

STATE OF RHODE ISLAND

SUPREME COURT

LAUREN NAGEL,

Plaintiff/ Appellee

vs.

JOSHUA NAGEL,

Defendant/Appellant

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SU2023-0066-A

DEFENDANT/APPELLANT JOSHUA NAGEL'S
RULE 12A STATEMENT OF THE CASE

This appeal is from Joshua Nagel, the father of two young daughters, who seeks to overturn an Order of the Family Court granting Lauren Nagel, the children's mother, final decision-making authority relative to the receipt of the COVID-19 vaccine and boosters.

BACKGROUND:

The parties have two daughters from their marriage, Cecelia aged 8, and Vivienne aged 5. On May 28, 2020, they were granted a divorce and Final Judgment entered on September 14, 2020. As part of that decree, the parties entered into a joint custody agreement, directing that both parents share in all major decisions affecting their children's health, including elective medical decisions. Exh. 7 at 2. Further along the decree provides: "Neither party shall unreasonably withhold his or her consent to medical treatment for the children or the administration of medication of medication recommended by the pediatrician of the children." Exh. 7 at 7.

On March 17, 2022, Lauren filed a Motion for Relief after Final Judgment. In the part that is relevant to this appeal, the mother sought an order of the Family Court that she “be permitted to immediately comply with the recommendations of the children’s pediatrician and obtain COVID-19 vaccinations for both minor children.”

Both Joshua and Lauren agreed that the children would remain unvaccinated during the pendency of her motion. The Court granted discovery, and the parties each engaged an expert witness to testify by deposition.

Lauren presented the children’s pediatrician, Dr. Powers, who recommended that the children receive the vaccine and the booster. The doctor conceded that the sole purpose of the vaccine was to benefit the recipient by protecting against severe illness and death; the vaccine is not given to prevent transmission. Tr. 11/1 at 10.

The only basis for Dr. Powers’ opinion that the children should get the vaccine is the recommendation of the Centers for Disease Control (CDC) and the American Academy of Pediatrics (AAP). She conducted no independent research; she was confused about when the Pfizer trials were conducted and what they found. Tr. at 14-17, 19. She was unaware that the vaccine was only Emergency Use Authorized (EUA) but conceded that if the President declared the emergency

over, it might change her recommendation.¹ See Exh. A; Tr. at 24.

Approximately 63% of Dr. Powers patients have had the Covid vaccine, while over 90% have had traditional childhood vaccines. Tr. at 29-30. She was unaware that less than 40% of children in the United States have had the vaccine, even though that data is published in the AAP material she receives. Exh. C; Tr. at 32-35. She was unaware of how many children in Rhode Island have died of Covid, and appeared surprised to learn that number was zero. Exh. F; Tr. at 45.

As for whether the vaccine is required to attend school, Dr. Powers admitted it is not. She also agreed that in August of 2022, the RI Department of Education ended any distinction between the vaccinated or unvaccinated children in school. Exh. G; Tr. at 47-8.

Dr. Powers initially asserted that there was scientific consensus recommending the vaccine to children; but was unaware that at least one state, many countries and the American Association of Physicians and Surgeons (AAPS) did not. Exhs. H, I, J; Tr. 50-58. She was unaware that the AAPS noted that the infection fatality rate for COVID in children is 0.0003%. Moreover, of those 3 deaths per million, 100% of deaths were in children with a pre-existing condition. (Exh. J) That AAPS report also noted that, “The long-term consequences of these

¹ On January 30, 2023, President Biden advised Congress that he will end the national emergency for COVID-19 on May 11, 2023. It is unclear whether the vaccine will be available after that date.

vaccine injuries remain unknown and are concerning. Post-COVID-19 vaccination myocarditis ... may leave abnormalities in the myocardium”; and “Individuals with allergic diseases ... may experience worsening of their chronic diseases and more frequent adverse reactions after . . . vaccination than healthy individuals.”

Exh J at 3. As one of these young girls has allergies, the vaccine puts her at risk for a worsening of her condition.

