

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
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**IN THE FAMILY COURT
AT WAITAKERE**

**I TE KŌTI WHĀNAU
KI WAITĀKERE**

**FAM-2010-090-000852
FAM-2008-090-001794
FAM-2021-090-000211
[2021] NZFC 12883**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[AZHAR GOUR] Applicant
AND	[RUBY MOSS] Respondent

Hearing: 20 December 2021

Appearances: E Stenhouse-White for the Applicant (via AVL)
Respondent appears in Person (via AVL)
J Surgenor as Lawyer for the Child (via AVL)

Judgment: 20 December 2021

ORAL JUDGMENT OF JUDGE E B PARSONS

[1] Today was set down for a formal proof hearing to determine a s 46R Care of Children Act 2004 application filed by Mr [Gour] for directions from the Court in relation to a dispute between guardians relating to the couple's son [Arvind] to receive COVID-19 vaccinations. The hearing has taken place by way of telephone

appearances, given the Alert Level Red in terms of the Traffic Light system imposed by the government during the existence of the COVID-19 pandemic.

[2] The matter has been set down by way of formal proof with the following background. Mr [Gour] filed an application for a 46R determination of dispute between guardians on 24 November 2021. He also filed an affidavit in support and sought directions specifically permitting [Arvind] to receive his COVID-19 vaccinations. He set out the history and noted that he would like [Arvind] vaccinated in accordance with the medical advice that had been provided. He attached to his application a letter from [Arvind]'s doctor, Dr [Kasi], (full name Dr [Kasi]), who has been [Arvind]'s doctor for a significant period of time.

[3] That application was served and the respondent, Ms [Moss], had the opportunity to file notice of response and affidavit. The period of time to do so was extended by Judge Pidwell for a further week to provide extra time to file an affidavit, a notice of response filed, given Ms [Moss] has indicated her opposition to the orders sought.

[4] No notice of response or affidavit has been filed or served by Ms [Moss], but she has attended the formal proof hearing today. Ms [Moss] has indicated that she has had difficulties in accessing a computer or any documentation to be able to comply with the directions made to file any response within the provided time frame. She has indicated, however, that she does oppose the order sought being made. I have indicated to her that because she has not filed a notice of response or affidavit, the matter, notwithstanding her views being heard, proceeded by way of formal proof today.

[5] In terms of r 416ZH, of the Family Court Rules 2002, what that means is that the applicant must prove to the satisfaction of the Court that the orders sought are consistent with s 4 of the Care of Children Act 2004. This means that any order sought must be established as being in the welfare and best interests of the particular child the order sought relates to.

[6] The person we are talking about and making decisions for today is [Arvind], who was born [date deleted] 2008. He is currently 13 and a half years old. His views have been obtained and relayed to the Court, both indirectly through his counsel Ms Surgenor, as well as directly to Her Honour Judge Pidwell during the course of a judicial interview which was undertaken with her on Monday, 29 November 2021 (by way of Zoom meeting between her, [Arvind] and in the presence of Ms Surgenor), which has been transcribed and provided to the parties. [Arvind] has also been represented in his views by each of his parents, although they have differing views of what those are.

[7] Therefore, as already noted, in terms of today's hearing, it is a formal proof hearing. Having said which, I have provided the opportunity to Ms [Moss] to make her views known and have factored those into my consideration and analysis.

Mr [Gour]'s position

[8] The primary submission made by Ms Stenhouse-White for Mr [Gour] in seeking the order permitting [Arvind] to be vaccinated is that the risk of contracting the COVID-19 virus is significant.

[9] Ms Stenhouse-White says the risk of COVID-19 virus being contracted by [Arvind], would present increased risk given the medical concerns he lives with and his history, which includes lung issues requiring daily monitoring and has seen him previously hospitalised.

[10] She points to the evidence filed by her client and, in particular, to specific paragraphs from Dr [Kasi]'s letter, which states the following:

From a medical perspective, [Arvind] has ongoing asthma and [another moderately severe condition], both requiring regular daily treatment. He has previously been admitted to hospital with severe episodes of asthma and, in view of these conditions, he is at significant risk of severe disease should he suffer COVID-19 infection while remaining unvaccinated.

