

Custody and the Coronavirus: Is a Novel Approach Necessary?

by

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Introduction

On October 7, 2021, the Supreme Court of New York for New York County in *C.B.v. D.B.*¹ entered an order providing that a father, the non-custodial parent of a three-year-old girl, could not have in-person contact with his child unless he either became vaccinated against COVID-19 or else agreed to regular testing prior to each visitation period with the child.² At the time of hearing a final custody determination had not been made, but the child resided primarily with the mother, and the court had granted the father supervised visitation due to concerns about past substance abuse and untreated mental health issues.³ The father's visitation, which was "limited to daytime access every other weekend," was supervised by his parents—mainly his mother.⁴

Just over a month prior to the October 7 order, on September 2, 2021, the child's mother and the child's court-appointed Guardian ad Litem (GAL) had orally moved the court for an order requiring that the father and any supervisor be vaccinated against COVID 19.⁵ Upon the joint motion of the mother and

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¹ The New York Supreme Court is a trial court with broad jurisdiction. A breakdown of the New York court structure is available at <https://ww2.nycourts.gov/courts/8jd/structure.shtml> (last visited Dec. 10, 2021).

² *C.B. v. D.B.*, 2021 N.Y. Misc. LEXIS 5111 (2021).

³ *Id.* at *2-*3.

⁴ *Id.* at *3.

⁵ *Id.* at *3-*4.

the GAL, the court issued a temporary restraining order suspending the father's in-person access to the child until he was vaccinated against COVID 19.⁶ At the same time, the court directed the mother to file a formal show cause motion seeking the same relief, which the mother did.⁷ The court heard oral argument on the show cause motion on September 15, 2021.⁸ At that time, the mother and the GAL orally stipulated that, as an alternative to vaccination, the father could agree to regular COVID-19 testing prior to each visit with the child.⁹ Arguing (1) that he had already had COVID-19 and thus had sufficient antibodies to protect him from reinfection, (2) that he objected to the vaccine on religious grounds, and (3) that any vaccination requirement would violate his "rights as an American citizen," the father refused vaccination.¹⁰ Furthermore, the father refused to submit to regular COVID-19 testing, "unless the plaintiff was subject to the same testing regimen."¹¹

Because the father had been offered an alternative to vaccination—i.e. regular testing—the court did not analyze the father's arguments with regard to vaccination.¹² Regarding the father's refusal to submit to scheduled testing unless the mother did the same, the court found that the father's "ultimatum was motivated by a desire to burden the plaintiff as opposed to a commitment to keeping his child safe."¹³ In its "final analysis," the trial court asked what it called, "the fundamental question in this dispute between the child's two parents . . . : What matters more to each of them, his or her own interests, or those of the child?"¹⁴ In answer to this question, the court suspended the father's in-person visitation with the child until he either was vaccinated, or agreed to frequent COVID-19 testing, as set out in the amended temporary restraining order.¹⁵

⁶ *Id.*

⁷ *Id.* at *4.

⁸ *Id.* at *

⁹ *Id.* at *4.

¹⁰ *Id.* at *7-*8.

¹¹ *Id.* at *9.

¹² *Id.* at *8-*9.

¹³ *Id.* at *9.

¹⁴ *Id.* at *10.

¹⁵ *Id.* at *10-*11.

C.B. v. D.B., which will be discussed in Part II below, is but one of many child custody cases impacted by COVID-19-related issues that have flooded courts across the United States since COVID-19 was declared a global pandemic in March 2020. In *C.B. v. D.B.*, the issue before the court was whether an unvaccinated, non-custodial father should be permitted to have visitation with his child. In other cases, parents have asked courts to order a change of custody where one parent would not agree to be vaccinated or did not follow social distancing and other recommended safety protocols, or to have the children vaccinated. In still other cases, parents have turned to the courts to decide whether their children would receive the COVID-19 vaccination when they were unable to agree.

Though the coronavirus that underlies the disputes in such cases is novel, the issues themselves are not—at least not entirely. For decades, parties to child custody litigation—usually parents, but also other relatives and even the state—have asked the courts to settle disputes about the healthcare of minor children and related matters. This includes disagreements related to when and whether children should receive childhood vaccinations for diseases such as polio, chicken pox, measles, mumps, rubella, and even the flu. When addressing child-custody related issues that are driven largely by concerns and fears related to COVID-19, courts should not endeavor to develop innovative approaches, but should look to the ample existing jurisprudence to guide them.

The primary purposes of this article are to survey the various COVID-19 related child custody issues that have arisen in the United States since the outset of the ongoing global pandemic; to analyze how those issues fit within the context of existing case law; and to offer recommended approaches to COVID-19 custody issues, depending upon which side of an argument a party might be on. To that end, Part I provides a brief history of the COVID-19 pandemic to aid in understanding the timeline of COVID-19-related child custody issues in the context of the evolving pandemic. Part II will examine a variety of COVID-19 issues related to the physical custody of minor children, including arguments that have been advanced by litigants, and the rationales that have been applied by courts in deciding such cases. Part III will similarly consider the courts' treatment of cases aris-

ing from disputes between parties regarding whether minor children should receive COVID-19 vaccinations. Parts II and III will provide practitioners with suggestions as to how they might approach their cases depending on what side of the argument they are on, and will likewise provide suggested language to use to advance their position before the court.

I. COVID-19: From Obscure “Viral Pneumonia” to Global Pandemic

On December 31, 2019, the first reports of the disease now known as COVID-19 began to emerge from Wuhan, a large city located in the Hubei Province of China.¹⁶ At the time, the disease was referred to only as “viral pneumonia,” and it was not yet known that the disease was caused by the novel coronavirus SARS-CoV-2,¹⁷ or that the virus would quickly spread and bring about a global pandemic that would affect nearly every aspect of human life on every corner of the planet. In a statement issued January 9, 2020, the World Health Organization (“WHO”) announced that Chinese authorities had used gene sequencing to rule out known viruses, and had preliminarily determined that a new coronavirus was responsible for the viral pneumonia outbreak in Wuhan.¹⁸ The WHO’s statement also noted that, since the beginning of the new year, travelers exhibiting symptoms of pneumonia with a travel history to Wuhan were known to have been at international airports.¹⁹ Interestingly, the WHO neither recommended safety measures for travelers, nor that any travel restrictions be placed on China.²⁰ On January 13, 2020, the first case of novel coronavirus outside China was discovered in Thai-

¹⁶ *Timeline: WHO’s COVID-19 Response*, WORLD HEALTH ORG. <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline> (last visited Dec. 21, 2021).

¹⁷ *Frequently Asked Questions*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (last visited Dec. 21, 2021).

¹⁸ *WHO Statement Regarding Cluster of Pneumonia Cases in Wuhan, China*, WORLD HEALTH ORG. (Jan. 9, 2020), <https://www.who.int/china/news/detail/09-01-2020-who-statement-regarding-cluster-of-pneumonia-cases-in-wuhan-china>.

¹⁹ *Id.*

²⁰ *Id.*

land,²¹ and just eight days later, on January 21, 2021, the first case of the virus was reported in the United States.²²

In an unprecedented effort to halt the spread of the coronavirus, on January 23, 2020, the Chinese government took the extraordinary measure of quarantining the entire city of Wuhan, as well as Huanggang, located thirty miles east of Wuhan.²³ The measure ultimately proved to be too little, too late, and on January 31, 2020, for only the sixth time since its establishment on April 7, 1948, the WHO declared a Global Health Emergency.²⁴ The WHO's declaration was followed in short order by the Trump Administration's declaration of a public health emergency on February 3, 2020.²⁵ The declaration included travel prohibitions for non-Americans who had visited specified countries, as well as quarantine requirements for U.S. citizens who had travelled abroad.²⁶

On March 11, 2020, the WHO declared the coronavirus a pandemic, and two days later, on March 13, 2020, President Donald Trump declared that the coronavirus had become a national emergency.²⁷ At the state level, governors issued declarations of emergency, and enacted various emergency protocols to protect the lives and health of their citizens, and in fairly rapid succession, the high courts of every state issued emergency orders suspending in-person proceedings except for those deemed necessary for the protection of the constitutional rights of crimi-

²¹ WHO Statement on Novel Coronavirus in Thailand, WORLD HEALTH ORG. (Jan. 13, 2020), <https://www.who.int/news/item/13-01-2020-who-statement-on-novel-coronavirus-in-thailand>.

²² Novel Coronavirus (2019-nCoV) Situation Report-3, 23 January 2020, WORLD HEALTH ORG. (Jan. 23, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200123-sitrep-3-2019-ncov.pdf?sfvrsn=D6d23643_8.

²³ "A Timeline of COVID-19 Developments in 2020, AM. J. MANAGED CARE (Jan. 1, 2021), <https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020>.

²⁴ *Id.*; *What We're Reading: US Declares Coronavirus a Public Health Emergency. . .*, AM. J. MANAGED CARE (Feb. 3, 2020), <https://www.ajmc.com/view/what-were-reading-us-declares-coronavirus-a-public-health-emergency-fda-approves-peanut-allergy-drug-california-healthcare-tax-rejected>.

²⁵ *A Timeline of COVID-19 Developments in 2020*, *supra* note 23

²⁶ *What We're Reading: US Declares Coronavirus a Public Health Emergency. . .*, *supra* note 24. .

²⁷ *A Timeline of COVID-19 Developments in 2020*, *supra* note 23.

nal defendants, and for the protections of the physical and mental health and the safety of individuals. Included in these exceptions were proceedings related to “emergency child custody and protection orders.”²⁸

As the states and their courts worked to develop alternate systems for dealing with the legal business of the people at the outset of the global pandemic, many questions arose about the pandemic’s impact on child custody and visitation issues, and particularly the courts’ role in determining custody related disputes where COVID-19 was an issue.

In the early stages, the United States primarily implemented protocols for stay-at-home orders, social distancing, and mask-wearing. The first stay-at-home order was issued from California in March of 2020.²⁹ A table showing the type and duration of COVID-19 stay-at-home orders during March of 2020 as the initial response is available from the Centers for Disease Control and Prevention (CDC).³⁰ Stay-at-home orders were lifted over time, and many states are currently fully reopened. Restrictions such as mask-wearing or social distancing are state-by-state or even based upon a locality’s rules. For example, North Carolina lifted all state restrictions or measures on July 30, 2021;³¹ however, local governments may still have mask mandates or other restrictions.³² Initial custody disputes centered around these mandates.

²⁸ See, e.g., *Administrative Order Suspending All In-Person Court Proceedings for the Next Thirty Days*, Alabama Supreme Court, Mar. 13, 2020, <https://www.alacourt.gov/docs/COV-19%20order%20FINAL.pdf>.

²⁹ *Governor Gavin Newsom Issues Stay at Home Order*, CALIFORNIA OFFICE OF GOVERNOR (Mar. 19, 2020), <https://www.gov.ca.gov/2020/03/19/governor-gavin-newsom-issues-stay-at-home-order/>.

³⁰ *Timing of State and Territorial COVID-19 Stay-at-Home Orders and Changes in Population Movement, March 1 – May 31, 2020*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Sept. 3, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6935a2.htm#F1_down.

³¹ *Current Restrictions & Recommendations*, NORTH CAROLINA (July 30, 2021), <https://www.nc.gov/covid-19/current-restrictions-recommendations>.

