HIB disease
(e) Pneumococcal disease
(f) Measles
(g) Mumps
(h) Rubella
(i) Chicken Pox

[13] While the risk of a child contracting some of the diseases was low, the risk for others was high. All these diseases had the potential to be fatal or to result in permanent adverse health consequences for the victim. Pertussis and measles are the most infectious diseases known to infect humans. They are airborne and infect most susceptible people in a room where carriers of the virus are present and the infection remains in the air for hours after an infectious person has left.

[14] Dr Petousis-Harris gave the recent example of the 2019 measles epidemic as evidence of the consequences of vaccine-preventable diseases, where most cases occurred in South Auckland and were among unvaccinated people.

[15] The risk of contracting any of the listed diseases is high because there is no cure for any of them. While improvements in hygiene and sanitation have been effective in reducing the spread of infectious diseases such as cholera and typhoid, this is not the case with the listed diseases, particularly the airborne variety.

[16] She concluded that the vaccines on the NZ Immunisation Schedule were extremely safe as they had been developed over decades of rigorous empirical research. In her words, children who are vaccinated are no more at risk of serious adverse events or health conditions than unvaccinated children and, of course, they are at much lower risk of contracting many diseases.

[17] Dr Petousis-Harris said the common responses to vaccines were brief pain, redness and swelling from the injection site and sometimes a fever.

[18] She was aware of the myths about ingredients of vaccines which include a belief that vaccines can contain chemicals such as mercury, animal-derived substances (such as monkey kidneys, or human cells). She unequivocally stated that they do not. A further claim that vaccines contain ingredients such as aluminium is misleading, as where such elements are used the use is in very small doses which do not pose a threat to human life. In her words, "all life is made of chemicals and all chemicals are poisonous if the dose is high enough, including water". Nor is there any mercury in childhood vaccines.

The Hearing

[19] Dr Petousis-Harris was cross-examined on the contents of her report and confirmed the high efficacy of vaccines. She said it is not necessary to meet individual children to determine the benefit of vaccination, although the specific vulnerability of children with underlying conditions will increase the risk to that child of adverse effects from becoming infected with any of the diseases.

[20] Dr Petousis-Harris said that the vaccines are so safe now that the only side effect of long-term risk was the child suffering an anaphylactic shock. As vaccines are given by qualified medical personnel, any such response would occur during the period following the vaccination when the vaccinated child is monitored at the medical centre where they have been vaccinated.

[21] [WN] suggested to Dr Petousis-Harris in cross-examination that because neither [AP] nor [MP] had contracted any of the diseases for which vaccination is

given, they had a resilience that made vaccination inappropriate when taking into account the potential risks of vaccination. Dr Petousis-Harris' response was that it was good luck rather than any other factor which had meant neither child had caught measles or any of the other noted diseases. She further noted that while the measles outbreak was in South Auckland and the children were in foster care out of the Auckland region, they remained at risk because of the speed at which the measles spread and how quickly the public health system was overwhelmed for a brief period to the extent that track and trace procedures became extremely difficult to implement.

[22] The assigned social worker, Christian Loau, was cross-examined on her affidavits affirmed on 3 April 2019 and 18 October 2019. She said the reason why the Chief Executive wanted the children to be vaccinated was because of the risk of them contracting measles during the recent measles' outbreak. She was also concerned about the children's vulnerability to the other diseases for which vaccinations are regularly given. While the children were not currently living in South Auckland, contact between the children and their mother occurred mostly in South Auckland, where the highest number of measles cases existed.

[23] It became apparent under cross-examination that the Gateway Assessment had not specifically recommended immunisation. It was only because of the elevated risk of the children contracting measles that the issue had been pressed to the stage of a court application.

[24] In his cross-examination, the children's lawyer, Dr Cooke, suggested to the social worker that it was a major flaw in Oranga Tamariki's policies and practices that an automatic scheme for immunisation was not in place and that proceedings were not automatically filed in the event there was not full consent from the parents or caregivers.

Evidence of [WN]

[25] [WN] told the Court that she had a degree in biblical counselling and emphasised her strongest objection to vaccination was on religious grounds and as a result of her upbringing. She could not explain why this ground of objection was not

referred to in the affidavit she filed in support of her opposition to vaccination. Nor could [WN] explain why she had told Judge Moss that both children were up-to-date with immunisations when she knew that they had not received any.

[26] [WN] believed that anyone could read the information available on the Internet and reach an informed view on the benefits and detriments of vaccination. Notwithstanding that the evidence of Dr Petousis-Harris was heard before her own, [WN] did not accept Dr Petousis-Harris had any special ability to analyse the research on vaccinations. In other words, [WN]'s internet research which had found multiple sources of data opposed to vaccination, meant she could have an opinion which should carry the same weight with the Court as that of the expert.

