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Legal Custody and Best Interests: Vaccines, Science and the Law

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By Michael R. Chilcot, Jr., Esq.

Unless you've been living under a rock for the past ten or so years, you've probably heard about the "debate" of whether or not to vaccinate your kids. It's also likely that you've heard from some expert or another, who used very large, sciency sounding words, about this particular topic. This article will discuss and explore some of the science and expert recommendations relating to this legal custody issue, some basic laws relating to vaccinations, and how courts throughout the country have reacted when presented with such issues.

If you Google, "vaccine and autism" or some permutation thereof, surely the websites returned will be some combination of "What causes autism? Do vaccines cause autism? The autism/vaccine myth", etc. The crux of the vaccine issue, however, essentially boils down to one man and one questionable study: Andrew Wakefield and his contention that MMR vaccines were linked autism. The contention was published, and then retracted by the British medical journal that first published it due to Wakefield being dishonest, violating basic research ethics rules and showing a "callous disregard" for the suffering of children. Despite this retraction, the woefully underrepresented sample size, and the financial and scientific conflicts of Wakefield, some parents and certain internet sites still entertain the misguided belief that vaccines cause autism. There have been numerous studies that have found no link between vaccines and autism or other chronic illnesses.¹ There is even some recent research

¹ See Offit, Paul A., and Charles J. Hackett. "Addressing Parents' Concerns: Do Vaccines Cause Allergic or Autoimmune Diseases?" *Pediatrics* 111.3 (2003): 653. AAP News & Journals. Web. Mar. 1, 2003. Available at <http://pediatrics.aappublications.org/content/pediatrics/111/3/653.full.pdf>; Centers for Disease Control and Prevention, *Vaccines Do Not Cause Autism*, Common Concerns (Nov. 23, 2015),

that suggests autism starts in the womb, well before any needles come within proximity of a child.² However, regardless of the absence of science or logic as a platform for decision-making, whether or not to vaccinate your kids is a parenting and legal custody decision and if the parents cannot agree, must be addressed as such.³

Unlike most parenting decisions, this one seems to be unique in that the problem arises when a parent is too concerned or when their concern is misdirected. Clickbait in one's Facebook feed can lead even the best parent to articles stating or strongly implying that vaccines cause autism or other equally terrifying disease. In some instances, parents believe this information, or at least become frightened enough to entertain the concept. At a basic level, this is understandable; autism is scary, vaccines require long needles, which are also scary, and the United States is only near the middle of the pack worldwide when it comes to science competency (which is scary for other reasons).⁴ It can also be difficult for anyone to know which sources of information to trust. This situation is known as the balance fallacy,⁵ which is essentially a logical breakdown that occurs when there are two arguments that garner roughly the same level of attention. When this happens, an assumption can form that both arguments are equal in veracity, value, merit, or weight. This fallacy is relatively harmless to individuals and society when the debated decision is whether to buy gluten free food or to stay

<https://www.cdc.gov/vaccinesafety/concerns/autism.html> ; Immunization Action Coalition, *Evidence Shows Vaccines Unrelated to Autism* (Nov. 2014), <http://www.immunize.org/catg.d/p4028.pdf>

² See Jon Hamilton, *Brain Changes Suggest Autism Starts In The Womb*, Shots Health News from NPR (March 26, 2014), <http://www.npr.org/sections/health-shots/2014/03/26/294446735/brain-changes-suggest-autism-starts-in-the-womb>

³ See *B.C.S. v. T.S.S.*, 2015 Pa. Super. Unpub. LEXIS 1042 (Pa. Super. 2015) (unreported), for how a dispute about vaccinations can lead to legal custody litigation; See *D.P. v. G.J.P.*, 146 A.3d 204, 215 (Pa. 2016) citing *Hawk v. Hawk*, 855 S.W.2d 573, 577 (Tenn. 1993) ("Although courts are commonly called on to resolve custody disputes between parents and to determine custody when parents are unfit, the trial court's interference with the united decision of admittedly good parents represents a virtually unprecedented intrusion into a protected sphere of family life.")