When confronted with this information, Dr. Powers admitted she was “surprised”. She again conceded that she was only recommending the vaccine to protect against serious illness or death. When asked: “Q. You're not recommending giving a vaccine to a 5 five-year-old because they might get the sniffles?” she admitted, “No, I'm not saying if they get the sniffles.” Tr. at 61-2.

The father has stated on many occasions that he fears for his daughters’ long-term fertility. Dr. Powers attempted to belittle that concern, stating it was “disproven.” Tr. 10/26 at 26. Yet on cross examination she was obliged to walk back that assertion, admitting there have been no fertility studies done. Tr. at 67.

Similarly, Dr. Powers downplayed evidence of potential harm as reported in the Vaccine Adverse Event Reporting System (VAERS). In September of 2021, the RI Department of Health produced a report which noted that of approximately one million Covid vaccines given to Rhode Islanders between January and September of 2021, there were nearly 1,500 adverse reactions, including 16 deaths.

Exh. E. When presented with this information, Dr. Powers tried to minimize it, noting that it wasn't conclusive evidence that the vaccine caused the deaths, although she did concede that "they should investigate that." Tr. at 42.²

Father's expert, Dr. Andrew Bostom, is an epidemiologist and medical doctor who has testified as an expert on COVID-19, including issues involving the vaccine. He retired as a professor of family medicine at Brown University after 24 years. He has extensive experience in conducting clinical trials, including a large randomized control trial (RCT). He has studied the effects of COVID-19 since the outbreak, and he has testified as an expert witness in both federal and state courts, including signing on to an amicus brief before the US Supreme Court.

Dr. Bostom reviewed the children's medical condition with the father in forming his recommendation against the vaccine for the two young girls. In reaching this conclusion, he noted the girls have natural immunity from having contracted Covid on at least one prior occasion. He cited a large North Carolina study which showed that naturally immune children were considerably less likely to require hospitalization from Covid than children who had not been infected and had been vaccinated. Tr. 11/1 at 78.

Dr. Bostom testified that the risk of death from Covid for these children is

² Unfortunately, we have been unable to uncover any evidence that RIDOH has followed up on that 2021 report.

“infinitesimal and approaches zero”. Exh. J; Tr. 19. In Rhode Island, he noted that the risk of pediatric hospitalization is also extremely low. Exh. L; Tr. at 26-7.

Dr. Bostom stated that neither of these children have comorbidities that put them at risk for serious illness Tr. at 30-31. He further testified that such comorbidities are “morbid obesity with diabetes, congenital lung and heart condition.” Tr. at 24. Mild asthma is not a comorbidity which places a child at risk of severe illness or death.

Dr. Bostom disagreed with the testimony of Dr. Powers that the vaccine was important to protect children against severe illness and death. His opinion was based upon his review of the RCT done by Pfizer in 5 to 11-year olds which failed to demonstrate vaccination protected against severe Covid illness or death, and found prior Covid infection prevented even mild Covid disease, regardless of vaccination status. He indicated that there was a risk of adverse outcomes in children, and in particular myocarditis. Tr. at 30-1. He was also critical of Dr. Powers’ refusal to consider recommendations of other states and countries, noting that studies in Israel were relied upon in approving the initial vaccine.

On December 6, 2022, the Court heard live testimony from both parents. The testimony showed that the parents are in general agreement with all medical recommendations for their children and have agreed to all other vaccines. The mom testified that her reason for wanting her children vaccinated is that she trusts

her pediatrician and she believes there is a consensus in the scientific community to give the vaccine. Tr. 12/6 at 66. She conceded that she learned through the expert depositions that there was no consensus. Tr. at 74.

Joshua testified as to his relationship with his daughters. He lives on a large farm in Foster, with trees, chickens, and an orchard, which gives an excellent experience for his daughters. He lives with his parents; his mother is a registered nurse and assists with any medical issues that girls may have. He is a practicing Catholic and takes his daughters to church regularly. Tr. at 79-81.