[27] When questioned closely on the grounds of her opposition to vaccination, [WN] was not able to provide documentary evidence justifying her opinion. For example, when it came to the issue of mercury in vaccinations, she thought she might have read about these dangers but she could not remember where she had seen the information or the source of the data reaching such a conclusion.

[28] From [WN]'s point of view, there was no risk to the children if they were not vaccinated, as they were both well and would have the resilience to ward off any viral infection.

[29] Under cross-examination by Ms Rakena, counsel for [RP], [WN] agreed that she had initially refused her consent to a number of interventions with the children since they were placed in the custody of the Chief Executive. These included haircuts, dental visits, [AP]'s engagement in the SAFE programme and [MP]'s engagement with a specialist for speech therapy.

[30] When Ms Rakena suggested to [WN] that it was her sense of injustice about the children being uplifted from her care which had driven her opposition to these necessary interventions and now to vaccination, [WN] replied that it was for her to make decisions about her children and not a social worker.

The Law

[31] The principles in *Hawthorne v Cox* apply to all decisions made under s 31 of COCA.[1]

[32] Section 30 relates to the guardianship of the Court and the concurrent jurisdiction to apply in either the High Court or the District Court. The court can only place children under the guardianship of the court pursuant to s 31 on an application and does not have the ability to do so of its own motion.

[33] In *Hawthorne v Cox* the Court made the following observations of the court's jurisdiction to make a guardianship order, at paragraph [75]:

> The Court's guardianship (or wardship) jurisdiction, while one to be evoked cautiously and after proper enquiry, ought to be regarded as a flexible and resourceful remedy that can be used to protect vulnerable children who cannot speak or act for themselves ... However, despite the need for flexibility, the touchstone for invoking jurisdiction remains the need to protect a vulnerable child ...

[34] In *Re CPPB* Judge Moss said of the court's power to make an order:[2]

> ... The jurisdiction is broad, and unfettered by legislative or judicial guidance as to its boundaries. It is a last resort jurisdiction, however, and it would not be proper to exercise its jurisdiction without consideration of whether there are other interventions that might achieve the stated goal.

[35] As final orders have not yet been made in this case, the Chief Executive does not have the option of seeking an order for sole guardianship under the Act and it was for this reason necessary to make an application that the children be placed under the guardianship of the Court under s 31 of the COCA for the specific purpose of immunisation.

[36] In *NGA v Hes,* the mother wanted her son to be inoculated against meningococcal disease, but his father wanted to address the risk with natural medicines because he doubted the safety of the immunisation programme.[3] The eight-year-old child had strong views in support of being immunised. The Court found that it was in the welfare and best interests of the child to be vaccinated because of the

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[1] *Hawthorne v Cox* [2008] 1 NZLR 409 (2007 26 FRNZ 440) [2008] NZFLR 1 (HC).
[2] *Re CPPB* FC Lower Hutt FAM-2008-063-226, 2 December 2011 at [9].
[3] *NGA v Hes* FC Christchurch FAM-1999-009-2203, 5 September 2005.

preponderance of medical evidence that the vaccine was safe and did not have serious side effects.

[37] In *Stone v Reader*, the Court had no specialist medical evidence in support of the application for immunisation but nevertheless directed the child subject to the application was to be vaccinated as judicial notice could be taken of the recommendations of the New Zealand health authorities that immunisation in accordance with the Ministry of Health schedule was the best protection for children from some common diseases.[4]

[38] In *[Aguilar] v [Aguilar]* the Court was considering an application by the father of a two-and-a-half-year-old child that the child be vaccinated in accordance with the Ministry of Health Guidelines, including the catch-up schedule as proposed by the child's general practitioner.[5] The child's mother opposed the application, as in her view sufficient immunisation could be achieved through homeopathic medicines and treatments which could be purchased at a pharmacy.

[39] It was held in that case that the most reliable expert information for the Court regarding vaccinations was that provided by the Ministry of Health National Immunisation Schedule of Vaccines for Children and that Dr Petousis-Harris, as a vaccinologist with the Department of General Practice and Primary Health Care at the University of Auckland, had the expertise and qualifications to give evidence to this effect and to give specific evidence on the nature of the vaccine treatment required for the involved child, who had become too old to have a vaccine used for younger children. The Court made the following observation:

> [45] It is rather timely that this hearing has taken place during an unprecedented measles epidemic in New Zealand, and Auckland in particular. The irony for [Laurel] is that the expert evidence suggests [Laurel] is more at risk of adverse effects of contracting, for example, measles than being vaccinated.

[40] The above decisions were made under s 46R of the COCA as the children were not in the custody of the Chief Executive. Use of s 46R is not available to this Court

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[4] *Stone v Reader* [2016] NZFC 6130.
[5] *[Aguilar] v [Aguilar]* [2019] NZFC 7525.

in the case currently at hand, as the children are subject to the Act and the only way in which children could be compelled to undergo vaccination was by them being placed under the guardianship of the court for that specific purpose, per s 31 of COCA.