On balance, and in the current Auckland COVID-19 infection setting, I feel the potential for any harmful effects from the vaccine are far outweighed by the risk of serious harm to [Arvind] from COVID-19 infection while he remains unvaccinated. In fairness, the Government has announced the introduction of AstraZeneca COVID-19 vaccines as well as signalling the

Novavax vaccine arriving sometime in 2022, both of these may be suitable alternatives to [Arvind] receiving the Pfizer vaccine, however, neither of these vaccines are available in New Zealand right now and hence any delay in [Arvind] being protected against infection prolongs his risk of potential harm from COVID-19 infection. Hence, in reference to [Arvind]’s best interests I would be grateful for your thoughts and advice on this matter.

[11] In completing that letter Dr [Kasi] was aware of the differing views of [Arvind]’s parents in that [Arvind]’s father is supportive of the vaccinations but his mother is not.

Ms [Moss]’s position

[12] Noting that Ms [Moss] has not filed any evidence, her position is recorded as her views, rather than based on any evidence filed by her.

[13] Ms [Moss] has indicated verbally today that she is aware of a lot of COVID-19 vaccines producing a lot of bad side effects. She says that children under the age of 16 should not have vaccines, especially because from her point of view the vaccines are new and have only just been made available and are experimental. Ms [Moss] says the current COVID-19 vaccines are not like the ones that children get when they are newborn which have been around for a long time (around for 20 years or longer) which she says took a long time to get right and were not just instantly available.

[14] Her concern is that the Pfizer vaccine may produce risk to [Arvind]. She says she knows people who have had bad side effects from the vaccination. She states that she is not anti or pro the vaccination but just does not think that children under 16 understand what is going into their body and again repeats that the vaccination is new and experimental. With his underlying health issues, she is concerned that [Arvind] may have further problems caused by receiving the COVID-19 vaccination.

Lawyer for the Child’s position

[15] Ms Surgenor has filed submissions as well as reports. She notes the support of the wider medical community for the vaccinations. She also points specifically to the evidence of Dr [Kasi] who has known [Arvind] for many years and has also been his doctor and has knowledge of [Arvind]’s underlying medical concerns. She said that

[Arvind] is very clear in his views, both with her and also with Judge Pidwell, that he wishes to receive the vaccinations. She submits that it is in his interests to be provided with the opportunity to receive the vaccinations. She confirms that [Arvind] is aware of the views of Dr [Kasi] in terms of the advice that has been provided to the Court.

[16] Ms Surgenor raises the concern that with [Arvind]'s specific breathing issues and the high risk of his lungs being impacted by contracting COVID-19, there is extra emphasis and concern to ensure that [Arvind] gets vaccinated soon, especially in light of the new strain (Omicron) which she says elevates the risk of him contracting the virus. She also notes that with [Arvind] being almost 14 years' old his views need to be respected and submits that in terms of ss 4 and 6, he should be entitled to receive both the vaccines as well as any boosters and notes that he has already suffered from the loss of being part of the end of year activities due to not being vaccinated.

Discussion

[17] The analysis required for this decision, falls within ss 4, 5 and 6. It is a formal proof hearing, so the orders sought must be consistent with s 4, which is the welfare and best interests of [Arvind]. That imports the principles in s 5 and the focus on this really is on his medical safety, which must be protected. The other considerations in terms of ss 5(b), (c), (d) and (f), relate to ongoing consultation, which has not resulted in any consensus. There is no suggestion that this decision impacts upon his care arrangement at this stage.

[18] [Arvind]'s views must be paid regard to. He has had the opportunity to have those clearly made available to the Court through Ms Surgenor and through his direct meeting with Judge Pidwell. It is noted that there is a sliding scale of autonomy that is provided and observed with children the closer they get to 18 years of age, which is when guardianship expires – known as the Gillick principle taken from an English case analysing guardianship decisions and dealing with contraception in that particular case.

