

Immunizing Against Anti-Vaxxers

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How Courts are Protecting Children from Parents Who Go Against Science and What it Could Mean in the Age of COVID-19

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Over the past nearly forty years,^[1] and with increased fervor over the past twenty years,^[2] the United States has seen the birth and exponential growth of the anti-vaccination (“anti-vaxxer”) movement. Spurred by conspiracy theories and junk science, this “movement” has gained traction across the nation and has even garnered protections under the First Amendment.

Only five (5) states have laws requiring children in public schools to be vaccinated unless they have a valid medical reason not to be vaccinated.^[3] The remaining 44 states allow children to be exempt from vaccinations due to religious concerns. While 15 states also allow exemptions for any type of nonreligious personal belief.

The Centers for Disease Control has conclusively stated that “there is no link between vaccines and autism.” Since 2003, there have been nine CDC-funded studies concluding that neither vaccines nor vaccine ingredients cause autism. More recently, a 2011 study by the Institute of Medicine and a 2013 study by the CDC added to the growing body of research debunking this myth.

The vaccine debate has also played out in another, less public, arena: family court. When two parents disagree on whether to vaccinate their child, that issue is front and center in any custody case. Until recently, the jurisprudence on this issue did not favor one position over the other.

In 2019, the Maryland Court of Special Appeals issued a quiet but ground-breaking ruling in *In re: K. Y-B*, 242 Md. App. 473. In *In re K. Y-B*, the mother of an infant objected to the child receiving vaccinations on religious grounds. After the filing of a CINA petition, the Department of Social Services was granted limited guardianship and permission to allow the minor child to receive routine vaccinations. The mother filed an immediate appeal, and the Court of Special Appeals held that a parent is free to believe as they wish but cannot act on their beliefs in such a way as to pose a serious danger to the child’s life or health or impair or endanger the child’s welfare. The Court further held that the significant risks to the child and to the public if he does not receive childhood immunizations outweigh a parent’s right to religious freedom.

This ruling creates a precedent in Maryland that failure to vaccinate a child poses a serious danger to the child’s life and health and impairs or endangers the child’s welfare. It reasonably follows that a parent who would make such a decision is not acting in the minor child’s best interest, which is the prevailing standard for determining custody.

A look at recent cases across the country on this issue evidences an emerging trend towards a public policy that requires vaccinations. It is also an indication that a parent’s anti-vaccination stance may be a determinative factor in awarding sole legal custody or tie-breaking authority to the other parent.

In 2004, the Texas appellate court upheld the trial court’s decision to give the father sole decision-making over vaccines when the mother was anti-vaccination. See *Garcia-Udall v. Udall*, 141 S.W.3d 323 (Tex.App. 2004).

In 2006, Colorado awarded sole legal custody to the parent who wanted to vaccinate the minor child in accordance with the recommendation of medical professionals. “Citing the special advocate’s finding that providing medical care consistently and under the advice of a qualified physician was in the child’s best interests and that the father was more likely to follow such advice, the court allocated decision-making responsibility for the child’s medical care to father.” *In re Marriage of McSoud*, 131 P.3d 1208, 1214 (Colo.App. 2006).

In 2014, North Carolina joined the trend in a case where the parents had joint decision-making authority, and the father wanted the children vaccinated, and the mother did not. Unbeknownst to the mother, the father had the children vaccinated, and the appellate court upheld the lower court’s finding that the father was not in contempt on the grounds that the vaccines were not harmful to the children. See *Meduri v Meduri*, 763 S.E.2d 338 (N.C.App. 2014).

Pennsylvania followed suit in 2015. In *B.C.S. v. T.S.S.*, 121 A.3d 1137 (Penn. 2015), the mother's anti-vaccination stance was deemed "unorthodox" and a display of "poor judgment" by the trial court, which awarded the father sole decision-making authority. The Pennsylvania Supreme Court affirmed.

The District of Columbia took an unorthodox approach in a 2015 case where the parties had joint legal custody, but the father had tie-breaking authority in the event of an impasse. The father exercised his tie-breaking authority and refused to allow the parties' daughter to receive the HPV vaccine. The trial court removed the father's tie-breaking authority and appointed a third party to resolve disputes over vaccines, and the appellate court upheld the lower court's ruling. See *Downing v. Perry*, 123 A.3d 474 (D.C.App. 2015).

In 2017, three (3) states issued opinions awarding sole legal custody to the parent who supported vaccinations for minor children.

Missouri upheld the award of sole medical decision-making to the father, against the mother's anti-vaccination wishes. See *Gammon v. Gammon*, 529 S.W.3d 350 (Mo.App. 2017).

In Indiana, an award of sole decision-making authority over vaccines for minor children was upheld in a case where the mother was anti-vaccination. See *Young v. Young*, 95 N.E.3d 218 (Ind.App. 2017).

The Tennessee appellate court upheld the award of sole decision-making authority to the mother, where the father was anti-vaccination. See *Pankratz v. Pankratz*, M2017-00098-COA-R3-CV (Tenn.App. 2017).

Also, in 2017, Oregon courts went one step further and upheld the trial court's order that the parties "ensure that a proper vaccination schedule is in place." *In re: Marriage of Botofan-Miller & Miller*, 406 P.3d 175 (Or.App. 2017).

Iowa has even linked a parent's stance on vaccinations to fitness for physical custody/access. "Iowa courts have historically favored a parent who provides immunizations when determining which parent should have physical care of the child." *In re Marriage of Asefi*, 838 N.W.2d 869 (Iowa App. 2013).

[1] The current anti-vaxxer movement is often traced back to 1982 when NBC aired a documentary called "DPT: Vaccine Roulette" which addressed a purported tie between the vaccine for pertussis and seizures in young children.

[2] In 1998, a British gastroenterologist named Andrew Wakefield published a study associating the MMR vaccine with autism. The study has since been discredited and the paper was retracted in 2010.

[3] New York, California, Maine, Mississippi, and West Virginia.