³² See, e.g., *City of Charlotte COVID-19 Updates*, CITY OF CHARLOTTE, <https://charlottenc.gov/covid19/Pages/default.aspx#:~:text=the%20proclamation%20mandates%20that%20face,least%20five%20years%20of%20age> (last visited Dec. 23, 2021) (indicating a mask mandate regardless of vaccination status).

Vaccinations changed the inquiry in many custody cases. In December of 2020, the vaccines began to take stride. On December 10, 2020, the Food and Drug Administration (FDA) advisory panel endorsed the first COVID-19 vaccine.³³ The next day, the FDA approved emergency use authorization (EUA) for the COVID-19 vaccination from Pfizer and BioNTech.³⁴ Moderna's COVID-19 vaccination was approved via EUA on December 18, 2020.³⁵ Johnson & Johnson's single-shot vaccine was granted EUA in February of 2021.³⁶ Until fall of 2021, the vaccinations were not approved for children. The following table³⁷ shows the most recent CDC data on vaccination for children by age:

Authorized for	Pfizer-BioNTech	Moderna	J&J/Janssen
4 years and under	No	No	No
5-11 years old	Yes	No	No
12-17 years old	Yes	No	No
18 years and older	Yes	Yes	Yes

As vaccinations rolled out through 2020 and 2021, custody disputes focused increasingly on vaccination status. Initially the inquiry was whether a parent was vaccinated and following local and CDC guidelines, though now the analysis includes the issue of whether to vaccinate a child.

³³ Scott Hensley & Richard Harris, *FDA Panel Recommends COVID-19 Vaccine for Emergency Use*, NPR (Dec. 10, 2020), <https://www.npr.org/sections/health-shots/2020/12/10/944813076/fda-advisers-weigh-pfizers-covid-19-vaccine>.

³⁴ Allison Inzerro, *FDA Agrees to EUA for COVID-19 Vaccine from Pfizer, BioNtech*, AM. J. MANAGED CARE (Dec. 11, 2020), <https://www.ajmc.com/view/fda-agrees-to-eua-for-covid-19-vaccine-from-pfizer-biontech>.

³⁵ Berkeley Lovelace Jr., *FDA Approves Second Covid Vaccine for Emergency Use as It Clears Moderna's for U.S. Distribution*, CNBC (Dec. 18, 2020), <https://www.cnbc.com/2020/12/18/moderna-covid-vaccine-approved-fda-for-emergency-use.html>.

³⁶ *Statement from NIH and BARDA on the FDA Emergency Use Authorization of the Janssen COVID-19 Vaccine*, NAT'L INST. HEALTH (Feb. 27, 2021), <https://www.nih.gov/news-events/news-releases/statement-nih-barda-fda-emergency-use-authorization-janssen-covid-19-vaccine>.

³⁷ Adapted from the CDC's table, *Most Children and All Teens Can Get COVID-19 Vaccines*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Nov. 23, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/children-teens.html>.

Nearly two years after the initial reports of a viral pneumonia, those in the United States are seemingly through the worst of the global pandemic. While the COVID-19 variant Omicron has recently been spreading, the numbers for Omicron appear to be more promising³⁸ and the COVID-19 deaths are falling even as Omicron cases rise.³⁹ Rapidly developed vaccines have proven effective in slowing the spread of the virus and reducing virus related morbidity. Antiviral drugs have been developed for the treatment of virus-related symptoms post-exposure. Life has begun to slowly return back to normal, albeit perhaps a “new normal.” Despite the overall success and progress in navigating the global pandemic that took the world by surprise, as well as by storm, many questions have arisen and continue to arise as a result of the pandemic, to include those of how legal decisions related to COVID-19 and child custody fit into our existing jurisprudence.

II. COVID-19: Physical Custody and Visitation

In 2020, the *Journal of the American Academy of Matrimonial Lawyers (JAAML)* addressed the COVID-19 pandemic in a comment.⁴⁰ The comment was limited by the availability of cases at that time because this was near the beginning of the pandemic. The author did an exceptional job, citing to local stay-at-home orders and the relatively few cases available.

A review of all fifty states reveals that each state in the union declared an emergency based upon COVID-19 on or about March of 2020.⁴¹ Subsequent court orders followed in all fifty

³⁸ NBC NEWS (Jan. 12, 2022). <https://www.nbcnews.com/health/health-news/omicron-covid-deaths-rise-many-are-still-delta-cdc-says-rcna11924> (last visited Jan. 17, 2022); Study: Omicron Associated with 91% Reduction in Risk of Death Compared to Delta, AXIOS <https://www.axios.com/cdc-omicron-death-delta-variant-covid-959f1e3a-b09c-4d31-820c-90071f8e7a4f.html> (last visited Jan. 17, 2022).

³⁹ U.S. Covid Deaths Are Falling Even as Omicron Cases Jump, BLOOMBERG (Dec. 29, 2021), <https://www.bloomberg.com/news/articles/2021-12-29/covid-deaths-fall-in-u-s-even-as-omicron-spread-continues>.

⁴⁰ Madison McBratney, Comment, *How to Stay-at-Home When You Have Two Homes: COVID-19's Effect on Co-parenting and Child Custody*, 33 J. AM. ACAD. MATRIM. LAW. 225 (2020).

⁴¹ A review of the initial orders entered by each state, timing of same, etc. is on file with the authors and available upon request.

states providing mandates on how courts would proceed. Many of those initial orders have been revised, amended, or superseded. For example, Oregon has issued at least twenty orders, alerts, and releases since the original March 2020 guidelines.⁴² The requirements on social distancing, masking, in-person versus remote, vaccination status or testing vary from state to state. Practitioners should be familiar with the rules and guidelines in their respective states of practice, and make sure to keep up-to-date on any orders, rules, and new releases.

One case included in the 2020 JAAML comment was *Riberio v. Wright*.⁴³ In this Canadian case, the court balanced the reality of the pandemic and associated stay-at-home orders and rules against the interests a child has in spending meaningful time with both parents. The author also pointed to a New York case, *A.S. v. H.R.*⁴⁴ In that case, the father originally sought permission to travel with the child to California for Passover, and then used COVID-19 to ask the court to allow him to move permanently. “The Court noted that it is likely that the father was using COVID-19 as an excuse to obtain the relocation permission he wanted.”⁴⁵ Since the comment was written, more cases have been handed down and are ripe for analysis. The issue of child vaccinations is directly addressed in the following section.

Refusal to protect a child from potential medical harm may result in a custodial change. Consider the Iowa case of *In re Marriage of Milne*⁴⁶ in which the Court of Appeals of Iowa awarded the father sole legal and primary physical custody based in part on the mother’s reluctance to vaccinate the children. While not specifically involving COVID-19 vaccines, the precedent holds for a COVID-19 issue. If faced with an argument using the *Milne* opinion from opposing counsel, a practitioner should point out that Iowa reviews dissolution of marriage *de novo*⁴⁷ and that some states have a more stringent standard.⁴⁸

⁴² *Prior Responses to Coronavirus (COVID-19)*, OREGON JUDICIAL BRANCH, <https://www.courts.oregon.gov/courts/Pages/coronavirus-prior.aspx> (last visited Dec. 23, 2021).

⁴³ *Riberio v. Wright*, 2020 ONSC 1829 (Mar. 24, 2020).

⁴⁴ *A.S. v. H.R.*, 2020 NYLJ LEXIS 1002 (2020).

⁴⁵ McBratney, *supra* note 38, at 234.

⁴⁶ *In re Marriage of Milne*, 952 N.W.2d 332 (Iowa Ct. App. 2020).

⁴⁷ “We review dissolution appeals *de novo*.” *Id.*

The case also contains a dissent which raises serious questions about whether the mother really did exhibit an unwillingness to vaccinate.

The *San Marco* case also deals with this issue.⁴⁹ The Court of Appeals of Florida affirmed the trial court's finding of changed circumstances and modification of custody where evidence showed that the mother had missed doctor appointments, the father had taken the child to appointments, and the mother refused to vaccinate the child for chicken pox, resulting in the child's contraction of chicken pox.⁵⁰

In a Cook County, Illinois case, the court initially stripped the mother of all custodial visitation until the mother was vaccinated against COVID-19.⁵¹ The judge later reversed his decision.⁵² “[S]purred by national backlash,”⁵³ the judge reportedly decided to reverse and allow resumption of visitation to the unvaccinated mother.

In the New York case mentioned in the introduction, the court limited the father's in-person access to the child based upon the vaccination status.⁵⁴ While the Canadian opinion in

⁴⁸ *In re Marriage of Richardson*, 102 Cal. App. 4th 941, 948, 126 Cal. Rptr. 2d 45, 50 (2002) (“Custody and visitation orders are reviewed for an abuse of discretion.”); *See Scoggin v. Scoggin*, 791 S.E.2d 524, 526 (N.C. Ct. App. 2016)(holding that North Carolina uses the abuse of discretion standard); Delaware, Michigan, and Mississippi also use abuse of discretion. *Michaels v. Gregory*, 935 A.2d 256 (Del. 2007)(“Absent misapplication of the law, our standard of review is abuse of discretion.”); *Krieg v. Krieg*, No. 341055, 2018 Mich. App. LEXIS 2591, at *4 (Mich. Ct. App. June 7, 2018)(“We review a parenting-time award for an abuse of discretion.”); *Barber v. Barber*, 288 So. 3d 325, 330 (Miss. 2020)(“The standard of review in child custody cases is limited. Reversal occurs only if a chancellor is manifestly wrong or applied an erroneous legal standard.”).

⁴⁹ *San Marco v. San Marco*, 961 So. 2d 967 (Fla. Dist. Ct. App. 2007).

⁵⁰ *Id.* at 968.

⁵¹ Bob Chiarito, *Judge Rules Pilsen Mom Can't See Her Son Because She's Not Vaccinated Against COVID-19* CHICAGO SUN-TIMES (Aug. 29, 2021), <https://chicago.suntimes.com/2021/8/29/22647262/judge-rules-pilsen-mom-custody-covid-19-vaccination>.

⁵² Dane Placko, *Chicago Judge Reverses Decision, Will Allow Unvaccinated Mom to See Her Son After All*, FOX 32 CHICAGO (Aug. 30, 2021), <https://www.fox32chicago.com/news/judge-reverses-controversial-decision-will-allow-unvaccinated-mom-to-see-her-son-after-all>.

⁵³ *Id.*

⁵⁴ *C.B.*, 2021 N.Y. Misc. LEXIS 5111.

Ribiero “laid the groundwork to deny parenting time based on exposure to Covid-19, whether via employment or poor social distancing practices,”⁵⁵ the *C.B. v. D.B.* case takes custodial effect based upon COVID-19 a step further into vaccinations.⁵⁶ Based upon the father’s and the visitation supervisor’s unvaccinated status, the court entered a temporary restraining order providing that the father could resume visitation only upon receiving a COVID-19 vaccination, or upon agreement for regular testing. Noting that the “danger of voluntarily remaining unvaccinated during access with a child while the COVID-19 virus remains a threat to children’s health and safety cannot be understated,”⁵⁷ the court determined that the father’s arguments against vaccination were not persuasive. The father argued that he had adequate antibodies because he previously had COVID-19 and that his religious beliefs precluded vaccination. He stated he would provide a medical opinion to substantiate his claim, but abandoned this effort and did not provide an expert medical opinion regarding his antibodies.⁵⁸ The court found that his religious argument was likely spurious because he is a Roman Catholic and, as the court noted, Pope Francis encouraged vaccination among Catholics.⁵⁹ The court essentially adopted a balancing test, with the father’s arguments against vaccination on one side, and the best interests of the child on the other side. The best interests of the minor child would not be limited to seeing parents on a regular, recurring basis, but also included, among other things, minimizing the risk of a child COVID-19 infection.