⁴ See Abby Jackson and Andy Kiersz, *The latest ranking of top countries in math, reading, and science is out – and the US didn't crack the top 10*, Business Insider (Dec. 6, 2016), <http://www.businessinsider.com/pisa-worldwide-ranking-of-math-science-reading-skills-2016-12>

⁵ For an editorial on the informal logical fallacy, see University of California Museum of Paleontology, *Beware of false balance: Are the views of the scientific community accurately portrayed?*, Understanding Science how science really works (Last visited Nov. 8, 2017), https://undsci.berkeley.edu/article/sciencetoolkit_04

home from the beach because of the remote possibility of shark attacks⁶; but when the decision involves preventing markedly preventable and deadly diseases that can spread through the human population like wildfire⁷, the decision becomes a dangerous one for individuals and society.⁸

A national survey conducted in 2009 found that 54% of parents were concerned about the “serious effects” of vaccines.⁹ While active parental involvement in decision-making for children’s best interests is both a right of constitutional dimensions¹⁰ and a corresponding sacred duty, misinformation can invade this province. This is demonstrated by the study’s survey results, which reflected that 25% of parents surveyed believe some vaccines cause autism in healthy children and 11% believe their children don’t require vaccination against diseases that are not that common anymore. Perhaps this misconception can be addressed by having doctors serve as better counselors to their patients. In the realm of the courtroom, however, it may translate into a necessity for expert testimony in support of vaccination. Rather than having this article devolve into a dissertation on why responsible parents should (mostly) ensure that their children are vaccinated, I leave you with these main points:

1. Most doctors agree that the odds of experiencing a vaccine-related injury are greatly outweighed by the risk and potential harm of catching a vaccine-preventable disease, with serious side effects being extremely rare;¹¹

⁶ According to a recent Boston Globe article, the chances of an encounter with a shark are “infinitesimally small” and a person is more likely to die as a result of an asteroid than from a shark attack. William J. Kole, *Afraid of a shark attack? Don’t worry, the odds are in your favor.*, BOSTON GLOBE, June 25, 2017 available at <https://www.bostonglobe.com/metro/2017/06/25/afraid-shark-attack-don-worry-odds-are-your-favor/M44hZVAgLHfviYusW9NOjM/story.html>.

⁷ See Ryan Jaslow, *CDC: Vaccine “philosophical differences” driving up U.S. measles rates*, CBS News (Sept. 12, 2013), <https://www.cbsnews.com/news/cdc-vaccine-philosophical-differences-driving-up-us-measles-rates/>

⁸ For a great explanation on “herd immunity” see Emily Wittingham, *What is Herd Immunity?*, WPSU NOVA (Sept., 5, 2014), <http://www.pbs.org/wgbh/nova/body/herd-immunity.html>

⁹ Nancy Shute, *Parents’ Vaccine Safety Fears Mean Big Trouble for Children’s Health*, U.S. News & World Report Health (Mar. 1, 2010), <https://health.usnews.com/health-news/blogs/on-parenting/2010/03/01/parents-vaccine-safety-fears-mean-big-trouble-for-childrens-health>

¹⁰ See *Santosky v. Kramer*, 455 U.S. 745 (1982) (discussing parental rights to raise one’s own children)

¹¹ E.G. - diphtheria, tetanus and pertussis kill 1 in 20, 1 in 10 and 1 in 1,500 cases respectively, but a serious allergic reaction occurs from the vaccine in 1 in 1,000,000 doses. Measles kills 1 in 2,000 people

2. The Center for Disease Control (“CDC”) and the American Academy of Pediatrics agree that the MMR vaccine is not responsible for an increase in the number of children with autism; experts believe that any correlation is coincidental because of the age of the first dose of the vaccine coinciding with when autism symptoms typically become perceivable;¹²

3. Herd immunity: the concept that the spread of contagious diseases is impeded or even stopped when a population is sufficiently immunized against a disease. It is important because some in the population can’t get vaccinated¹³ and depend on herd immunity. Additionally, due to one reason or another, not all vaccines are effective. Look into herd immunity, read about it, heck even read some anecdotal stories about it, it will break your heart, and we can do better as a society;¹⁴

4. Most doctors, the CDC, and The National Academies of Sciences, Engineering and Medicine agree that a child’s immune system can handle the antigens in multiple vaccines even if they are administered at the same time;¹⁵ “In fact, children are exposed to more antigens in the

who contract it but a temporary low platelet count is caused by the vaccine in 1 in 30,000 vaccines. See Centers for Disease Control and Prevention, *Possible Side-effects from Vaccines*, Vaccines and Immunizations (May 8, 2017), <https://www.cdc.gov/vaccines/vac-gen/side-effects.htm> for more statistics on common vaccinations

¹² For further explanation see Centers for Disease Control and Prevention, *Measles, Mumps, and Rubella (MMR) Vaccine Safety Studies*, Measles, Mumps, and Rubella (MMR) Vaccine Safety (Aug. 28, 2015), <https://www.cdc.gov/vaccinesafety/vaccines/mmr/mmr-studies.html>; Alison Singer, the co-founder and president of the Autism Science Foundation and mother of a daughter and sister to a brother with autism has called for accepting the science and moving on from wasting valuable resources researching whether the MMR vaccine causes autism, see Allison Singer, *Time to regroup on autism*, CNN Opinion (Feb. 3, 2010), <http://www.cnn.com/2010/OPINION/02/03/singer.autism.study.vaccines/index.html>

