

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

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**IN THE FAMILY COURT
AT AUCKLAND**

**I TE KŌTI WHĀNAU
KI TĀMAKI MAKĀURAU**

**FAM-2018-004-000682
[2022] NZFC 1479**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[KATE COOPER] Applicant
AND	[GABRIEL BRUCE] Respondent

Hearing:	18 February 2022
Appearances:	Applicant in Person Respondent in Person M Mikkelsen Lawyer for Child
Judgment:	28 February 2022

RESERVED JUDGMENT OF JUDGE S J FLEMING

Introduction

[1] [Trudy] is aged [12 years]. Her parents – Ms [Cooper] and Mr [Bruce] – are unable to agree on whether she should be vaccinated against Covid-19. Mr [Bruce] supports [Trudy] being vaccinated while Ms [Cooper] opposes.

[2] In November last year Ms [Cooper] made an application on a without notice basis to prevent Mr [Bruce] arranging for [Trudy] to be vaccinated. The application – to resolve a dispute between guardians – was directed to proceed on notice.

[3] Submissions have been filed by both of [Trudy]’s parents and they addressed me further at the hearing. Ms Mikkelsen is [Trudy]’s lawyer and she has reported as to [Trudy]’s views, which are that she should be vaccinated. Ms Mikkelsen has also filed submissions and addressed those submissions at the hearing.

Background

[4] Ms [Cooper] and Mr [Bruce] have been involved in proceedings around the care arrangements for their daughter [Trudy] and her sister [Daisy] (aged eight) for around four years. A parenting order was made in November 2019 on an agreed basis and that order provided for the care of the children to be shared between their parents. There have been difficulties in communication between the parents for a long time and communication counselling was directed in August last year when Mr [Bruce] applied to enforce the order. That counselling only commenced towards the end of last year. It is not clear if Ms [Cooper] will continue to engage in communication counselling primarily because she regards it as unlikely to assist in enabling any resolution of the issues that have arisen, and continue to arise, between her and Mr [Bruce].

[5] About two weeks before this hearing, [Trudy] had an argument with her mother and asked to be collected by her father, which was agreed. [Trudy] has not seen her mother since 4 February and has been in the care of her father.

[6] It is Mr [Bruce]’s understanding [Trudy] and her mother had argued on the evening about vaccination. Ms [Cooper] agrees there was an argument but says it was

not about vaccination. [Trudy] is very conscious of this particular dispute and told her lawyer that she believed her mother was angry with her because she ([Trudy]) wants to be vaccinated against Covid-19. It has clearly been an issue for some time and Mr [Bruce] referred to [Trudy] emailing in late November last year that she did not want to think about or discuss vaccination until after Christmas.

Ms [Cooper]’s Position

[7] No expert medical evidence was filed by either parent, although Ms [Cooper] did refer to a number of studies and commentaries which she had researched. In summary she believes that the risks associated with this vaccination outweigh any benefits to be gained from it.

[8] In particular, Ms [Cooper] submits:

- There is a risk of a serious adverse reaction to the vaccination;
- The risks of vaccination far outweigh the risks of contracting the virus;
- Vaccination does not prevent a vaccinated person contracting the virus;
- There is no long term data available around the effects of the vaccination on children; and
- The vaccination affects the recipient’s immune system.

[9] I accept Ms [Cooper] is genuinely concerned about the risks of the vaccine and cites examples of cases where there has been a serious adverse reaction.

[10] Ms Mikkelsen submitted the Ministry of Health Guidelines recorded that everyone 12 years and over can be vaccinated and the Immunisation Advisory Centre has this to say:

Vaccine Approval Process in New Zealand

“All medicines approved for use in New Zealand, including vaccines, go through strict review by Medsafe to make sure they meet local and international safety and efficacy guidelines. Once Medsafe has reviewed all available data, it makes a recommendation to the New Zealand Government as to whether a medicine can be granted approval in New Zealand.”

[11] Ms Mikkelsen further noted that while New Zealand’s Ministry of Health National Immunisation Schedule of Vaccines for Children does not presently include the Covid-19 vaccine, the Immunisation Advisory Centre in relation to vaccinating children aged 12 to 15 in New Zealand against Covid-19, records:

All New Zealanders can have confidence in the safety and efficacy of Pfizer/BioNTech vaccine and Medsafe’s provisional approval of the Pfizer/BioNTech for 12 to 15 year olds adds weight to this confidence. New Zealand is again in the fortunate position of taking cues from international experience where the vaccine has already been approved for this younger age group in places of high rates of disease including Canada, the United States, Europe and Japan.

[12] Ms [Cooper] has also given evidence [Trudy] has told her that she does not want to be vaccinated, but in any event Ms [Cooper] does not believe [Trudy] is old enough to make that decision for herself.

Mr [Bruce]’s Position

[13] Mr [Bruce] supports [Trudy] being vaccinated against Covid-19 and believes [Trudy] wants to be vaccinated. He accepts there is some risk of an adverse reaction to the vaccination, but his research has lead him to the conclusion that it is a very low percentage chance of a serious adverse reaction. He is unaware of any medical reason why [Trudy] should not be vaccinated. Both parents agree she is a healthy child.