The father’s arguments lacked considerable influence with the court, though it is possible that situations with different and more compelling arguments could produce a very different result. By way of example, a court would have a difficult decision if a parent employed a medical expert who testified that the COVID-19 vaccine would be harmful to the parent and/or the child (which the father failed to do). Assuming a baseline that each side had an expert and both experts were qualified in the

⁵⁵ McBratney, *supra* note 38, at 232.

⁵⁶ See *supra* note 4.

⁵⁷ *C.B.*, 2021 N.Y. Misc. LEXIS 5111, at *5.

⁵⁸ *Id.* at *8.

⁵⁹ *Id.*

field and presented testimony and reports, the court would be faced with the “battle of the experts” and tasked with determining difficult issues about COVID-19 and vaccinations from expert testimony. One could easily see how political a case of that nature might become, and the political beliefs of those involved could create a strong risk of bias. Politics aside, reasonable minds can differ on emerging issues such as the intersection of COVID-19 and child custody. Objections to vaccination or testing are covered in greater detail in the sections below. When determining child custody and visitation, the courts may elect to err on the side of caution when presented with competing evidence because a child custody inquiry is based upon the goal of protecting the best interests of minor children.⁶⁰

Consider whether a parent could prove a religious claim preventing a vaccination. There is a high likelihood that courts will face this issue in the future as employers are already receiving requests for religious exemptions⁶¹ and this is a known issue regarding school vaccinations. Evaluating the sincerity of the religious claim is particularly difficult, and “it is easy to see how this exemption may be abused.”⁶² Custody cases and religious exemption present an opportunity to examine credibility. When discussing school vaccine requirements, one commentator stated “where an individual claims exemption to the vaccination requirement based upon religious beliefs, in most jurisdictions, short of bringing the issue before a court to be adjudicated, there is no mechanism by which to police the legitimacy of a claimed religious exemption to vaccination.”⁶³ Unlike a school vaccina-

⁶⁰ *Arkoosh v. Arkoosh*, 164 P.2d 590, 591 (Idaho 1945) (“[T]his court has uniformly held the welfare and best interests of a minor child is the polar star by which the court must be guided.”); *Roybal v. Rauli*, 832 S.E.2d 202, 216 (N.C. Ct. App. 2019) (“In custody matters, the best interests of the child is the polar star by which the court must be guided.”); *In re Antonio R.A.*, 719 S.E.2d 850, 858 (W. Va. 2011) (The “welfare of the child is the polar star” in a custody case.). Some states have statutory guidelines. *see, e.g.*, MINN. STAT. § 518.17.

⁶¹ Laurel Wamsley, *Judging ‘Sincerely Held’ Religious Belief Is Tricky for Employers Mandating Vaccines*, NPR (Oct. 4, 2021), <https://www.npr.org/2021/10/04/1042577608/religious-exemptions-against-the-covid-19-vaccine-are-complicated-to-get>.

⁶² Elizabeth Angeley, *Anti-Vaccination: A Growing Epidemic*, 32 J.A.M. ACAD. MATRIM. LAW. 271 (2020).

⁶³ *Id.* at 283.

tion, a custody case involving COVID-19 and a religious exemption will place the issue squarely before the court (absent a settlement). When faced with questions regarding whether the parent has a sincerely held religious objection, the court's inquiry should include fact-finding and drawing conclusions about the parent's sincerity and credibility. An inquiry could include: (1) what tenants or beliefs of the religion are at issue, (2) when the parent joined the religion in question, (3) what commitment does the parent have to the religion, (4) how established is the religion, (5) what is the strength of the connection between the parent and the religion, (6) what involvement does the parent have in this religion, (7) what connection does the child have to the religion or any other religion, (8) whether the parent has practiced or observed other religions, (9) whether the matter at issue directly inhibits or prevents the practice of the religion, (10) what alternatives exist, and (12) any other relevant factors. The court can test the validity of a parent's credibility⁶⁴ in claiming the exemption, as courts frequently do in custody cases. This will be evaluated on a case-by-case basis, where the court must consider the totality of circumstances and all relevant information.

This inquiry is focused on the parent's religious exemption; it is not known at present whether the court's duty to act in the best interests of the minor child outweighs a parent's ability to claim a religious exemption. The first line of defense is to attack the exemption claim. Assuming the exemption claim is legitimately made and accepted by the court, one could argue that the court can always act in the best interests of a child and little, if anything, can stand in the court's way when doing so. Parents have a fundamental right to make decisions regarding the care,

⁶⁴ See, e.g., "The court had the benefit of seeing and hearing the parties and their witnesses and was in a much better position to determine the credibility and weight of the evidence." *Pollock v. Pollock*, 77 N.W.2d 485, 491 (Wis. 1956); "[I]t is the exclusive province of the [trier of fact] to determine the credibility of a witness." *Sabbah v. Sabbah*, 151 Cal. App. 4th 818, 823, 60 Cal. Rptr. 3d 175, 179 (2007); "The function of trial judges in nonjury trials is to weigh and determine the credibility of a witness." *In re Oghenekevebe*, 473 S.E.2d 393, 398 (N.C. Ct. App. 1996); "The ore tenus rule recognizes that the trial judge is better able than is the appellate court to determine the credibility of the witnesses." *Diorio v. Long*, 839 So. 2d 650, 654 (Ala. Civ. App. 2001).

custody, and control of their children,⁶⁵ though only a religious exemption deemed valid by the trier of fact would trigger any concerns of violating the rights of the parent claiming the exemption. Note that a practitioner could also argue regarding what government agencies have done. For example, the U.S. Navy has not honored any religious exemptions to date.⁶⁶

A court faced with such an issue must not run afoul of the U.S. Constitution. The test stated in *Lemon v. Kurtzman*,⁶⁷ known as the *Lemon* test, may apply. The *Lemon* Court adopted a three-part test to determine if a government practice offends the Establishment Clause.⁶⁸ Under *Lemon*, a government practice regarding religion will not offend the Establishment Clause if it has a secular purpose, its principal or primary effect neither advances nor inhibits religion, and it does not create an excessive entanglement of the government with religion. While the authors are unaware of any current case claiming the COVID-19 restrictions are a government practice establishing an anti-religion position with respect to child custody, it is reasonable to anticipate such an argument. Also, the *Lemon* framework may prove to be a helpful rubric in evaluating what a court can do.

A medical exemption is another argument against vaccination of a parent.⁶⁹ All fifty states presently allow for a medical exemption to required school vaccinations.⁷⁰ Other exemptions

⁶⁵ “[W]e have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

⁶⁶ Geoff Ziezulewicz, *The Navy Hasn’t Approved Any Religious Exemptions for Sailors Seeking to Avoid COVID-19 Vaccine*, NAVY TIMES (Dec. 2, 2021), <https://www.navytimes.com/news/your-navy/2021/12/02/the-navy-hasnt-approved-any-religious-exemptions-for-sailors-seeking-to-avoid-covid-19-vaccine/>.

⁶⁷ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

⁶⁸ U.S. CONST. Amend. 1

⁶⁹ The Cook County mother argued she had adverse reactions to vaccinations and was advised not to obtain a COVID-19 vaccination. Stephanie Francis, *Family Law Judge Backtracks on Visitation Order for Mom Regarding COVID-19 Vaccine*, ABA J. (Aug. 30, 2021), <https://www.abajournal.com/news/article/family-law-judge-backtracks-on-visitation-order-regarding-covid-19-vaccine>.

⁷⁰ *States with Religious and Philosophical Exemptions from School Immunization Requirements*, NATIONAL CONFERENCE OF STATE LEGISLATURES

include religious and a personal or philosophical objection.⁷¹ Whether these types of exemptions can be extended to a parent who refuses a COVID-19 vaccination in a custody dispute remains to be determined, though the argument should be anticipated and evaluated on a case-by-case basis.

Cases in which COVID-19 is used as a *shield* present a unique challenge. A mother argued that COVID-19 prevented her from making progress in her case, specifically that she could not participate in obtaining mental health treatment.⁷² The court's other findings in the case contradicted the mother's argument, specifically that she was unable to protect her child from abuse or engaging in risky behavior, that the mother had not procured a safe, stable home, and that she had gained insight into the child's abuse.⁷³ The facts of this case which belied the mother's own argument, like the *C.B. v D.B.* case above, aided in the decision by the court and limit the case's precedential value.

Another New York case also serves as an early benchmark on "shield" use of COVID-19 in custody disputes.⁷⁴ This case involved a father who did not see his children at the outset of the pandemic and objected to proceeding in court in-person or virtually based upon COVID-19 concerns. In deciding to proceed with a virtual hearing, the court stated it "will not abide plaintiff's [the father] attempt to use a global pandemic as a sword and a shield to further delay the resolution of this proceeding."⁷⁵ Another case involving a virtual proceeding argument is *Pridemore v. Pridemore*⁷⁶ from the Court of Appeals of Ohio. The mother moved to North Carolina and the court awarded her emergency custody, finding she left Ohio "[f]earing for her and her children's safety"⁷⁷ based upon domestic violence.⁷⁸ In defense of the mother's request to transfer the custody case to North Caro-

(Nov. 22, 2021), <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx>.

⁷¹ For a thorough review of law surrounding vaccines and exemptions, see Angeley, *supra* at note 62.

⁷² *In re T.M.B.*, 862 S.E.2d 632 (N.C. 2021).

⁷³ *Id.* at 639.

⁷⁴ *S.C. v. Y.L.*, 2020 N.Y. Slip Op. 50590 (N.Y. Sup. Ct., May 18, 2020).

⁷⁵ *Id.*

⁷⁶ *Pridemore v. Pridemore*, 2021-Ohio-4449 (Ct. App. 2021).

⁷⁷ *Id.* at *3.

⁷⁸ *Id.* at *24.

lina, the father argued that the trial court's interest in minimizing the inconvenience of litigating a case in Ohio was moot as the court utilized remote proceedings in response to the COVID-19 pandemic. The court disagreed, holding that a transfer of custody for an inconvenient forum remains in the court's authority despite the public safety concerns which led to remote hearings in response to the COVID-19 pandemic.⁷⁹ The court should evaluate the genuine nature of the use of COVID-19 when it appears one party is using it as a sword to defeat the rights of the other parent or as a shield to prevent an unfavorable custody result, instead of a shield to defend a parent's own rights.