[41] I accept the submission of Dr Cooke that these children are too young to express an informed view on the issue of immunisation. He has not sought their views on the issue in these circumstances but drew my attention to the decision of *AA v Family Court at Auckland*.[6] In that case the Court held that the views of the children must be obtained before a psychological report was directed under s 133. This requirement appears to have been necessitated in that case because of the belief of the High Court Judge that children met the definition of "parties" under COCA and that it is a requirement of s 133(7) that the views of parties are obtained before a decision is made to require a psychological report.

[42] If that was indeed the intention of the Court then a litigation guardian would need to be appointed for all children in cases under COCA, as children are deemed to be incapacitated by their minority and no application can be progressed until a litigation guardian is appointed for a child.[7] Considering the applicability of that authority to this case, I find either:

(a) The High Court decision is *per incuriam*; or

(b) The decision must have been decided on the specific facts of that case. I note the children in this case are younger than those in *AA* and distinguish the case on that ground.

[43] Dr Cooke is not therefore required to give the children an opportunity to express views on immunisation.

Discussion

[6] *AA v Family Court at Auckland* [2018] NZHC 1638.
[7] Family Court Rules 2002, r 90.

[44] Any decision about medical intervention for a child who is not in the custody of the Chief Executive is a decision for the guardians of the child, normally the child's parents. In this case, [AP] and [MP] are in the Chief Executive's custody and, as final orders have not yet been made, the only ability to ensure that necessary medical intervention occurs for them when both parents do not consent is for an application to be made to place the children under the guardianship of the Court pursuant to s 31 of the Care of Children Act for the specific purpose of such treatment.

[45] The approach of this Court must be the same as in any case where scientific evidence is an issue, that is, that expert evidence is required and if a party challenges this evidence, that party must either file their own expert evidence or have sufficient ability to test the evidence of the applicant's expert in cross-examination. [WN] neither filed expert evidence in support of her opposition to immunisation of the children or herself had any understanding of the science on which the Ministry of Health Guidelines for Immunisation is based.

[46] The Chief Executive did not seek to rely on the Ministry of Health Guidelines alone, although this may have been sufficient as the Court found in *Stone v Reader*.[8] The Chief Executive chose to file evidence from Dr Petousis-Harris who is an expert in the field and she addressed and explicitly rejected each of the grounds of [WN]'s opposition to immunisation as not based on comprehensive and current scientific data.

[47] [WN] raised a new ground of objection in her oral evidence that it was against her religious principles for the children to be vaccinated. Yet despite her qualifications in biblical studies, she could not point to any passage in the Bible supporting this position. Nor could she explain why this ground was not raised in the affidavit she filed in support of the notice of opposition.

[48] [WN] provided no evidence in support of the original grounds of opposition. When asked whether her views had changed after hearing the evidence of Dr Petousis-Harris, [WN] claimed that her opinion was as good as the opinion of Dr Petousis-Harris. [WN] felt that her detailed internet search of articles on the issue enabled her

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[8] *Stone v Reader,* above n 4, at [21].

to reach her own, equally as authoritative, conclusions on the risks of immunisation for her children.

[49] I do not accept [WN]'s opposition to the application. To do so would make a mockery of science and the place of specialist evidence in Court proceedings.

[50] The best example of the difference between a community where decisions affecting the health of the population are made in accordance with empirical medical science and a community where that is not the case, is the contrast between the Covid-19 response of New Zealand and that of the United States of America. The tragedy of the Covid-19 pandemic is that, until very recently, there was no ability to be vaccinated against the disease. The contrasting consequences of the degree of scientifically supported intervention in each of these countries to prevent the spread of Covid-19 is stark and tragic when the mortality rate in the United States is compared to the mortality rate in New Zealand.

[51] It should not be necessary for the Chief Executive to file expert evidence in cases concerning the immunisation/vaccination of children in accordance with the Ministry of Health Guidelines. The evidence of Dr Petousis-Harris establishes that the guidelines have been developed and continue to be updated in accordance with the current science on the issue, science in respect of which there is little dispute among immunisation experts. It is important that the Chief Executive changes her policies and practices in this area to ensure it is obligatory to vaccinate all children who are subject to the Act and to file urgent applications in the Family Court seeking that children are placed under the guardianship of the court for the specific purpose of vaccination if there is opposition from any guardian of the child.

Outcome

[52] I have no doubt that it is in the welfare and best interests of both children that they are immunised at the earliest opportunity against all the diseases listed in the schedule. The only way in which such immunisation can be achieved in this case is for the children to be placed under the guardianship of the Court for this purpose.

[53] I make an order under s 31 accordingly and the applicant is to file an order for sealing.

AG Mahon
Family Court Judge