

# Child Law

The newsletter of the Illinois State Bar Association's Section on Child Law

## The Intersection of the Law, Vaccinations, and COVID-19

BY LISA L. DUNN

The family courts, as well as possibly every part of our society, have been hit hard by the global pandemic. The courts have been asked to decide if children should be allowed to spend time with a parent because that parent may be employed in a setting where he is more likely to be exposed to COVID-19. It is requested to make decisions regarding whether a child should travel because she might be exposed to COVID-19. Additionally, the court might be required to opine about whether or not a child should be allowed to travel at all, if he or she would be obligated to quarantine upon return, and thus is temporarily unable to attend in person school or extracurricular activities. The court might be asked to rule on whether a child should travel or engage in certain activities, if that will expose other people

in her home who are more susceptible to the virus. Furthermore, the court has been asked to determine if it is in the child's best interest to issue an injunction to prevent out of state travel. And now, the courts are being asked to decide if a child should receive the COVID-19 vaccine.

The CDC previously approved the Pfizer COVID-19 vaccine for children aged 12 and older, and recently authorized the vaccine for children aged 5-11 years old. The medical community considers this a watershed moment in the COVID-19 pandemic, as it represents an opportunity to protect as many as 28 million Americans from an illness that has claimed the lives of over 5 million people worldwide.<sup>1</sup>

Healthcare providers advocate for getting children vaccinated. The reasons may

include:

Although COVID in children is usually less severe, children can become seriously ill and die from the disease. For example, there were more than 200,000 pediatric cases in the month of October 2021 in the United States. Over 700 children have died from the disease in the U.S. through November 2021.

Vaccinating children directly affects vulnerable populations with whom they interact. This could include grandparents, parents, teachers and others who may be vaccinated, but could be more susceptible to serious illness.

The arrival of cold weather and return to more indoor activities, as well as the expected surge of variants, has proven to be the perfect recipe for new COVID-19 cases, particularly for the unvaccinated.

The vaccine trials on 5-11 year-olds have established that the vaccine is safe and effective.

Many medical authorities, including the American Academy of Pediatrics, American Academy of Family Physicians, Mayo Clinic, Centers for Disease Control and Prevention, World Health Organization, and Lurie Children's Hospital of Chicago, recommend that children receive the COVID-19 vaccine. These recommendations are available as publicly accessible resources to use if you represent the party who wants the child vaccinated.

Some parents may be opposed to getting their children vaccinated. The reasons are varied and tailored to the child's and family's specific circumstances.

Vaccines are not new to the general population or the courts. The United States Supreme Court in *Jacobson v. Massachusetts* held that vaccination programs are constitutional.<sup>2</sup> Various statutes require children to be vaccinated in Illinois. For example, students entering sixth and twelfth grade must receive the meningococcal vaccine.<sup>3</sup> Many Illinois Universities require students to receive the meningitis vaccine, including but not limited to University of Illinois,<sup>4</sup> Illinois State University,<sup>5</sup> and Northern Illinois University.<sup>6</sup>

At the college level, the Seventh Circuit Court of Appeals upheld the Indiana University mandate that all students must be vaccinated against COVID-19 unless the student is exempt for religious or medical reasons.<sup>7</sup> The appellate court denied a motion for an injunction pending an appeal. The court stated that getting the vaccine is a condition of attending Indiana University. If a student does not want to get vaccinated, he can go elsewhere. However, each university has the discretion to decide what is necessary to keep students safe.

As of the writing of this article, there have been no appellate court decisions in Illinois specifically addressing the COVID-19 vaccine and minor children. However, that is likely to change. The trial courts have been grappling with this issue since the COVID-19 vaccine was approved for children aged 12 and older. So, let's consider some scenarios and the best way to present

your case.

If the case is pre-decree and there has been no determination of medical decision-making, you should ask the court to appoint a *Guardian Ad Litem* or Child Representative. The *Guardian Ad Litem* or Child Representative, in the course of her or her investigation, should contact the child's pediatrician. In my experience, pediatricians are usually agreeable to providing a written letter setting forth his or her medical opinion about the necessity for a vaccination. The letter may also include information about the child's health and whether the child is current in his other mandated vaccinations.

In addition to considering a doctor's recommendation, the other factors the court may consider are: whether the child has received all other state-mandated vaccines; whether the child received those vaccines on a timely basis; does the child attend a school that requires the vaccine for attendance or for participation in extracurricular activities; if the child has any underlying medical conditions that may affect the decision to vaccinate; and if one or both of the parents are vaccinated. Additionally, the court may consider the child's preferences and a parent's religious convictions.

Generally, in this writer's opinion, the court should find that in the absence of any legitimate medical or religious issues, a child should be vaccinated. Vaccination will allow the child to fully participate in school, extracurricular activities, and travel opportunities. This is important for a child's mental and emotional health and well-being. Vaccination serves a child's best interest by protecting her health, fostering her psychological and emotional health, and imparting important social lessons. These include receiving the vaccine to maintain and protect her health for her sake and for those around her. Furthermore, courts tend to rely upon established scientific principles and recommendations from experts, and those experts are recommending the vaccine. Therefore, the court may find that the benefits of immunization outweigh the potential risks to the child.