If one party is ill with COVID-19, there is instructive law in the *Thompson v. Thompson* case.⁸⁰ *Thompson* involved a father who was sick with tuberculosis. The relevant issue is not the disease or malady in question, but rather the danger to the child presented by the condition. The court in *Thompson* said “[a]t the time of the original custodial award respondent was ill and not only unable to care for his child but any contact with her would have been dangerous due to his infectious condition.”⁸¹ If a court is faced with a parent in a custody proceeding who is infected with COVID-19, limitations on visitation appear prudent and responsible to protect children's health.⁸²

A child in the custody of the government presents unique challenges with regard to physical custody and visitation in light of the COVID-19 pandemic. One challenge is determining the scope of state's authority to limit parental access to children for visitation. In an April 2021 decision, the North Carolina Court of Appeals upheld a trial court's decision to limit a mother's visitation to video only when the supervised visitation center was shut down because of concerns over COVID-19.⁸³ The court of *In re K.M.*⁸⁴ awarded the mother visitation to be supervised at a facility. The supervision facility was closed due to COVID-19 at

⁷⁹ *Id.* at *33.

⁸⁰ *Thompson v. Thompson*, 298 P.2d 866 (Cal. Ct. App. 1956).

⁸¹ *Id.* at 867.

⁸² For more information on cases involving parent health, see Tom S. Tanimoto, *Child Custody Considerations in a COVID-19 ERA and Thoughts for the Future*, 25 HAWAII B.J. 12 (Sept. 2021) (discussing *inter alia* three cases involving AIDS and other relevant information).

⁸³ *In re K.M.*, 861 S.E.2d 10 (N.C. Ct. App. 2021).

⁸⁴ *Id.*

the time of the trial. The mother's in-person visitation was suspended until the facility re-opened or an alternative facility was found. The mother was granted visitation by video during the closure. Interestingly, the mother initially agreed to suspend her in-person visitation prior to the above ruling when the COVID-19 restrictions placed significant limitations on the ability to accomplish in-person visits. This was a temporary measure, and in-person visits between mother and child resumed after a period of months. The mother argued that electronic visitation could not replace in-person (despite her prior consent on the topic), and that the trial court's suspension of supervised visitation violated case law and a statute.⁸⁵ However, the trial court made findings of fact and conclusions of law that could have supported an award of no visitation to the mother.⁸⁶ A quick review of those findings includes the mother's drug use, her outbursts towards the social worker, and her multiple criminal charges during the pendency of the case.

The facts of this case make it an easier to see how the sitting judge reached a decision. While not all cases will present this level of factual support with issues extrinsic to COVID-19 against the person whose visitation is restricted, the case is still instructive. First, the court's use of alternatives should be employed by practitioners to cover all bases for the best interests of the client. Second, a thorough inquiry of the options should be performed. Knowing there is a visitation center is not sufficient; further inquiry is necessary. For example, is there a visitation center that is not closed? If so, what are the COVID-19 protocols? What is the cost? Travel time? Are the protocols rigid or can they be changed if there is a court mandate requiring more restrictive protocols on matters such as mask-wearing or social distancing? What other options are available (and what details apply for each alternative)? Third, it is important to assess the facts and conclusions

⁸⁵ N.C. GEN. STAT. § 50-13.2(e)(providing, inter alia: "Electronic communication may not be used as a replacement or substitution for custody or visitation."); *In re* T.R.T., 737 S.E.2d 823, 828-29 (N.C. Ct. App. 2013).

⁸⁶ "The trial court could have properly awarded Respondent-Mother with 'no visitation' at all. However, in its discretion, the trial court concluded that it was preferable to temporarily award Respondent-Mother weekly video contact for so long as in-person visitation was unavailable due to the pandemic." *In re* K.M., 861 S.E.2d 10, 17 (N.C. Ct. App. 2021).

that must be made by the court in each state. The *K.M.* court noted several unchallenged findings and conclusions. It is not a stretch to imagine a different factual scenario that may have produced a different result. Fourth, this is an emerging area of law where pure reliance on facts or law may be insufficient. A good faith argument for or against state action may be more readily received as the courts are tasked with treading new ground on COVID-19 custody cases.

III. To Vaccinate or Not to Vaccinate

Shortly after the very first vaccines against COVID-19 became available for emergency use, a vigorous public discourse about the safety and efficacy of the vaccines began. While some hailed the vaccines as a welcome answer to lockdowns, social distancing, and mask-wearing, others looked with a dubious eye on the rapidly developed vaccines that were released to the public before being subjected to the rigorous approval process of the FDA. As the vaccines gained approval for emergency use in children, predictably, Americans began to debate whether and to what extent federal, state, and local governments as well as private entities could require COVID-19 vaccination among certain segments of the population. Likewise, disputes began to arise between parents as to whether their minor children should and would be vaccinated. When parents found themselves unable to settle their differences regarding vaccinating their children against COVID-19, they did what parents with differing beliefs about vaccination have always done—they turned to the courts for resolution.

Even though Americans find themselves living in what many describe as “unprecedented times,” there is ample precedent related specifically to legal disputes surrounding vaccinations for children to guide the courts in ruling on such cases. Within our body of law, there are two distinct, yet interconnected, legal inquiries at play. The first is the government’s authority with regard to vaccine mandates—including the government’s authority to enact vaccine mandates, and the government’s authority to allow exemptions from such mandates based upon religious, philosophical, medical, or other bases. This inquiry is important because, as shown by the cases that follow, many parents who object to their minor children receiving vaccinations rely, at least

in part, on constitutionally based objections provided for under state and local law. The second is the legal standards applied by courts in making custody determinations for minor children; this includes primarily the best interest of the child standard and how courts apply this standard within their individual jurisdictions' legal framework when determining cases involving disputes about whether and when minor children will receive certain vaccinations.

A. *Vaccinations and the Law in the United States*

The use of vaccines in America to protect against harmful communicable diseases is not new, nor is the anti-vaccination sentiment that underlies child custody litigation related to vaccination decisions for minor children today. In 1721 Cotton Mather, a Puritan minister who, incidentally, believed in and aided in the prosecution of witchcraft in Colonial America,⁸⁷ also advocated for the use of a smallpox inoculation to halt the spread of the deadly and disfiguring disease.⁸⁸ Mather's belief in the efficacy of inoculation against smallpox was such that he even inoculated his own son—almost killing him.⁸⁹ The public response was one of outrage—a bomb was thrown through Mather's window in answer to his pro-inoculation efforts.⁹⁰

It would be another seventy-five years before the first smallpox vaccine was created and the use of vaccinations in America became routine,⁹¹ and still another thirty-three years after that before Massachusetts became the first state to mandate vaccination for the general public.⁹² In 1855, Massachusetts once again was the leader as to mandatory vaccination when that state passed legislation requiring vaccination in school children to prevent smallpox.⁹³ Over the course of the next forty years, ten states—New York, Connecticut, Indiana, Arkansas, Illinois, Vir-

⁸⁷ *Cotton Mather*, ENCYCLOPEDIA BRITANNICA, Feb. 9, 2021, <https://www.britannica.com/biography/Cotton-Mather>.

⁸⁸ *Id.*; *History of Vaccines*, PROCON.ORG (Mar. 7, 2019), <https://vaccines.procon.org/history-of-vaccines/>;

⁸⁹ *Cotton Mather*, *supra* note 87.

⁹⁰ *Id.*

⁹¹ Angeley, *supra* note 62, at 272.

⁹² *Id.*

⁹³ *History of Vaccines*, *supra* note 88.

ginia, Wisconsin, California, Iowa, and Pennsylvania—followed Massachusetts’ lead by enacting mandatory vaccination legislation for school children.⁹⁴

No doubt concerned about the relatively rapid succession with which states were passing legislation requiring vaccines for school children, opponents of mandatory vaccinations began to unite in their efforts to oppose vaccine mandates.⁹⁵ Organizations such as the Anti-Vaccination Society of America, the New England Anti-Compulsory Vaccination League, and the Anti-Vaccination League of New York were formed to combat mandatory immunization laws.⁹⁶ While these organizations saw initial success by securing the repeal of mandatory vaccine legislation in seven states,⁹⁷ as courts began to weigh in on the constitutionality of vaccine mandates, it became clear that the law and public policy favored the state’s authority to enact and enforce such mandates.⁹⁸

The court system addressed vaccinations and mandates in the early twentieth century. On February 20, 1905, the U.S. Supreme Court handed down its ruling in *Jacobson v. Massachusetts*.⁹⁹ In that case, Pastor Henning Jacobson challenged the constitutionality of a Massachusetts law requiring all adults to be vaccinated against smallpox, and imposing a five dollar fine on residents who were not vaccinated.¹⁰⁰ Jacobson argued in part that

his liberty is invaded when the State subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who objects to vaccination, no

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *See, e.g., Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding Massachusetts’ compulsory vaccination law).

⁹⁹ 197 U.S. 11 (1905).

¹⁰⁰ Nicholas Mosovick, *On this Day, the Supreme Court Rules on Vaccines and Public Health*, CONSTITUTION DAILY (Feb. 20, 2021), <https://constitutioncenter.org/blog/on-this-day-the-supreme-court-rules-on-vaccines-and-public-health>.

matter for what reason, is nothing short of an assault upon his person.¹⁰¹

Noting that the Court had “recognized the authority of a State to enact quarantine laws and ‘health laws of every description,’”¹⁰² and that “[a]ccording to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety,”¹⁰³ the high court upheld Massachusetts’ compulsory vaccination law as being in harmony with the U.S. Constitution.¹⁰⁴

In late 1922, a schoolgirl named Rosalyn Zucht challenged certain City of San Antonio Ordinances which provided “that no child or other person shall attend a public school or other place of education without having first presented a certificate of vaccination.”¹⁰⁵ In *Zucht v. King*, the appellant had been excluded from both private and public school because she did not present the required certificate of vaccination, and she refused to submit to vaccination.¹⁰⁶ Zucht challenged the validity of the San Antonio Ordinances arguing in part that the ordinances unconstitutionally deprived her “of her liberty without due process of law by, in effect, making vaccination compulsory”¹⁰⁷ and that the ordinances should be “void because they leave to the Board of Health discretion to determine when and under what circumstances the requirement shall be enforced without providing any rule by which that board is to be guided in its action and without providing any safeguards against partiality and oppression.”¹⁰⁸ The Supreme Court in *Zucht* ultimately concluded that the San Antonio Ordinances requiring proof of vaccination for school children were valid.¹⁰⁹ Pointing to a long line of cases, the Court noted first that it was well-settled that requiring compulsory vaccination was within the police power of the state,¹¹⁰ and further-

101 *Jacobson*, 197 U.S. at 26.

102 *Id.* at 25.

103 *Id.*

104 *Id.*

105 *Zucht v. King*, 260 U.S. 174, 175 (1922).

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.* at 177.

110 *Id.* at 176 (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1922)).

more that the state could delegate authority to a municipality to determine the circumstances under which vaccinations would be mandated.¹¹¹ The Court noted that a municipality cloaked in the power of the state “may vest in its officials broad discretion in matters affecting the application and enforcement of a health law.”¹¹² Likewise, the Court made clear that when exercising its police power, a state or municipality may establish reasonable classifications for determining its applicability and that a regulation does not violate the constitution just because it does not apply to all.¹¹³

As set out above, *Jacobson* and *Zucht* clearly establish a state’s authority to require mandatory vaccination for school children. Neither case speaks directly to a state’s authority to provide statutory exemptions for children based upon religious or philosophical objections; the Free Exercise Clause of the First Amendment was not held to constrain the states until 1940.¹¹⁴ The disputed law in *Jacobson* allowed exemptions for children who provided medical documentation that vaccination was contraindicated based on individual health factors, but did not allow a medical exemption for adults.¹¹⁵ The Supreme Court decision in *Jacobson* provides that this distinction did not result in a lack of equal protection for adults because the law was “applicable equally to all adults in like condition.”¹¹⁶ The Supreme Court’s treatment of the exemption issue in *Jacobson* indicates that the states are the absolute authority on vaccinations within their borders—including whether and when to require vaccinations, and if

¹¹¹ *Id.* (citing *Laurel Hill Cemetery v. San Francisco*, 216 U.S. 358 (1910)).

