

DURING the pandemic, the infection rate among children has remained low, and it appears that a vaccine will not be available for children until later this year or possibly even early 2022, depending on their age. Still, questions about how, when, or should children receive the vaccine are starting to come to mind for those divorced or never-married parents that realize this could be an issue between them.

There are hundreds of cases dealing with whether children should be vaccinated for a variety of diseases. A COVID-19 vaccine, when available, will only add to these conflicts between parents.

Even though most public schools require childhood vaccinations for enrollment, it is a state-by-state determination. Whether to require the COVID-19 vaccination for school-age children once it is available also will be a state-by-state decision. In larger metropolitan areas, there may be private schools that will accept unvaccinated children, but some parents may be fearful that those schools could be more susceptible to infection because of the number of unvaccinated children.

An overview of some of the cases decided by the courts—and the standards used to make decisions—may help us in knowing what to expect as the COVID crisis continues.

In *San Marco v. San Marco* (2007), the Florida Court of Appeals agreed with the trial court and found that the mother had failed to provide her five-year-old daughter with proper medical care because the daughter had missed her MMR (measles, mumps, rubella), chicken pox, and pneumococcal vaccines. There was medical testimony at trial that the child's multiple ear infections and contraction of chicken pox could be traced to the lack of vaccinations.

The mother had testified that she did not have the child get chicken pox shots because she had “personal concerns” about the vaccination. In Florida at that time there was a process for stating objections to vaccinations in order to obtain an exemption. The mother did not take this action.

The standards used by the trial court were a showing of substantial change of circumstances as well as the best interest of the child. The appellate court found that the trial court did not abuse its discretion in its holding.

In *Downing v. Perry* (2015), the Court of Appeals of the District of Columbia, using the abuse of discretion standard, held that the father, who had unilaterally refused the child's human papillomavirus (HPV) vaccine after a strong recommendation in favor of the vaccination from the couple's family treatment coordinator, should not retain the “tie-breaker” position previously agreed to by the parties.

The “tie-breaker” position is the ability to make decisions on issues where the parties have a dispute over day-to-day legal custody matters. Here, the father initially had that position. The evidence showed that the father was acting as if he had de facto sole legal custody instead of

Sticking It to the Kids

BY DENA SILLIMAN NIELSON

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joint custody. The appeals court held that the “tie-breaker” position should be with the mother, who was in favor of the vaccination, and that the trial court had not abused its discretion in making that change.

In *L.N. v. V.V.* (2019), just prior to the beginning of the pandemic, the New York Family Court of Kings County avoided deciding directly on the issue of whether the child should be vaccinated, but rather ruled that final decisionmaking authority should be granted to the mother who was in favor of vaccinations for the child.

In this case, the unmarried parents had delayed the vaccinations for the child and had been approved to do so by utilizing a religious exemption through a New York State Public Health Law, based on the father’s Buddhist beliefs. However, because of a localized measles outbreak, the state changed that law temporarily and eliminated the religious exemption, leaving only a medical exemption.

The child did not qualify for the medical exemption, so the parents had to decide whether to vaccinate the child. They could not agree and, because of that, the child was unable to attend school. At the time of the court’s decision, the child had missed 36 days of school. Based on the totality of the circumstances, the preponderance of evidence, and the best interest standard, the court ruled that the mother was more able to put the child’s best interest ahead of her own, including whether to have the child vaccinated.

In *Crouch v. Crouch* (2021), the Colorado Court of Appeals reversed the trial court in a case involving the father’s efforts to modify medical decisionmaking responsibility to allow him to vaccinate the children over the objection of the mother.

In this case, the trial court had ruled that the children’s physical health was endangered by the mother’s refusal to vaccinate them. However, the trial court then did not decide

the second prong of the inquiry—whether the harm likely to be caused by the change in decisionmaking is outweighed by the advantage to the children.

Instead, because the mother’s objection was based on her religious beliefs, the trial court basically imposed an additional burden on the father to show that the failure to vaccinate the children would cause them substantial harm—an analysis used in constitutional arguments instead of decisionmaking allocations. The appeals court found this additional burden on the father to be erroneous and held that the proper standard in decisionmaking cases is the endangerment standard. The case was remanded back to the trial court for further hearings. No further decision has been made as of this writing.

These decisions and the standards used by the courts vary by state because marriage and divorce are state issues and are governed by state statutes and rules. Many times, this means there is a hodgepodge variety of decisions and standards used by the courts across the country on almost any issue.

Although the standards used by the courts can vary from state to state, the courts seem unified in trying to find a way to make sure the children get vaccinated when possible. While the final decision has not been made to date in the Colorado case, some generalities are apparent that can be used to predict how these cases might be decided going forward during and after the pandemic.

The trial courts generally look for a substantial change of circumstances since the original or previous order to modify medical decisionmaking was entered. This exercise allows for the court’s determination as to which parent might be best suited to make medical decisions. In many courts, the best interest of the child standard is used for this determination. This is a factual inquiry, and each state will have their own factors to use for this standard. If the parent objecting to the vaccine can show the need for a medical exemption for the child, the court must take that into account in its examination of the facts. Certainly, no court would want to put any child in harm’s way.

A religious exemption argument to avoid a vaccine may have a different outcome, as some states still recognize the religious exemption—and where that assertion is made in good faith, the child can avoid the vaccination. However, these same states also require children to be vaccinated with all vaccinations before enrolling in school for the first time.