Or, the court may take the approach that it is not for the court to decide if a child should be vaccinated. Rather the court must

decide which parent should be allocated the decision-making authority for either medical decisions, or more specifically vaccinations.

In a pre-decree case where there is no court ordered decision making, or in a shared decision-making case, the parent who wants the child vaccinated should not unilaterally do so. If a child receives the COVID-19 vaccine with the other parent's approval that may leave the vaccinating parent subject to the court's contempt powers.

If you represent the parent who does not want the child vaccinated, you will file a petition for temporary restraining order and preliminary injunction. Once again, if you are the movant, you will need valid religious reasons or medical reasons to convince the court.

If your case is post-decree and the parents have shared or joint decision making, then the court's analysis will differ. The court may require the parties to attend mediation. The court may appoint a *guardian ad litem* or child representative. The court may decline to hear the matter and require a party to file for sole decision making.

In Canada, there have been rulings regarding the COVID-19 vaccine. A court in Alberta, Canada found that a father's desire to keep his children from receiving the vaccine was not in their best interest and ruled the mother may vaccinate the children without the father's consent.<sup>8</sup> The father was ordered not to discuss the COVID-19 vaccine or the pandemic in general with the children because the father thought the pandemic was "purported", the vaccine "experimental" and did not believe in the pandemic generally. One of the children suffered "from vaccine anxiety" after receiving false information from his father, as determined by the court. The father was ordered not to supply the children with social media or other information about the virus. The mother was directed to have sole decision-making authority with respect to the medical and health related decisions associated with COVID-19 vaccination or treatment. This was reported in *Newsweek* on December 18, 2021.

Does your argument change if you bring an emergency motion requesting a minor

child get vaccinated? The answer depends on whether there is truly an emergency. In Cook County, Judge Pamela E. Loza ruled that the request for the child to be vaccinated was an emergency. The court ruled that because the child attended a private school and the school required the children to be vaccinated to participate in extracurricular activities, this was enough to order that the child get vaccinated. The court considered that the school rules had recently changed and the motion was brought at the start of the school year. The court also weighed the impact on the child's education if he was not vaccinated, the impact on the child's participation in extracurricular activities, the consequences if the child traveled unvaccinated, and the effect of

an unvaccinated child on close family members.<sup>9</sup>

As part of our representation to clients, we need to inform the court of all the reasons why our clients either oppose or are in favor of their child receiving the COVID-19 vaccine. Until such time as there is an Illinois appellate ruling on this issue, we as practitioners need to continue to analyze the issues and be creative and intelligent in our arguments to the court.

*Lisa L. Dunn is a partner with the Law Offices of Massucci, Blomquist, Anderson & Dunn in Arlington Heights. She represents clients in family and matrimonial law matters.*

1. NorthShore University Health System December 7, 2021 communication.
2. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).
3. 410 ILCS 315/1.10.
4. 110 ILCS 305/21.
5. 110 ILCS 675/20-120.
6. 110 ILCS 685/30-125.
7. *Klaassen v. Trs. Of Ind. Univ.*, No 21-2326 (7<sup>th</sup> Cir. Aug. 2, 2021).
8. *TRB v. KWPB*, 2021 ABQB 997 (court of Queen's Bench of Alberta)
9. Thank you to Rebecca Melzer for her assistance and explanation of her representation of the father in this case, *Lott v. Lott*, 2018 D 3016.



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# APPRECIATION MONTH

## May 1-31 | Membership Renewal Incentive

*Renew by May 31 to be entered into a drawing to win one of five Apple iPads with Apple Pencil (or cash-equivalent VISA gift card)*

**May 3-14** | Illinois Bar Journal Caption Contest

**May 3** | Free 1.5 Hour, Live CLE Webcast

*12-1:50 p.m. | 2022 Celebration of Women as Leaders in the Profession*

**May 5** | Free 1 Hour, Live CLE Webcast

*12-1 p.m. | Wellness Series - Part 2: Building Your Resilience Bank Account*

**May 9-21** | Bookstore Sale - 25% off All ISBA Books!

**May 11** | Free 1.5 Hour, Live CLE Webcast

*1-2:30 p.m. | Running to the Roar: Why We Need Courageous Conversations*

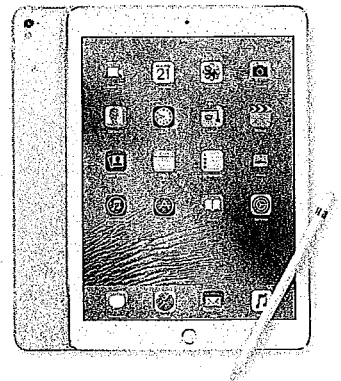
**May 16-21** | Facebook Contest - Win a \$100 Visa Gift Card

**May 23-28** | Instagram Contest - Win a \$100 Visa Gift Card

**May 24-27** | Member Discount Vendor Giveaways

**May 26** | Free 1 Hour, Live CLE Webcast

*12-1 p.m. | Wellness Series - Part 3: Building Your Prevention Toolbox*



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