¹¹² *Id.* (citing *Lieberman v. Van De Carr*, 199 U. S. 552 (1905)).

¹¹³ *Id.* at 176–77 (citing *Adams v. Milwaukee*, 228 U. S. 572 (1913); *Miller v. Wilson*, 236 U. S. 373, 384 (1915)) (“[I]n the exercise of the police power [...] reasonable classification may be freely applied and that regulation is not violative of the equal protection clause merely because it is not all-embracing.”).

¹¹⁴ *Phillips v. City of New York*, 775 F.3d 538 (2d Cir. 2015) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)). Frederick Gedicks & Michael McConnell, *The Free Exercise Clause*, INTERACTIVE CONSTITUTION, [https://constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/265#:~:text=reynolds%20v.,United%20States%20\(1878\),and%20the%20rights%20of%20others](https://constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/265#:~:text=reynolds%20v.,United%20States%20(1878),and%20the%20rights%20of%20others) (last visited Dec. 6, 2021).

¹¹⁵ *Jacobson*, 197 U.S. at 12, 17.

¹¹⁶ *Id.* at 12.

and when a person should be permitted an exemption to a statutory vaccine mandate.¹¹⁷

That individual states may provide a religious exemption from mandatory vaccination is made absolutely clear in *Phillips v. City of New York*, which was decided in 2015 by the U.S. Court of Appeals for the Second Circuit.¹¹⁸ In *Phillips*, the appellants challenged New York's mandatory vaccination law, which provided both medical and religious exemptions, on a number of constitutional bases.¹¹⁹ There, two of the appellants had been granted religious exemptions from vaccination, but were excluded from school when another student was diagnosed with chicken pox.¹²⁰ The third appellant was excluded from school after her mother was denied a religious exemption because her religious belief with regard to vaccinations was determined to have not been sincerely held.¹²¹ Noting that “[b]ecause the State could bar [the appellants] from school altogether, *a fortiori*, the State's more limited exclusion during an outbreak of a vaccine-preventable disease is clearly constitutional,” the Second Circuit upheld New York's law as constitutional.¹²² The court also noted that it is generally accepted that individual states may allow vaccine exemptions for religious or other reasons.¹²³

By 1963, at least twenty states had laws mandating that school aged children be vaccinated against a variety of different diseases.¹²⁴ As of the writing of this article, every state in the union requires that students be vaccinated against specified diseases, with many of those states basing their requirements on the Centers for Disease Control and Prevention's (CDC) Advisory Committee on Immunization Practices' (ACIP) recommenda-

¹¹⁷ *Id.*

¹¹⁸ *Phillips*, 775 F.3d 538.

¹¹⁹ *Id.* The Second's Circuit's analysis included Substantive Due Process, Free Exercise of Religion, Equal Protection, Ninth Amendment.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ Patrick D. Robben & Alison Grafsgaard, *Vaccines and the Law*, 72 BENCH & B. MINN. 24 (2015).

¹²⁴ Kevin M. Malone & Alan R. Hinman, *Vaccination Mandates: The Public Health Imperative and Individual Rights*, CENTERS FOR DISEASE CONTROL AND PREVENTION, , https://www.cdc.gov/vaccines/imz-managers/guides-pubs/downloads/vacc_mandates_chptr13.pdf (last visited Jan. 31, 2022).

tions.¹²⁵ Presently, the ACIP recommends that from birth to eighteen years of age, children be vaccinated against a total of approximately sixteen vaccine-preventable diseases, including COVID-19.¹²⁶ As of January 31, 2022, California and Louisiana are the only states that require school children to be vaccinated against COVID-19.¹²⁷ While every state also provides for a medical exemption from mandatory immunization for school children, only forty-four states allow a religious exemption for immunization, and just fifteen states permit exemptions for philosophical (non-religious) objections based upon “personal, moral, and other beliefs.”¹²⁸

Since the early twentieth century, courts have made clear that state legislation requiring mandatory vaccinations falls squarely within the police power of the states. Since shortly after the creation of the first vaccines, state legislatures have passed laws requiring school children to be vaccinated. It is within this legal and historical framework that the next section examines the recent treatment by the courts of child custody cases in which courts have been asked to decide if and when children will receive vaccinations, to include the COVID-19 vaccination, when one or both parents in some cases, object.

B. *Objecting to Vaccines*

The following is a discussion of recently decided cases in which courts have been asked to determine whether children will receive certain vaccinations. Because relatively few COVID-spe-

¹²⁵ *States with Religious and Philosophical Exemptions from School Immunization Requirements*, *supra* note 70.

¹²⁶ *2021 Recommended Vaccinations for Infants and Children (Birth Through 6 Years) Parent-Friendly Version*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Feb. 12, 2021), <https://www.cdc.gov/vaccines/schedules/easy-to-read/child-easyread.html>; *2021 Recommended Vaccinations for Children (7-18 Years Old) Parent-Friendly Version*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Feb. 12, 2021), <https://www.cdc.gov/vaccines/schedules/easy-to-read/adolescent-easyread.html#table-teen>; *ACIP Vaccine Recommendations and Guidelines*, Advisory Committee on Immunization Practices (ACIP), CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/vaccines/hcp/acip-recs/index.html> (last visited Jan. 1, 2022).

¹²⁷ *States with Religious and Philosophical Exemptions from School Immunization Requirements*, *supra* note 70.

¹²⁸ *Id.*

cific vaccination cases have reached the appellate courts, most of the below cases deal with custody issues surrounding other routine childhood vaccinations, but they are nonetheless informative for practitioners representing clients in COVID-related vaccination cases.

1. *Religious Objections to Vaccination*

When two parents disagree as to whether their children should be vaccinated, it is frequently the case that the objecting parent does so based upon religious grounds, among other things. Many of the objecting parents rely, at least in part, on the First Amendment, and upon their jurisdiction's statutory religious exemption for school children.¹²⁹ In those instances, some courts have determined the sincerity of the parents' religious belief to establish whether and to what extent the parent's religious objection should be considered.¹³⁰ Other courts have rejected the statutory exemption's applicability at all and have proceeded under a best-interest framework without consideration of the parties' religious beliefs.¹³¹

In *Grzyb v. Grzyb*,¹³² decided in 2009, the Circuit Court of Fairfax County, Virginia granted "sole full medical and health care decision-making for [a] child" to the child's mother, who opposed routine childhood vaccinations based "substantially, although not exclusively" on religious grounds."¹³³ In this case, both parties briefed the trial court on First Amendment issues and cases, as well as the statutory religious exemption to vaccination issues, but the court concluded that the statutory religious exemption did not apply.¹³⁴ While the court considered the parties' arguments related to the mother's religious objections in reaching its decision, it did so in the context of Virginia's statutory best-interests-of-the-child factors.¹³⁵ In *Grzyb*, the parties shared joint legal and physical custody of the child pursuant to a

¹²⁹ See, e.g., *Grzyb v. Grzyb*, 79 Va. Cir. 93 (Va. Cir. Ct. 2009).

¹³⁰ *Id.*

¹³¹ *M.A. v. A.A.*, No. A-1493-20, 2021 N.J. Super. Unpub. LEXIS 1326 (N.J. Super. Ct. App. Div. June 30, 2021).

¹³² *Grzyb*, 79 Va. Cir. 93.

¹³³ *Id.* at *100.

¹³⁴ *Id.* at *93.

¹³⁵ *Id.*

final order of custody entered in September 2008.¹³⁶ Just two months later, the case came before the court after the father filed a motion seeking sole decision-making authority for medical decisions for the child, based primarily upon the mother's refusal to allow the child to receive routine childhood vaccinations.¹³⁷ Before considering the father's motion, the court first determined whether the threshold requirement had been met, i.e., that there be a material change in circumstances with regard to child custody before the court has the authority to modify a permanent child custody order.¹³⁸ The court easily found that there had been a material change in circumstances,¹³⁹ noting that (1) the parents had "reached a complete impasse on whether to give the child routine immunizations and, almost as significantly, do not appear to be able to work together toward a resolution"¹⁴⁰; (2) the parents could not agree on other medical issues¹⁴¹; and (3) with a child so young, there would be many more medical issues to decide.¹⁴² Given the parents' inability to work together regarding vaccinations, and the parents' agreement that the court should appoint a sole decisionmaker, the court concluded that it was "in the child's best interest [that the court] assign one parent sole decision-making authority regarding the child's health and medical care."¹⁴³

After noting the very limited facts upon which the parties agreed—that the child had received no vaccinations to date, the mother opposed routine immunization, and the father favored immunization—the court considered the parties' arguments regarding their disagreement over immunization of the child. Specifically, evidence showed that, prior to the parties' separation, they were in agreement that the child should not receive routine immunizations, and that Mr. Grzyb's position changed only after the parties separated. The court considered it significant that Mr. Grzyb had previously shared Mrs. Grzyb's religious objections to

¹³⁶ *Id.* at *94.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at *94-*95.

¹⁴³ *Id.* at *95.

vaccination, because his change of heart “call[ed] into question the sincerity of [his] current objection” and further suggested that “Mr. Grzyb’s objections [were] animated, in part, by the hostility [that suffused] the relationship between the parties.”¹⁴⁴

Conversely, the evidence considered by the court with regard to Mrs. Grzyb’s religious convictions as to vaccination tended to show that Mrs. Grzyb had a *bona fide* religious objection to immunization. While Mrs. Grzyb had received vaccinations in the past, and had had elective cosmetic surgery, she testified that her religious objection to vaccination started when she was pregnant with the child, that she had prayed about the matter, and that she “felt ‘led by the Holy Spirit’” on the matter.¹⁴⁵ Mrs. Grzyb’s pastor also testified as to his church’s position on vaccinations and differing opinions amongst parishioners, and that he believed Ms. Grzyb’s religious objection to be sincere. Based upon the evidence, the trial court concluded that Ms. Grzyb’s religious objections to vaccination were “bona fide and genuine.”¹⁴⁶

The court’s decision in *Grzyb* makes clear that, at least some courts will give significant weight to the sincerity of the parties’ beliefs when deciding the best interests of the child. Even though the medical evidence presented clearly showed that the child would benefit from routine vaccinations, the court ultimately concluded that that Mrs. Grzyb, who opposed routine vaccinations, was in a better position to make health and medical decisions for the child. While it is true that the court expressed reservations about Ms. Grzyb’s anti-vaccination position, those concerns were attenuated by the fact that her objection was to routine, and not medically indicated, vaccines. This, paired with the fact that the court believed Mr. Grzyb to be motivated by his hostility toward Mrs. Grzyb, and not his genuine beliefs about what would be in the best interest of the child appears to have had the greatest impact on the court’s decision. If Mrs. Grzyb had been unwilling to agree to any vaccinations at all, even those medically indicated, the court may very well have gone the other direction.