[19] [Arvind] is moving towards that age and will be 18 in just over 4 years' time. His views as expressed on this issue of immunisation need to be considered. It is

observed that there is specific provision for children aged 16 and 17 to make their own application for a review of a guardian's decision when they are 16 and 17 in terms of s 46C. This adds heft to the argument that the closer a young person is to turning 16 and beyond, the more weight that has to be placed on their views and be taken into account within the Court's decision-making process.

[20] There is medical evidence filed from Dr [Kasi] which is specific to [Arvind] supporting that the COVID-19 vaccinations are available to [Arvind]. I also pay regard and take judicial notice of the fact that the Ministry of Health has taken a position that supports the vaccine being available to those aged between 12 and 15, a position that was taken from August 2021. I note the case of *Stone v Reader*, where vaccinations were approved by the Judge at the time. She noted, when authorising the vaccinations, that the recommendations of the New Zealand Health Authorities, in accordance with the Ministry of Health schedules, was that the vaccinations were available for the best protection of children from common disease and further noted that that was the best evidence before the Court.¹

[21] The same situation arises in this matter, where the information noted below is provided by the Ministry of Health in relation to the Pfizer Covid-19 vaccine.

The Ministry of Health has issued information noting that the Pfizer vaccine is proving to be highly effective in young people after two doses are administered. The Ministry notes that children are far less likely to fall seriously ill and less likely to transmit the virus to others and that across all age groups studies have shown that about 95% of people who receive both doses of the Pfizer vaccine were protected against getting COVID-19 symptoms. The Ministry information also notes that Pfizer has reported 100% efficacy against symptomatic COVID-19 infection in the 12 to 15-year-old age group, with a higher antibody response than was seen in the 16 to 25-year-old age group.

Medsafe is responsible for approving the use of all medicines and vaccines in New Zealand. The Pfizer vaccine was provisionally approved for New Zealanders aged 16 and over in February 2021 and young people age 12 to 15 in June 2021. It is noted that Medsafe only approves a vaccine in Aotearoa once they are satisfied of strict standards for safety, efficacy and quality. Millions of people have now been vaccinated around the world and no additional safety concerns have been raised. The Ministry further notes specifically regarding 12 to 15 year olds, that the safety and efficacy of the Pfizer vaccine was first evaluated through a large clinical trial where participants were randomised to either receive two doses of the vaccine

¹ *Stone v Reader* [2016] NZFC 6130.

21 days apart or a placebo and notes the results of that in approving the vaccine for this age group.²

[22] That is not to say that there are not side effects, as raised by Ms [Moss] as a concern. Side effects are acknowledged by the Ministry of Health including a sore arm, a headache, feeling tired, feeling feverish, sweaty, nausea and aching muscles. This needs to be taken into account, as Dr [Kasi] has done, in weighing up the concerns around side effects of the vaccination as opposed to not.

Orders

[23] Having weighed the specific advantages and disadvantages for [Arvind] with his particular medical history and needs, Dr [Kasi]'s evidence was that on balance the potential for harmful effects from the vaccine are far outweighed by the risk of serious harm to [Arvind] from the COVID-19 infection if he remains unvaccinated.

[24] Given the medical evidence from Dr [Kasi], the information from the Ministry of Health and paying regards to the views of [Arvind], I am satisfied that it is in his welfare and best interest, and is required to ensure his safety to have the COVID-19 vaccines administered as soon as possible.

[25] The application made by Mr [Gour] was for COVID-19 vaccinations, therefore, the two vaccines that are required immediately are authorised to be administered as soon as it can be done.

[26] Any boosters are to be made available and administered on the specific advice from Dr [Kasi] that they are required, given that he knows [Arvind] specifically and will be in the best position to assess his individual medical needs.

Judge Emma Parsons
Family Court Judge

Date of authentication: 22/12/2021

In an electronic form, authenticated pursuant to Rule 206A Family Court Rules 2002.

² Information noted from Ministry of Health