He testified that he has agreed to all the other childhood vaccines because they have been through full trials and are not experimental. Tr. at 82-3. When he talked to the pediatrician, he stated that she admitted that the Covid vaccine was a “gamble” for children. Tr. at 89.

As for why he did not want his children vaccinated, he explained he was aware it was only emergency use authorized, that the children have natural immunity after having contracted Covid, and that their reaction to getting Covid was mild. He was aware of Dr. Bostom and respected his opinion. He is concerned about unknown risks to his daughters. Tr. 90-2.

On January 17, 2023, the Court issued a bench decision, granting Plaintiff’s motion in part. As an initial matter, the Court specifically found that Defendant did not act unreasonably. The trial justice went on to state, however, that she is not

bound by the parties' agreement, and that she has the power to determine the best interests of the children.

She found there was no consensus in the medical community regarding whether children should receive the vaccine. She made no finding that the children are at risk of serious illness or death from Covid. Ultimately, the Judge sided with Dr. Powers, based upon her being the children's pediatrician, over Dr. Bostom, who she characterized as having a "general" objection to the vaccine.

SUMMARY OF ISSUES:

- 1. The Trial Court erred by making a best interests of the child determination after finding that the father acted reasonably in accordance with the final decree.**

In addressing the final decree and the issue of reasonableness, the Court found that "there is not uniformity of agreement in the medical community regarding whether children, in general, should receive the COVID vaccine and whether the benefits of the vaccine to children, in general, outweigh the risks or vice versa." Further, she found that the parents generally agreed to all medical recommendations of the pediatrician, including other vaccines; the sole issue of dispute involved COVID-19. This led inextricably to the Court determining that the father had acted reasonably in rejecting the vaccine.

In light of the evidence before the Court, the Court cannot conclude that the Defendant's refusal to follow the recommendations of Dr. Powers, in this one instance, is objectively unreasonable.

But then the Court overruled the father’s objection to the vaccine:

To the extent that the Defendant argues that the language in the marital settlement agreement and in the final judgment means that if one parent has a reasonable objection to a recommendation of the children's pediatrician, then that parent will automatically prevail, the Court rejects that argument. That language is not stated. It could have been stated, but it was not. Furthermore, the Court always has the jurisdiction to resolve issues relating to the minor children in a divorce if those children -- if those issues relate to the children's healthcare.

Tr. 1/17, at 26.

The parties used the language “neither party shall unreasonably withhold consent” in other sections in the final decree, including extracurricular activities; medical and dental treatment; and therapy and counseling. Conversely, they agreed to language regarding relocation which specifically left it to the Court to decide if there was no agreement: “Both Plaintiff and Defendant agree that neither party shall relocate the minor children from the State of Rhode Island without mutual agreement or court permission.” Exh. 7, p. 6-7.

The Court should have ended its consideration of the case once it found the father acted reasonably. To do otherwise in essence rewrites the final decree and overrules what the parties had agreed to.

When a party seeks to modify a custody order, there must be a showing of changed circumstances. Only then does the Court invoke the best interests of the child standard. Olson v. Olson, 701 A.2d 1030, 1031 (R.I. 1997). Since the Court

here made no such determination of changed circumstance, her decision must be reversed.

2. Even if the Trial Court were permitted to ignore the language of the final decree, the Court failed to articulate how the 8 factors in the best interest of the child standard warranted a change in custody for mother to make the sole decision regarding COVID-19 vaccination.

Prior to conducting hearings on the matter, the Court asked the parties for any case law in other jurisdictions in which the vaccine issue was presented. The parties were only able to find few mostly unpublished trial court cases. One, J.F. v. D.F., 160 N.Y.S.3d 551 (N.Y. Sup. Ct. 2021), is particularly inapt, in that the child there was old enough to express her desire to be vaccinated. Dismissing the father’s concern as “wait and see what further research demonstrates on both the efficacy of the vaccine and the impact of both short and long-term side effects;” the Court used hyperbole that the father’s position was, “untenable, when the specter of a killing or incapacitating disease is swirling in the environment surrounding this young girl.” Id. at 557. This statement ignores the fact that young people are at practically zero risk of serious illness or death from Covid. And to reiterate, the vaccine does not prevent transmission.