¹⁴⁴ *Id.* at *96.

¹⁴⁵ *Id.* at *97

¹⁴⁶ *Id.*

In *M.A. v. AA*,¹⁴⁷ a New Jersey appellate court upheld the trial court's order appointing the child's father as limited guardian for purposes of immunization when the mother objected on religious grounds under the New Jersey statute that requires vaccinations for school children, but provides an exemption from mandatory vaccination based upon religious grounds.¹⁴⁸ In that case, the parties divorced and, pursuant to a Marital Settlement Agreement (the "MSA"), agreed to share joint legal and physical custody of their minor child.¹⁴⁹ With regard to the care of the child, the MSA required only that the parties "conduct themselves in a manner that shall be best for the interest, welfare, and happiness of [the child]," but did not address the specific issue of vaccination.¹⁵⁰ The appellate court highlights this omission as significant because, prior to separating, when the child was in pre-school, the parties had jointly claimed a religious exemption from vaccination on her behalf, and had done so again after divorce when the child was heading to kindergarten.¹⁵¹ The letters sent by the parties identified the specific objectionable vaccines — "DTaP/DPT, HepB, Hib, Tetanus (TB), MMR, Polio, and V]ricella (Chicken Pox)"¹⁵²—and, using Bible quotes and dramatic language, strongly asserted that both parents had a deeply held religious objection to vaccination.¹⁵³

About a year after the parties divorced, a dispute arose between them about whether the minor child should be vaccinated.¹⁵⁴ The dispute began after the father gave consent for the child to receive the diphtheria, tetanus, and pertussis (DTaP) vaccine after the child stepped on a rusty nail while in his care.¹⁵⁵ From there, the parties' dispute escalated. First, the father objected to the child travelling with the mother to Bulgaria because the child was unvaccinated. He filed a motion with the court to prevent the travel, but his motion was denied because the child

¹⁴⁷ *M.A.*, No. A-1493-20.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at *1-*2.

¹⁵⁰ *Id.* at *2.

¹⁵¹ *Id.*

¹⁵² *Id.* at *2-*3.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at *4-*5.

¹⁵⁵ *Id.* at *4.

had previously travelled to Bulgaria while unvaccinated.¹⁵⁶ Next, the father took the child for additional vaccinations to include a second tetanus shot, along with the vaccination for measles, mumps, and rubella (MMR), which he did without the mother's knowledge or consent.¹⁵⁷

The parties' dispute culminated in the mother filing a motion for sole custody, and to enjoin the father from having the child vaccinated further,¹⁵⁸ and the father filing a cross-motion for sole medical decision-making authority with regard to the child.¹⁵⁹ At a hearing on the parties' motions, the trial court heard expert medical testimony from the child's pediatrician, and from the mother's expert, who had not physically examined the child but had reviewed the child's medical records.¹⁶⁰ Based upon his review of the child's medical history, the mother's expert testified that the child was at risk for a life-threatening immune problem should she have additional vaccinations.¹⁶¹ Conversely, the child's pediatrician, who was familiar with the child's medical history and had examined and treated the child, testified that the child should be vaccinated.¹⁶²

The trial court also heard and considered testimony from both parties related to the mother's religious objection to vaccinations, which she asserted pursuant to New Jersey Statute § 26:1A-9.1.¹⁶³ The mother testified that she and the father had agreed not to vaccinate the child, and that the father had prepared the objection letters that were submitted to the preschool and kindergarten pursuant to the state's statutory exemption.¹⁶⁴

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at *5.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at *6-*10.

¹⁶¹ *Id.* at *6-*7.

¹⁶² *Id.* at *8-*10.

¹⁶³ *Id.* at *14-*15. N.J. STAT. ANN. § 26:1A-9.1 provides "this act shall provide for exemption for pupils from mandatory immunization if the parent or guardian of the pupil objects thereto in a written statement signed by the parent or guardian upon the ground that the proposed immunization interferes with the free exercise of the pupil's religious rights." That statute also proves that the State Commissioner of Health may suspend the exemption "during the existence of any emergency."

¹⁶⁴ *M.A.*, No. A-1493-20, at *10.

Interestingly, the mother testified that she did not know where the language in the letters came from.¹⁶⁵ The mother also testified that she had been opposed to vaccinations since she was young, but that she had not sought religious exemptions from vaccination for herself.¹⁶⁶ She also testified that she was opposed to vaccinations based upon safety and efficacy concerns, and had issues with how the vaccines were made.¹⁶⁷ The father testified that he and the mother had never discussed vaccinations until they were expecting the child.¹⁶⁸ During their conversations about vaccinations after the mother became pregnant, the father said the mother never raised religious objections and that, in fact, the mother was an atheist.¹⁶⁹ The father further testified that the objection letters to the school were a “fraud” and were worded with the intention of getting the child into school even though she had not been vaccinated.¹⁷⁰

After hearing testimony from both parties and their experts, the trial court concluded that the mother’s arguments under section 26:1A-9.1 “did not apply in this type of case, where the dispute is between former spouses with co-equal custodial rights who disagree about vaccination.”¹⁷¹ The trial court instead determined that the best interest of the child standard was determinative of the case, and it resolved any conflict between the best interests standard and the mother’s rights under the Free Exercise clause “by applying the federal sincerity test and then the best interest standard.”¹⁷² After concluding that the mother’s so-called religious objections were not based upon a sincerely held religious belief, and that, “solely from a medical perspective, it was in the child’s best interest to be vaccinated,”¹⁷³ the trial court appointed the father “sole guardian for immunization purposes.”¹⁷⁴ The appellate court upheld the lower court’s ruling in its entirety, noting first that “[i]n a child custody case, the best

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at *10-*11.

¹⁶⁸ *Id.* at *10.

¹⁶⁹ *Id.* at *11.

¹⁷⁰ *Id.* at *11-*12.

¹⁷¹ *Id.* at *15-*16.

¹⁷² *Id.* at *17.

¹⁷³ *Id.* at *14.

¹⁷⁴ *Id.* at *17.

interests of the child are a paramount consideration,”¹⁷⁵ and second that the parties had contractually agreed in their MSA that the best interest standard would apply.¹⁷⁶ Furthermore, the appellate court rejected the mother’s arguments that “a ‘sincerity’ analysis of her religious-based objection [was] precluded by N.J.S.A. 26:18-9.1.”¹⁷⁷ The appellate court pointed out that “[b]y its express language, the statute concerns the attendance of children at school who have not been vaccinated. It does not address the situation presented here, involving parents with equal custodial rights who do not agree about the medical treatment of their child.”¹⁷⁸ Likewise, with regard to the mother’s assertion that her rights under the Free Exercise clause were fundamental and could not be subjected to a sincerity test, the appellate court noted that the Free Exercise clause was not without limitation, and was, in fact, contingent upon the existence of a belief that is both “(1) sincerely held, and (2) religious in nature.”¹⁷⁹

The courts’ analysis and reasoning in both *Grzyb* and *M.A.* is certainly instructive for practitioners representing parties on either side of a vaccination-related custody dispute where one party asserts a religious objection to vaccination, whether under the First Amendment or a statutorily prescribed religious exemption to vaccination.¹⁸⁰ In both cases, the trial courts concluded that the statutory exemption did not apply, with the *M.A.* court noting that the exemption applied where a child’s ability to attend school was at issue, and not when two parents with joint custody disagreed on whether to vaccinate their child.¹⁸¹ However, both trial courts considered the parties’ First Amendment rights in the context of the best interest standard, giving particular weight to the sincerity of the parties’ religious beliefs about vaccinations.¹⁸² The courts’ care in considering and evaluating the sincerity of the parties’ beliefs in each case suggests that this is an argument that practitioners should not ignore—even where

¹⁷⁵ *Id.* at *20.

¹⁷⁶ *Id.* at *20-*21.

¹⁷⁷ *Id.* at *24.

¹⁷⁸ *Id.* at *25.

¹⁷⁹ *Id.*

¹⁸⁰ *Grzyb*, 79 Va. Cir. 93; *M.A.*, No. A-1493-20.

¹⁸¹ *M.A.*, No. A-1493-20, at *15, *6.

¹⁸² *Grzyb*, 79 Va. Cir. 93; *M.A.*, No. A-1493-20.

the jurisdiction is likely to base its ultimate decision on the best interests of the child standard and not on one party's religious objections. As shown by these two opinions, a party's willingness to use religious objection to vaccination as a pretext to manipulate the court factors into the best interests standard, and will likely only result in the court ruling against that party. It is also noteworthy that, in *Grzyb*, the trial court expressed reservations about granting the mother final medical decision-making authority due to her religious objections to vaccination,¹⁸³ but ultimately found those concerns attenuated by the mother's testimony that her objections were limited to "routine" vaccinations, and not vaccinations based upon medical necessity.¹⁸⁴ In *M.A.*, the mother's objections to her daughter receiving a tetanus shot after getting a rusty nail through her foot appears to indicate that her objections were to *all* vaccinations and not just "routine" ones.¹⁸⁵ While the court did not comment upon this, it is nonetheless a potentially useful distinction for an attorney representing an anti-vax parent to make—i.e., "my client will not withhold medically necessary treatment for any existing problem."

2. *Philosophical, Medical, or Other Non-Religious Objections*

As noted above, all fifty states allow a medical exemption from their statutory requirements that school-aged children receive routine vaccinations.¹⁸⁶ However, only fifteen states provide for exemptions from vaccination based upon philosophical objection.¹⁸⁷ Even though courts in different jurisdictions appear to generally agree that these statutory exemptions do not apply in cases where parents do not agree as to whether their children should be vaccinated,¹⁸⁸ practitioners representing parents in COVID-19, or other vaccination disputes should not ignore medical and philosophical arguments since they still have weight in the best interest of the child analysis. While objections to vac-

¹⁸³ *Grzyb*, 79 Va. Cir. at *100.

¹⁸⁴ *Id.*

¹⁸⁵ *M.A.*, No. A-1493-20, at *4.

¹⁸⁶ *States with Religious and Philosophical Exemptions from School Immunization Requirements*, *supra* note 70.

¹⁸⁷ *Id.*

¹⁸⁸ *See, e.g., Grzyb*, 79 Va. Cir. 93; *M.A.*, No. A-1493-20.

cinations for children based upon religious beliefs seem to be the most prevalent objections in parental custody disputes related to vaccination decisions, many parents also object to vaccinations for medical reasons and other philosophical, non-religious reasons. The following cases suggest that courts give greater weight to fact- and science-based evidence, and may even disregard altogether testimony that is based solely upon a parent's beliefs and perceptions. Likewise, where one parent objects to vaccines based upon medical concerns, courts may give greater weight to testimony based upon the expert's personal knowledge of the child's medical history, rather than based simply upon a review of the child's records. When such medical evidence is nonexistent, or even unpersuasive, courts tend to hold that vaccinations are in the best interests of the child. As to non-religious, non-medical bases for objecting to vaccinations, courts tend to reject those outright.