Much like in *L.N. v. V.V.*, it may take a while for the school to demand the vaccination record, but it will happen. In that case, it caused the child to miss more than a month of school until it got sorted out.

Still, parents have the right to raise their children according to their own religion, don’t they? They do, yet where the state, health department, or school district adopts a rule that it only will recognize a true and honest medical exemption to allow the child to avoid the vac-



A Real Shot in the Arm

As more and more adults get vaccinated against the COVID-19 virus, some parents are asking when their children can be vaccinated. A coronavirus vaccine for children is in clinical trials and is not yet available. For this particular virus, the disease usually is not as serious for kids as compared to adults.

To say most children have less of a reaction to COVID-19 is not to say that they are immune. Some do experience a severe response and, in some cases, develop a syndrome called multi-system inflammatory syndrome (MIS-C) and experience inflamed organs and tissues.

Remember, too, that since children are growing and constantly changing, so is their immune system. Kids' immune response may

vary at different ages. Moreover, parents historically have been hesitant to enroll their children in clinical trials. For instance, the adult clinical trials for COVID gathered more than 40,000 participants. Yet, the clinical trials for children ages 12-18 by Moderna, announced in December 2020, have struggled to locate even 3,000 parents willing to allow their offspring to participate.

The adult vaccines being administered were given emergency clearance because of the urgent and immediate need. Whether a child's vaccine will be released under those same standards is a question that has not been answered as of yet.

Many parents are fearful of having their children vaccinated for any disease. They see

COVID-19 as just an additional malady where the cure is worse than the disease. They emphasize that most children have mild symptoms, and believe that the coronavirus will disappear due to herd immunity or better sanitation and hygiene.

Indeed, there remains a lingering belief among some parents that the MMR (measles, mumps, rubella) vaccine can cause autism or that the flu vaccine will give you the flu. Of course, there has been opposition to vaccines for as long as there have been vaccines. However, in recent years, this opposition has resulted in a resurgence of formerly eradicated diseases. Some of these had localized outbreaks while others were more widespread.

cine, and there are valid reasons to require all others to be vaccinated—such as a pandemic or an outbreak of measles as in *L.N. v. V.V.*—you most likely can expect the court either to rule directly that the child will be vaccinated or grant medical decisionmaking to the parent who has shown himself/herself to be in favor of vaccination.

In *C.F. v. New York City Department of Health and Mental Hygiene* (2020), the New York Supreme Court rejected the petitioners' argument that a measles vaccination rule implemented by the Health Department in certain sections of Brooklyn violated their Feder-

al and state constitutional rights to the free exercise of religion. In short, the court stated that the strict scrutiny test does not apply to neutral laws of general applicability, such as the one at issue in this case. It is the rational basis test that applies to rules of general applicability—meaning no one particular group was targeted but rather the rule applied to everyone equally.

It is possible that there may be rules similar to the one in this case as we enter the COVID-19 vaccination period for children. We can expect those rules to be of general applicability and narrowly tailored to achieve vaccinations

for as many children as possible in an effort to control the coronavirus and save as many lives as possible.

The rule at issue in *C.F.* later was rescinded once the measles outbreak had been eradicated. Similar rules enacted during the pandemic could be rescinded once COVID-19 is shown to be under control for children's infections. ★

Dena Silliman Nielson is an attorney with a law office in Westminster, Colo., and author of Common Sense Divorce: Ten Steps to Save You Time, Money, and Worry.

Vaccines: Then and Now

For more than 200 years, scientists have been devising vaccines to protect the population from dreaded diseases. The 19th century saw the creation of vaccines for rabies, cholera, and typhoid, as well as the early stages of a vaccine for the plague.

The most-robust development of vaccines occurred in the 20th century to guard against diphtheria (1913), tetanus (1927), yellow fever (1936), pertussis (1943), and the flu (1945).

The combination of vaccines for diphtheria, tetanus, and pertussis became known as DTP and was given as a single dose in 1948. The Salk polio vaccine was introduced in 1955 and was replaced by the oral Sabin polio vaccine in 1962. The vaccine for measles was licensed in 1963, but was replaced with a vaccine with much fewer side effects in 1968. The first MMR vaccine—which combined the vaccines for measles, mumps, and rubella—became available in 1971 and was given to toddlers beginning at age 15 months.

These advancements were not without setbacks. In 1928, 12 children died in Australia



when a multi-use bottle of diphtheria vaccine that had no preservative was stored improperly and then reused, having become contaminated with bacteria.

Contaminated polio vaccines caused about 200 children to die in 1955 in the Cutter Incident. Cutter Laboratories in California, in its rush to market the Salk vaccine, produced vaccine that actually gave children polio

instead of protecting them against it.

In 1997, DTP, a long-term staple in childhood vaccinations at that point, was replaced with the DTaP vaccine, which was touted to have fewer side effects. This partially was in response to a claim by reporter Lea Thompson in a 1982 "Vaccine Roulette" NBC news segment. The medical community argued at the time that the DTP vaccine was not shown to have caused seizures or brain damage in children and was highly effective in protecting against whooping cough (pertussis). Regardless, the change was made. (This news report is thought to be the beginnings of the anti-vaccination movement of today.)

Several more vaccines have been developed since 1982. Most notably are Prevnar, a newer pneumococcal vaccine; Flumist, an intranasal flu vaccine; Havrix, a hepatitis A vaccine; and Gardasil, the first HPV vaccine. There are others, too, as well as several new combination vaccines. Although combination vaccines do not change the number of vaccines the child receives, they do reduce the number of shots kids have to receive at each visit.