

# Legality of COVID-19 vaccinations for children

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COVID-19 vaccinations are now going to be offered to children aged 5 and over, including those not considered to be at-risk. The most recent update came in February 2022 where the Joint Committee on Vaccination and Immunisation Committee recommended non-urgent vaccination of children aged 5-11 who are not in a clinical risk group, with roll-out expected to begin in April 2022.

A dispute between parents concerning vaccination is resolved through the family courts by application for a Specific Issue Order under section 8 of the Children Act 1989, and reference by the court to the welfare checklist: section 1(3) of The Children Act 1989.

Recent cases have helped to establish the specific considerations for the court when determining disputes about vaccination of children generally, and also, particularly with respect to COVID-19. Two such cases were decided prior to the vaccine roll-out for children but laid the groundwork for future decisions to be made.

*Re H* was a Court of Appeal decision in a public law case, but also helped to clarify the law in respect of private law proceedings. Care and placement orders had previously been made in respect of the child and as the parents did not agree to the child receiving routine vaccinations (which was the intention of the local authority) an application to the court was made by the local authority.

The court determined that under s.33(3), the local authority was authorised to arrange for the child to be vaccinated despite opposition from the parents, and further determined that administering a vaccine included as part of the UK's public health programme is not a "grave" issue, in the absence of the child having a contra-indication in relation to the vaccine(s) in question.

A robust examination of the scientific evidence in relation to immunisations was undertaken by the court. The conclusion of this analysis was that,

*“Although vaccinations are not compulsory, scientific evidence now establishes that it is generally in the best interests of otherwise healthy children to be vaccinated...”* [104] and additionally,

*“...subject to any credible development in medical science or peer reviewed research to the opposite effect (along with the instruction of a jointly instructed expert), the proper approach to be taken by a court where there is a disagreement as to whether the child should be vaccinated is that the benefit in vaccinating a child in accordance with Public Health England guidance can be taken to outweigh the long-recognised and identified side effects.”* [55]

The local authority’s application was therefore granted.

A specific issue order was made in *M v H* ( private law vaccination) [2020] EWFC 93. The father’s original application was regarding the MMR vaccine, but this was later widened to include all the vaccines on the NHS vaccination schedule. The father also sought an order authorising administration of the COVID-19 vaccine to the two children (aged 6 and 4) and those necessarily required for future travel. All vaccinations were opposed by the children’s mother.

The court made a Specific Issue Order for both children to *“be given each of the childhood vaccines that are currently specified on the NHS vaccination schedule.”* [42]

Whilst the court declined to make an order in relation to travel vaccinations, as this was considered to be too speculative, or for vaccination against COVID-19 as it was considered to be too premature to do so (roll-out for children having not yet commenced), Macdonald J commented that,

*“...it is very difficult to foresee a situation in which a vaccination against COVID-19 approved for use in children would not be endorsed by the court as being in a child’s best interests, absent peer-reviewed research evidence indicating significant concern for the efficacy and/or safety of one or more of the COVID-19 vaccines or a well evidenced contraindication specific to that subject child. ”* [4]

Whilst this comment was made obiter, it gave a helpful steer for courts that would undoubtedly be faced with the issue in the future.

Expert evidence was deemed not to be necessary, and Macdonald J also reaffirmed the determination in *Re H* in relation to the threshold that would need to be crossed for the court to be in a position to conclude that a UK Health Security Agency approved vaccine is not in a child's best interests:

*"... new peer-reviewed research evidence indicating significant concern for the efficacy and/or safety of one or more of the vaccines that is the subject of the application or a well evidenced contraindication specific to that subject child, to allow the instruction of an expert" [11].*

In the recent High Court case of *Re C (Looked after child) (Covid-19 vaccination)* [2021] EWHC 2993 (Fam), following the making of a care order in 2015, a local authority sought to arrange for the child receive the flu jab and COVID-19 vaccine; this was supported by the child's father and Guardian but strongly opposed by the child's mother.

Given that the child was 12 years old and strongly in favour of vaccination, reference was made to whether the child had 'Gillick competency' as per the test in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112. As the child was in agreement with the local authority as to vaccination, the court did not make a determination about this.

Poole J tied together the principles set out in *Re H* and *M v H*, giving a comprehensive judgment:

*"... the principles set out by the Court of Appeal in Re H (above) apply equally to both the Covid-19 vaccination for 12–15-year-olds and the winter flu virus vaccination for children in school years 7-11, as they do to the specific childhood vaccinations considered in that case. Like the standard vaccinations for infants, the Covid-19 and winter flu virus vaccinations are now part of national programmes of vaccination for children approved by the UK Health Security Agency, the successor body to Public Health England. The court can be satisfied, without the benefit of expert evidence, that the decisions to include the vaccinations in national programmes are based on evidence that they are in the best interests of the children covered by the programmes. Given the oral submissions that I received from the mother it is worth emphasising that vaccination programmes may be in the best interests of children even though administering the vaccines is not free from risk." [20]*

## Conclusion

As the COVID-19 vaccine has just been approved for all age groups (from 5+) but the pandemic is also seemingly long past its peak, there is high probability of further disagreements between parents as to whether or not to vaccinate their child(ren).

The development of case law in the last couple of years has helped to clarify that the starting point for any court considering a dispute as to whether a child should receive an approved UK Health Security Agency vaccine, is that such a vaccine is likely to be in the child's best interest, absent compelling evidence to the contrary.

To hold sway, this evidence would need to take the form of:

- a) Peer-reviewed research evidence indicating significant concern for the efficacy and/or safety of the vaccine in question.
- b) A well evidenced contraindication specific to the child and vaccine in question, confirmed by an instructed expert.

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