In *Grzyb v. Grzyb*,¹⁸⁹ discussed above, the mother opposed vaccinations for the parties' minor child based primarily upon her religious beliefs, but also based upon medical and scientific concerns she had about vaccinations.¹⁹⁰ In addition to evidence regarding the mother's religious beliefs, both parties introduced expert testimony about the safety and efficacy of vaccines.¹⁹¹ The mother's expert, who was a physician and also held a doctorate in neuropsychology, testified about "the risks associated with routine vaccinations" on direct examination.¹⁹² The court recessed after the mother's expert's testimony, and when the court reconvened about six weeks later, the expert did not return to be cross-examined and, thus, his testimony was not considered.¹⁹³ The father's medical witness, an expert in pediatric infectious diseases and vaccine safety,¹⁹⁴ who did not examine the child, but did speak with the child's doctor,¹⁹⁵ testified that there was no medical reason that the child should not receive the Prevnar,

¹⁸⁹ 79 Va. Cir. 93.

¹⁹⁰ *Id.* at *97-*98.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at *98.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

MMR, DPT, polio, Hepatitis B, varicella, and flu vaccines.¹⁹⁶ The doctor also testified that the risk of “serious complications” from the vaccines was very low, and that the diseases themselves posed a greater risk than the vaccines.¹⁹⁷ Since the trial court only considered the evidence presented by the father’s expert, the court concluded that it was “uncontradicted and undisputed that the child would benefit if she received routine vaccinations.”¹⁹⁸ Even so, the court still awarded the mother, who opposed routine vaccinations, final decision-making authority with regard to the child’s health care because it was the mother who had primarily made health care decisions for the child.¹⁹⁹ The outcome in this case demonstrates that, at least in some instances, even very convincing medical evidence will not be the primary factor in determining whether a child receives vaccinations. Where a party does not have access to an expert medical witness, that party should offer strong evidence in other areas that demonstrates that he or she is the best person to make medical decisions for the minor child.

In *M.A. v. A.A.*,²⁰⁰ as in *Grzyb*, the mother opposed vaccinations for her child on religious grounds, but also due to her concerns about their safety and efficacy.²⁰¹ At a hearing, the mother presented expert medical testimony in support of her contention that vaccination was not in the best interests of the child.²⁰² The mother’s expert witness in rheumatology and immunology testified that the child was “at very high risk for a life-threatening autoimmune problem” which could be brought on by a vaccine.²⁰³ The mother’s expert based his testimony on his review of the child’s medical records (which showed the child had had a “systemic allergic reaction” after one vaccination, and had also had an idiopathic thrombocytopenic purpura (ITA)—a blood disorder caused by a virus attacking the child’s platelets), an interview with the mother, and an examination of the child.²⁰⁴ The

196 *Id.* at *98.

197 *Id.*

198 *Id.* at *98-*99.

199 *Id.* at *99-*100.

200 *M.A.*, No. A-1493-20.

201 *Id.* at *11.

202 *Id.*

203 *Id.* at *6.

204 *Id.*

court noted that the mother's expert had not talked to the child's pediatrician, nor had he reviewed the pediatrician's records. The mother's expert based his opinion about the allergic reaction on a photograph of a rash, and did not order any laboratory tests.²⁰⁵ Finally, the mother's expert testified that vaccines were responsible for protecting hundreds of millions of people against "dreaded diseases."²⁰⁶

The father's expert was the child's pediatrician, but was not an expert in vaccinations.²⁰⁷ The father's expert testified that the child had had ITP, but that a month later she no longer had the condition, and that she had only had a three to five percent higher risk of ITP than the general population.²⁰⁸ He also testified that the child did not have a systemic allergic reaction to a previous vaccine, but that she had had contact dermatitis, which was unrelated to any vaccination,²⁰⁹ and noted that the child had had several other vaccinations without any side effects.²¹⁰ In the father's expert's opinion, the child was perfectly healthy and should receive vaccinations.²¹¹ Like the mother's expert, the father's expert testified favorably about routine vaccinations.²¹² After weighing the expert's testimony, the court found that mother's expert's "methodology was 'lacking'" because, among other things, he had not interviewed the father about his family history, did no additional testing on the child, and provided no statistical data about the risk to the child as compared to people in similar circumstances.²¹³ In short, the expert's testimony was insufficient to demonstrate that the child was at risk for a serious adverse reaction caused by vaccinations.²¹⁴ Conversely, the court noted that, because he was not an expert in vaccine-related injuries, the father's expert's testimony "would not permit the court to conclude there was no risk to the child from the immuniza-

205 *Id.* at *8.

206 *Id.*

207 *Id.*

208 *Id.* at *9-*10.

209 *Id.*

210 *Id.* at *9.

211 *Id.* at *10.

212 *Id.* at *8-*9.

213 *Id.*

214 *Id.* at *13.

tion.”²¹⁵ Because both experts’ testimony fell short of showing that there either was, or was not a risk to the child from vaccination, neither opinion aided the court in ruling on the mother’s application for injunctive relief to prevent the father from having the child vaccinated.²¹⁶ Based upon the evidence presented, to include both experts’ testimony about the benefits of vaccination, the court ruled that it was in the child’s best interests that one parent be granted sole decision-making authority with regard to immunizations.²¹⁷

In *Matheson v. Schmitt*,²¹⁸ the Michigan Court of Appeals upheld a trial court’s order requiring mandatory vaccinations of the parties’ minor child.²¹⁹ In that case, the parties, who separated when the mother was pregnant with the child, and divorced the following year, shared joint legal custody of the child, and the mother had primary physical custody of the child.²²⁰ About a year after the parties divorced, the father filed a motion asking the court to order that the minor child be vaccinated, because the mother was refusing to allow vaccinations for the child.²²¹

At a hearing on the father’s motion, the mother raised medical and philosophical objections to vaccination.²²² Specifically, based upon testimony from the child’s pediatrician, the mother argued that because the child’s family’s medical history included various autoimmune disorders, the child herself was predisposed to developing rheumatoid arthritis from vaccinations.²²³ Further testimony from the pediatrician revealed that his opinion was formed solely based upon the child’s family medical history and prior genetic testing, but that there was no test that would predict whether a child was predisposed to vaccine injuries.²²⁴ The pediatrician also testified that he recommended that the child receive the routine vaccinations recommended by both the CDC and the

²¹⁵ *Id.*

²¹⁶ *Id.* at *12-*14.

²¹⁷ *Id.* at *14.

²¹⁸ *Matheson v. Schmitt*, No. 347022, 2019 Mich. App. LEXIS 7389 (Mich. Ct. App. Nov. 21, 2019).

²¹⁹ *Id.*

²²⁰ *Id.* at *1-*2.

²²¹ *Id.* at *2.

²²² *Id.* at *20-*25

²²³ *Id.* at *19-*20.

²²⁴ *Id.*

state.²²⁵ In addition to the child’s pediatrician’s testimony, the mother introduced evidence related to the different side effects and vaccine injuries that may be caused by routine childhood vaccines.²²⁶

In contrast to the mother’s evidence, the father’s witness, Dr. Teresa Holtrop, M.D., who was also familiar with the child’s family’s medical history, testified that she “highly recommended that the child be vaccinated.”²²⁷ Dr. Holtrop also testified to specific and immediate risks to the child from whooping cough, which she described as being at “epidemic proportions” in Michigan.²²⁸ She also provided first-hand accounts of the “dire and life-changing situations” caused when children were not vaccinated and became ill with “vaccine-preventable diseases.”²²⁹

At the outset of its review of the trial court’s order regarding vaccination of the child, the appellate court concluded that the trial court correctly applied the “preponderance-of-the-evidence standard in determining whether the proposed vaccinations were in the child’s best interests.”²³⁰ After considering the evidence of the parties in the context of the best interests of the child standard set out in Michigan General Statutes § 722.23,²³¹ the trial court determined that the mother had not presented evidence sufficient to persuade the court that the child would be harmed by any specific vaccination, or that the any vaccination would not

²²⁵ *Id.* at *22-*23.

²²⁶ *Id.* at *20-*21.

²²⁷ *Id.* at *23.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.* at *18.

²³¹ *Id.* The trial court determined, and the appellate court affirmed, that three of the twelve statutorily prescribed best interest of the child factors were particularly relevant in this case. Those factors are: “(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any,” MICH. GEN. STAT. § 722.3(b); “(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs,” MICH. GEN. STAT. § 722.3(c); and “(l) Any other factor considered by the court to be relevant to a particular child custody dispute,” MICH. GEN. STAT. § 722.3(l).

be in the child's best interests.²³² Of the mother's evidence the trial court noted:

the dispositive issues are not whether vaccines can potentially cause adverse effects or whether the vaccine manufacturing industry and pharmaceutical companies are unduly influencing governmental regulatory agencies. Instead, what is at issue is whether the administration of vaccinations is in the *child's* best interests, taking into account *her* physical health.²³³

Conversely, the trial court held that the father had shown by the greater weight of evidence that vaccination was in the best interests of the child.²³⁴ Noting that the mother had failed to have an immunologist or other physician “(1) review the results of the medical testing that was conducted on the child, (2) to perform additional testing, and (3) confirm that the child *was in fact* predisposed to injury or death if she were vaccinated,”²³⁵ the Michigan Court of Appeals made clear that general information about the potential for vaccine injury was insufficient to support an argument that vaccination is not in a child's best interests.

Three cases heard in three separate Minnesota district courts, *In re O'Halloran*,²³⁶ heard August 5, 2021 in Washington County, Minnesota; *In re Rieck*,²³⁷ heard October 15, 2021 in Anoka County, Minnesota; and *Hruby v. Hruby*,²³⁸ heard November 19, 2021 in Le Sueur County Minnesota, illustrate how many trial courts would likely apply existing law to a custody dispute where parents disagree on whether their children should be vaccinated against Covid 19. Further, these cases offer practitioners insight into how courts' decisions may be impacted by the evolving nature of the Covid 19 pandemic.

In *O'Halloran*, the parties disagreed on whether their two children, one then old enough to receive the COVID-19 vaccination approved by the FDA for emergency use in children, and

²³² *Id.* at *24-*25.

²³³ *Id.* at *22 (emphasis added).

²³⁴ *Id.* at *25.

²³⁵ *Id.*

²³⁶ *In re O'Halloran*, 82-FA-19-2832, Minn. Wash. Cnty. Dist. Ct. (Aug. 18, 2021).

²³⁷ *In re Rieck*, 02-FA-12-1087, Minn. Anoka Cnty. Dist. Ct. (Dec. 29, 2021).