[14] One of Mr [Bruce]’s major concerns is to support [Trudy] in her wish to be vaccinated because she is under a great deal of stress. [Trudy] is very conscious of the ongoing argument about vaccination between her parents. It is a burden for her and I expect the rift in her relationship with her mother will also be contributing to her anxiety. She is also prevented from partaking in activities such as playing in [sporting] competitions, going out to restaurants and going to the movies. Mr [Bruce] believes all of these repercussions weigh heavily on a child already under pressure and

suffering from anxiety, noting that she is fearful of contracting Covid-19 and all of her friends have apparently been vaccinated.

[Trudy]’s Position

[15] Both parents have given evidence to the effect [Trudy]’s views coincide with their own views on vaccination, although Ms [Cooper] did not take any issue with Ms Mikkelsen’s report which set out [Trudy]’s views as expressed to her.

[16] Ms Mikkelsen reported on 2 February 2022. She had met with [Trudy] at her school in the presence of her guidance counsellor. [Trudy] was aware she was meeting with Ms Mikkelsen to discuss the possibility of vaccination and that her parents have different views.

[17] At the time they met it had already been agreed [Trudy] would be moving to her father’s care over the next month because of difficulties in her relationship with her mother. [Trudy] told Ms Mikkelsen the following:

- She was fed up with her mother’s efforts to manipulate her into not getting the vaccine.
- She was unable to discuss vaccination with her mother because her mother was trying to convince her to not be inoculated.
- Her father asked her about vaccination rather than trying to convince her.
- She wanted to be vaccinated but did not want to be vaccinated on her own and wanted her father to accompany her.

[18] [Trudy]’s view as expressed to her lawyer was that she should “get the vaccine”. She thought it was “the right thing to do” and if not vaccinated, believed she would be anxious and concerned about the possibility of becoming ill, being trapped inside (if isolating) and not being able to attend events.

The Law

[19] Section 46R of the Care of Children Act (the Act) provides if a child’s guardians are unable to agree on a matter concerning the exercise of their

guardianship, either may apply to the Court for its direction. This dispute around vaccination squarely falls within the definition of a dispute between guardians in terms of s 46R.

[20] The principles contained in s 5 of the Act must be taken into account and [Trudy] must be given the opportunity to provide her views (s 6). Although there is a requirement for [Trudy]’s views to be taken into account and given due weight, her views are not determinative of the issue. The welfare and best interests of the child in her particular circumstances must be the Court’s first and paramount consideration. [Trudy] is living in a difficult situation trying to make sense of the parental conflict and the differing opinions of her parents, which appear to be presently impacting on her relationship with her mother. It is not clear how [Trudy]’s parents intend to assist her in reconciling with her mother, although both seem committed to doing so.

The Weight to be Placed on [Trudy]’s Views

[21] [Trudy] appears from all reports, particularly her lawyer’s, to be a mature thoughtful child, albeit affected very much by the conflict between her parents. She has had the benefit of her mother’s very strong views against vaccination, which appear also to be supported by her maternal grandmother. She has also been exposed to the views of her father, which are clearly in support of vaccination, although, according to [Trudy], his views are put much less forcefully to her than those of her mother.

[22] In *Gillick v West Norfolk and Wisbech Area Health Authority*,¹ (*Gillick*) it was accepted children with sufficient maturity and understanding may be capable of providing consent without requiring parental consent. Of course, in this case, one parent does consent to vaccination but *Gillick* is authority for the proposition that when a child achieves a sufficient understanding and intelligence to enable her to understand fully what is proposed, then the parental right to determine whether their child will have medical treatment terminates (at 188-189). The test is often referred to as the Gillick Competency Test.

¹ *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

[23] [Trudy]'s views have been clearly expressed and she has provided reasons for the views which are consistent, cogent and rational. I agree with her lawyer's submission that they indicate [Trudy] has "taken a thoughtful and mature approach to this issue", even although her views have undoubtedly been affected by her parents' position. Her views should be given significant weight, but they alone do not determine the outcome. I also need to consider all of the evidence, including [Trudy]'s views, in determining what is an outcome that is in [Trudy]'s welfare and best interests.

Decision

[24] I accept Ms [Cooper] has a genuine concern that the risks associated with being vaccinated outweighs any benefits to [Trudy] and that because vaccination of children in this age group have only relatively recently commenced, the longer term effects, if any, are still unknown. Of course, the longer term effects of a child of this age contracting the virus are also largely unknown.

[25] I accept also Mr [Bruce]'s views that [Trudy] is at much more risk of contracting Covid-19 if not vaccinated, are similarly genuinely held. In particular, I accept one Mr [Bruce]'s major concerns is about the social impact on [Trudy] if she remains unvaccinated, including her inability to partake in many group activities and family outings when she wants to do so.

[26] I accept that there is a benefit to being vaccinated and I also accept there is a risk, which there always is with vaccination. There are also risks associated with [Trudy] contracting Covid-19. It is agreed [Trudy] is a healthy child and there is no evidence suggesting the vaccine would be more likely to cause her abnormal or serious side effects or an adverse reaction.

[27] I am satisfied it is in [Trudy]'s best interests to be able to be vaccinated in accordance with her wishes. Quite apart from any risk/benefit analysis of the actual vaccination, [Trudy] is entitled to have her views given significant weight and to be able to participate fully in her sporting and social interests in her community.

[28] The application to prevent [Trudy] being vaccinated against Covid-19 is declined.

Signed at Auckland this 28th day of February 2022 at 12.05 pm

S J Fleming
Family Court Judge