¹³ Such as: people without a fully-working immune system, including those without a working spleen; People on chemotherapy treatment whose immune system is weakened; People with HIV; Newborn babies who are too young to be vaccinated; Elderly people; Many of those who are very ill in a hospital

¹⁴ For a great explanation on “herd immunity” see Emily Wittingham, *What is Herd Immunity?*, WPSU NOVA (Sept., 5, 2014), <http://www.pbs.org/wgbh/nova/body/herd-immunity.html>; For anecdotal stories see Emily F. Moore, *Why I No Longer Tolerate Anti-Vaxxers*, In Practice: Reflections from NPs and Pas (Sept. 29, 2016), <https://blogs.iwatch.org/frontlines-clinical-medicine/2016/09/29/no-longer-tolerate-anti-vaxxers/> and Lisa Aliferis, *To Protect His Son, A Father Asks School To Bar Unvaccinated Children*, Shots Health News from NPR (Jan. 27, 2015), <https://www.npr.org/sections/health-shots/2015/01/27/381888697/to-protect-his-son-a-father-asks-school-to-bar-unvaccinated-children>

¹⁵ See Centers for Disease Control and Prevention, *The Health and Medicine Division of the National Academies Reports on Vaccine Safety*, Vaccine Safety Research (Mar. 9, 2017), <https://www.cdc.gov/vaccinesafety/research/iomreports/index.html>

environment every day than to those in all their vaccinations combined,” wrote pediatrician, Dr. Laurel Schultz.¹⁶

So if all this scientific stuff isn’t clear and your client is still hesitant about getting his or her child vaccinated, what does this mean in terms of legal custody? In 1905, the U.S. Supreme Court held that States have the authority to mandate vaccinations.¹⁷ In 1922, the U.S. Supreme Court reiterated the government’s authority to require vaccinations as a condition precedent of public school attendance.¹⁸ Since then, all 50 states and D.C. have mandated that children receive basic vaccination before being allowed to attend public school.

There are three types of exemptions to the requirement that each child be vaccinated prior to attending school.¹⁹ Every State and D.C. allows a medical exemption to these immunizations (if you have cancer, HIV/AIDS, or other similar immune system weakening condition). All but three States also allow a religious exemption. The Commonwealth of Pennsylvania is one of 18 States to allow an additional “philosophical” exemption. Pennsylvania recently, on the recommendations of the Advisory Committee on Immunization Practices, strengthened and expanded the vaccination requirements for children entering school, to the extent that no exemption is claimed. Nevertheless, even if you were to claim an exemption from vaccination, your child may be excluded from school during an outbreak of a vaccine preventable disease.²⁰

With the availability of a “philosophical” exception in place as a general rule, Pennsylvania doesn’t force children to be vaccinated. With a simple stroke of the pen, the vaccination requirement becomes illusory; amounting to more of a suggestion than a requirement. However, that

¹⁶ See Laurel Schultz, *Can getting more than one vaccination at once overload my child’s immune system?*, babycenter Expert Advice (Last Visited November 8, 2017), https://www.babycenter.com/404_can-getting-more-than-one-vaccination-at-once-overload-my-ch_11452.bc

¹⁷ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)

¹⁸ *Zucht v. King*, 260 U.S. 174 (1922)

¹⁹ See National Conference of State Legislatures, *STATES WITH RELIGIOUS AND PHILOSOPHICAL EXEMPTIONS FROM SCHOOL IMMUNIZATION REQUIREMENTS*, NCSL Health (Oct. 20, 2017), <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx>

²⁰ See Pennsylvania Department of Health, *SCHOOL VACCINATION REQUIREMENTS FOR ATTENDANCE IN PENNSYLVANIA SCHOOLS*, SCHOOL IMMUNIZATION REQUIREMENTS (Last Visited Nov. 8, 2017), <http://www.health.pa.gov/My%20Health/Immunizations/School/>

doesn't mean that courts are powerless to decide the vaccination issue. There are presently no published vaccine-related legal custody cases in Pennsylvania. However, there was a case from 1991 where a family court judge in Philadelphia directed that approximately 1,000 children in a church-run school had to be vaccinated in the midst of a measles outbreak.²¹ The court ultimately ruled it was in the children's best interest to have them vaccinated. Due to the timing of the case, by the end of the outbreak, however, only 9 children from the school were vaccinated and 6 children from the school ended up dying.