²³⁸ *Hruby v. Hruby*, 40-FA-13-961, Minn. Le Sueur Cnty. Dist. Ct. (Dec. 10, 2021).

one not, should receive the vaccination for COVID-19.²³⁹ The father believed the children should receive the vaccination, and the mother objected to her children receiving COVID-19 vaccinations based upon the vaccine's lack of full FDA approval for children, and because there had not been research done specifically as to the vaccine's safety for children, like her twelve-year-old son, who have sensory processing disorder.²⁴⁰ The children's mother appealed to the Washington County, Minnesota District Court from the decision of a parenting consultant requiring that the parties' children receive the vaccine for COVID-19.²⁴¹ Based upon the recommendations of the children's pediatrician, the parenting consultant's order required that the parties' oldest child be immediately vaccinated against COVID-19, and that the parties' youngest child be vaccinated when a vaccine was approved for his age group.²⁴² In support of her position that the children should not be vaccinated, the mother argued that the oldest child, who has a sensory processing disorder, has "high-functioning autistic tendencies," although the child had not actually been diagnosed with autism.²⁴³

The mother also argued that the children's pediatrician had not actually recommended vaccination for the oldest child—in a letter to the court, the pediatrician wrote that the oldest child "due to his age qualifies to get the Covid vaccine. It is the recommendation of the AAP, CDC, and our office that all 12 year olds receive the Covid vaccine."²⁴⁴ The mother averred in her affidavit that the children had not had flu shots for the previous ten years, though the children's shot records indicated otherwise,²⁴⁵ and that the child's pediatrician had agreed with *her* decision not to vaccinate the children.²⁴⁶ The evidence showed that the oldest child had previously contracted COVID-19, and had the antibodies in his bloodstream.²⁴⁷ At the hearing, the mother testified that the youngest child had had Lyme's disease, which the father

²³⁹ *O'Halloran*, 82-FA-19-2832, at *1-*2.

²⁴⁰ *Id.* at *1.

²⁴¹ *Id.*

²⁴² *Id.* at *2.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* at *3.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at *7.

denied in his own testimony.²⁴⁸ The mother presented no medical evidence that the child had had Lyme's disease, nor any evidence that such a diagnosis would put the child at increased risk of harm if vaccinated.²⁴⁹ In its findings of fact, the court found that the mother's assertion that the pediatrician had not recommended vaccination for the oldest child "demonstrates that Mother is not interested in what [the pediatrician] recommends unless it supports her own position, and she is putting her own views ahead of those of her chosen medial professional."²⁵⁰

Applying the best interest factors prescribed in Minnesota Statute § 518.17 to the above facts, the district court concluded that the "Mother's concerns, though based strongly on internet propaganda that the Court does not find reliable, are not completely baseless. The fact that there has not been final FDA approval of the vaccine to date is a reasonable basis to delay the vaccine."²⁵¹ Based upon this and other conclusions, the trial court ordered that the oldest child would be vaccinated "as soon as the FDA gives final approval for a vaccine that applies to [his] age group."²⁵² Regarding the younger child, the trial court ordered that once the FDA gave either final or emergency approval for a vaccine in his age group, the parents would seek and follow the advice of that child's pediatrician.²⁵³

In *Rieck*,²⁵⁴ the mother of two minor children filed a motion to have the children vaccinated against COVID-19.²⁵⁵ The children's father, who had opposed other vaccinations for the children in the past, objected to their receiving the COVID-19 vaccination arguing that the vaccine was more dangerous than COVID itself, and that both children were already immune, having had COVID in January 2021.²⁵⁶ The father also introduced evidence regarding the "insufficiency" of the vaccine, and the lack of research showing that the vaccines were safe and effec-

²⁴⁸ *Id.* at *4.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at *3.

²⁵¹ *Id.* at *7.

²⁵² *Id.*

²⁵³ *Id.* at *8.

²⁵⁴ *Rieck*, 02-FA-12-1087.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

tive.²⁵⁷ The court heard testimony from the children’s doctors and from the mother’s expert witness who specialized in vaccine and vaccine preventable diseases, all of whom agreed that the children, even the daughter who suffered from autoimmune hypothyroidism, should be vaccinated against COVID-19.²⁵⁸ The court gave significant weight to the expert’s testimony, which focused largely on the safety of the vaccine development process, the studies conducted, the typical side effects and the CDC’s recommendations for vaccination.²⁵⁹ The expert also contradicted the father’s evidence noting that he had derived his evidence from unreliable sources such as the Vaccine Adverse Event Reporting System (VAERS), an online tool where any person can submit information.²⁶⁰ Noting that the court was “a court of law, not medicine” and that the court was “not in a place to make factual determinations on the validity of science supporting vaccines[,]”²⁶¹ granted the mother’s motion that the children be vaccinated against COVID-19.²⁶²

In *Hruby*, the respondent father filed a motion with the court seeking the right to have his eleven-year-old daughter vaccinated against COVID-19 and influenza, among other things.²⁶³ The child’s mother objected, arguing that the vaccines offered no health benefits for otherwise healthy children, and expressing concerns regarding possible side effects.²⁶⁴ In reaching the conclusion that it was in the best interests of the child to be vaccinated, the court relied upon the testimony of the child’s pediatrician regarding CDC and American Academy of Pediatric recommendations regarding vaccinations.²⁶⁵ The court also gave significant weight to a November 2, 2021 CDC press release recommending COVID vaccination for children ages five to eleven, and materials disseminated by the CDC and the Minnesota Department of Health.²⁶⁶ It is of note that the omicron variant of

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Hruby*, 40-FA-13-961.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

the COVID virus was spreading like wildfire.²⁶⁷ The variant had been identified as a “Variant of Concern” by the World Health Organization, and “little was known about omicron’s transmissibility, or the potential severity of the disease.”²⁶⁸

While *O’Halloran*, *Rieck*, and *Hruby*, are but three rulings from one state’s courts, the cases show how the very same factual considerations made by courts in other vaccination related disputes apply in COVID-19 vaccination disputes between parents. As did the trial courts in *Grzyb, M.A.*, and *Matheson*, the district court in *O’Halloran* disregarded arguments that were not based in fact and supported by evidence, and gave little consideration to medical evidence that applied generally but did not demonstrate a connection between the child’s health and an increased danger of vaccine injury. These cases show that practitioners representing parties on both sides of a vaccine dispute should focus on the evidence-based facts that support their client’s position. Of particular value, is testimony by medical experts who are not only familiar with the child’s medical history, but who have examined the child, and have conducted their own independent testing.

Likewise, in *Rieck* and *Hruby*, the courts relied heavily on scientific evidence, and particularly on information available through the Centers for Disease Control and Prevention. Whether representing an anti-vax or pro-vax litigant, practitioners should look for publications by the CDC or other government agencies that may support their client’s position—whether to vaccinate or not to vaccinate. Where parties wish to introduce evidence of a government agency’s position on a particular vaccination, attorneys should consider asking the court to take judicial notice of the contents of the publication, or at the very least that the agency holds a particular position.²⁶⁹ Parties should also carefully craft arguments that include the application of their jurisdiction’s best interest of the child factors to the facts of the particular case, to aid the court in reaching their desired result.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *See, e.g.* *Seymour v. Seymour*, 263 A.3d 1079 (Me. (2021) (holding that the trial court abused its discretion when it failed to take judicial notice of vaccine information available on the Centers for Disease Control and Prevention website).

IV. Conclusion and Final Recommendations for Practitioners

On the surface, the intersection of COVID-19 and child custody litigation presents new challenges. A deeper investigation reveals that existing law on legal and physical custody and precedent on vaccination and disease provide substantial guidance for the practitioner and the courts. A practitioner must identify whether a COVID-19 dispute in litigation over child custody may result in a change in physical custody and/or whether an argument for a change is warranted. Such a change in custody likely will be based on all relevant factors, including the COVID-19 issue.

When addressing the vaccination of a child, there are two primary categories of court rulings: first, the court decides whether to vaccinate the child (or children); second, the court provides one party with decision-making authority over healthcare or the vaccine specifically. The resulting order from a COVID-19 dispute should be unambiguous and clearly direct decision-making authority, a custodial change, or the vaccination order the court intends.²⁷⁰ While an advocate for either side should consider the above, a review of arguments for both sides should assist any court or attorney faced with a COVID-19 custody case.

Attorneys representing anti-vaccination parents should create a record of the client's objection to try to prevent a vaccination from occurring without the client's consent. The vaccination of a child is an act that, once performed, cannot be undone. The client should be advised to send a written objection letter to each provider, school, the opposing party, and all other interested parties.²⁷¹ In conjunction with the letter, the client should consider petitioning the court regarding the impasse on the vaccination issue. To prepare for the hearing on the vaccination issue, the

²⁷⁰ See, e.g., Ill. Dep't of Healthcare & Fam. Servs. *ex rel.* Nile C. v. Andrew G. (*In re L. G.*), 2019 IL App (1st) 180847-U, 2019 WL 1458736 (Ill. App. Ct. Mar. 29, 2019), (stating "because the circuit court phrased the vaccination order in the passive voice, the order was essentially insufficient to allocate any parental rights at all" and going on to speculate that the mother could not be found in contempt due to ambiguity).

²⁷¹ The court references letters sent by one parent in *M.A.*, No. A-1493-20, at *2-*3.

starting line is at the usual place – the best interests of the minor child standard. Some states have detailed statutorily prescribed best interest factors. Review the rules and cases in your state to see if there is a prior court decision granting decision-making authority for medical purposes on similar facts under the best interests standard (or stated statutory factors).

Be prepared to oppose evidence from medical experts on the other side. As one practitioner noted,²⁷² anybody can find an expert to agree with his or her side. If you reasonably anticipate an argument to defer the decision to a third-party such as a doctor, consider who should choose the doctor – the court, one party, or a neutral such as a parenting coordinator (if appropriate and authorized). Also consider vetting any doctors involved to determine what the likely response and/or view of the doctor will be in advance of any hearings on this issue.

A constitutional argument must be considered for the anti-vaccination parent. Investigate arguments regarding whether the government's role in a custody trial is considered state action. The issues could be stated as: are the court's actions in requiring a vaccination or granting decision-making authority to a parent in favor of vaccination a violation of the right to parent, and to what extent can a parent make decisions free from government intrusion. If a religious objection is applicable in a custody case, be prepared to argue an infringement of the parent's (and child's, if applicable) right to freedom of religion. It is wise to anticipate that the opposition will attack the veracity of any religious exemption argument.

Attorneys representing parents who support vaccination of a child should focus first and foremost on the health and safety argument. When a parent refuses to protect a child from potential medical harm, there is precedent to award sole custody to the other party.²⁷³ While a scientific case may persuade the court, the difficulty in presenting that type of case cannot be overstated. Medical experts are expensive. Once experts are on board, an attorney can reasonably expect discovery, depositions, and pre-trial matters to take longer, cost more than a case without ex-

²⁷² Email from Jonathan McGirt, solo practitioner, to North Carolina Bar Association Family Law Listserv, (Nov 29, 2021 8:20PM EST)(on file with authors).

²⁷³ *In re Marriage of Milne*, 952 N.W.2d 332 (Iowa Ct. App. 2020).

perts, and have a generally higher level of complexity. Since every client cannot afford to wage a war of the doctors and medical evidence, consider practical methods such as pulling government information from the CDC, using articles and secondary sources, and crafting legal arguments based upon the prior vaccination cases listed herein and any applicable law in the jurisdiction.

The “pro vaccination” attorneys appear to have the stronger position based upon the above review of cases. A practitioner may be able to successfully rely on arguments that are not new to the trial court – the best interest of the children, avoiding the risk of harm to the children, and factual or legal arguments for an award of sole decision-making authority.

The above article provides a solid framework for attorneys in a child custody case with a COVID-19 issue. Many lawyers will see arguments arising about child vaccinations, parent vaccinations, and changes in both physical and legal custodial arrangements based upon COVID-19 issues in the coming weeks, months, and years. The authors hope that this article can assist lawyers and courts in preparing to tackle those issues head on, as well as provide guidance to clients facing a COVID-19 custody challenge.