In a 2015 Connecticut trial court decision, the court considered mother's refusal to vaccinate as a factor in granting father's custody petition seeking legal authority to make decisions over the children's health matters.²² The court didn't question the sincerity of mother's anti-vaccination beliefs, instead focusing on the best interest of the children and which parent is best suited to make health decisions for them. The Connecticut court, citing the U.S. Supreme Court, stated that constitutional rights do not include the "liberty to expose the community or the child to communicable disease or the latter to ill health or death." The court further stated that mother's beliefs were in conflict with advice of the children's doctors and the guardian *ad litem* in the case. Ultimately the court ruled in the best interests of the children that father have final decision making authority in the matters of his children's health.

And most recently, a Detroit trial judge sent a mother to prison following her refusal to comply with a court order requiring her to vaccinate her children.²³ Mother and father had previously agreed to not vaccinate their children, but father then changed his mind and sought court involvement when mother did not agree. The judge ultimately sided with the father and ordered that mother had until October 11, 2017 to get the children vaccinated. When she didn't, she was sentenced to jail for a week. Mother stated, "I feel my rights as a parent have been taken

²¹ See Anders Kelto, *Why A Court Once Ordered Kids Vaccinated Against Their Parents' Will*, NPR Public Health (Feb. 19, 2015), <http://www.npr.org/sections/health-shots/2015/02/19/386040745/why-a-court-once-ordered-kids-vaccinated-against-their-parents-will>

²² *Archer v. Cassel*, 2015 Conn. Super. LEXIS 515

²³ See Minyvonne Burke, *Mother strongly against vaccines ordered to vaccinate son or face jail time*, New York Daily News (Sep. 28, 2017), <http://www.nydailynews.com/news/national/mother-ordered-vaccinate-son-face-jail-time-article-1.3527875>

away.” Most media sources covering the case seem to spin it that way as well. A quick review of the docket for the case showed that a hearing was held on the merits of the case to vaccinate the kids.²⁴ After hearing, the judge ruled that it was in the children’s best interest to be vaccinated.

While parents enjoy a constitutionally-protected interest in raising their children, when disputes arise, the jurisdiction of the court is invoked to protect the best interests of the children involved. With respect to vaccination, this means that while a parent may have the right to not vaccinate the child if the other parent agrees, it does not mean that such right will prevail after the court has been asked by the other parent to step in and make a best interests determination. Unfortunately, coverage and comments like those made by mother in the Detroit case inately and selfishly ignore the equal right of the other parent to exercise his/her legal custody to have the children vaccinated and the right of the children to be protected from disease, given that children lack the competence to make such decisions on their own.

Given the overwhelming scientific evidence and absent any extenuating circumstances, it is unlikely that a Pennsylvania judge would rule differently than the Connecticut or Michigan courts mentioned above. Since the Philadelphia court, in 1991, ruled against a parent’s first amendment right to freedom of religion and ordered children to be vaccinated, surely a court now would break the tie in the case of disagreeing parents in favor of vaccination. Generally, according to science and expert recommendations, it is in a child’s best interest to be vaccinated. The strategy for hearing on this issue could be as simple as having the child’s pediatrician testify that it is in the best interest of the child to be vaccinated. The pediatrician, as an expert²⁵, could cite the numerous research and data to support the pro-vaccination opinion. While the "anti-vaccination" parent could bring his or her own expert and cite to conflicting “research”, it would be up to the court to consider and weigh the evidence. Simply because there are two experts in court, making opposite

²⁴ See <https://courtextplorer.oakgov.com/OaklandCounty/SearchCases> and search “James Horne”

²⁵ A witness qualifies as an expert if, by knowledge, skill, experience, training, or education, the witness’s scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson and will help the trier of fact to understand the evidence or to determine a fact in issue; and the expert’s methodology is generally accepted in the relevant field. The expert may testify by opinion or “otherwise.” See Pa. R.E. No. 702. Often, the expert is tasked with educating the judge or jury as to a particular scientific or technical principles relevant to the case.

assertions doesn't mean that both assertions are equal in veracity, value, merit or weight. It is part of the fundamental work of a court to pierce the balance fallacy in such situations.

Conclusion

Pennsylvania judges, when faced with legal custody issues, are required to seek to promote the best interest of the child. While science and experts make recommendations based on the average child, every situation and certainly every child is different; what's best for Tommy might not be what's best for Suzie. However, science and expert recommendations through testimony and/or citing to research and recommendation of other experts, form a solid foundation for child custody advocacy; whether that manifests informally through agreement between the parties or in a formal adversarial court setting. Understanding the science and those recommendations is the first step to preparing for that potential battle.

About the Author



Attorney Michael R. Chilcot, Jr. is a member of McQuaide Blasko's family law practice group in the State College, Pennsylvania office. He is a member of the Pennsylvania Bar Association Family Law Section and the American Bar Association Section of Family Law.

Michael R. Chilcot, Jr., State College

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