Another case is unpublished: Richmond v. Natanson (Superior Court of New Jersey, June 24, 2022). In that case, the Court heard from both parents, as well as expert witnesses for both. The trial judge made extensive findings of fact based upon the relevant 11 factors for the best interests of the child under New Jersey

law. First, the Court found that many of the factors did not skew either way; both parents were fit and cooperative and in agreement with all medical decisions except the COVID-19 vaccine. In finding that the child should be vaccinated, the Court relied on the following facts: that the “continuity and quality of the minor child's education would be disrupted by virtual learning, which would be more likely to occur if the minor child is unvaccinated.” Also, the Court found the child's daily life would be adversely affected if she remained unvaccinated. Most importantly, the Court found that the child had not been previously infected and had no natural immunity. In making that determination, the Court relied on the testimony of the mother’s expert witness, a professor of pediatrics and infectious diseases, over that father’s expert who was in general pediatric practice.

At the close of this case, we noted to the Court that these factors, which led the New Jersey Judge to rule in favor of the vaccine, now skew heavily to the father’s position. First, the Court agreed that the father was a fit parent and cooperative and the COVID-19 vaccine issue is the only medical issue on which the parents disagreed. Second, the children here have both had Covid and therefore have natural immunity. Moreover, there was no evidence that the children’s unvaccinated status had any effect on their daily living. And finally, father’s expert was far more qualified to opine on the necessity of the vaccine than the children’s pediatrician.

Ultimately, the trial judge found none of the cases cited helpful and ignored them. Yet, she then made no effort to identify which of the best interests of the child factors favored overruling the father's reasonable objection to the treatment. While this Court gives deference to best interests' determinations made by a trial judge, a parent moving to change custody must, "show by a fair preponderance of the evidence that circumstances had changed such that the placement should be modified in the interest of the children's welfare and that the change of placement was in the best interests of the children." Souza v. Souza, 221 A. 3d 371, 377 (R.I. 2019). Where the trial court fails to make a finding of substantial change in circumstances before considering the best interests of the children, this Court should reverse.

3. The automatic stay should remain in effect during the appeal where there is no finding that the children will suffer irreparable harm by remaining unvaccinated against COVID-19.

Recently, a Court in Ontario, Canada ruled that a father who had final decision-making authority over medical decisions should not lose that right because he disagreed with the COVID vaccine for his daughter. The Judge noted:

We are currently in a dynamic and rapidly changing situation in public health advisories concerning the COVID-19 situation, particularly concerning children.

A.M. v. C.D., 2022 ONSC 1516, p. 12 (March 9, 2022).

A year later this statement is truer. The pandemic is over. The irrefutable

evidence is that these children are at no risk of harm from COVID, that those with natural immunity are at least as protected as those who have had the vaccine, and that there are serious questions as to the harms that the vaccine may cause. To the extent this Court decides to continue this case to the full briefing calendar, the balancing of risks favors continuing the stay of any administration of the vaccine.

CONCLUSION:

For the foregoing reasons, the father asks this court to reverse the decision of the Family Court and dismiss mother's motion, or place this matter down for full briefing, while maintaining the stay of the lower court decision.

Respectfully submitted,
Defendant/Appellant,
By his Attorney,

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**CERTIFICATION OF WORD COUNT AND
COMPLIANCE WITH RULE 18(B)**

1. This Rule 12A statement contains 2995 words, excluding the parts exempted from the word count by Rule 18(b).
2. This Rule 12A statement complies with the font, spacing, and type size requirements stated in Rule 18(b).

/s/ Gregory P. Piccirilli, #4582

CERTIFICATION

I hereby certify that I served this document through the electronic filing system on the following attorneys of record:

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/s/Gregory P. Piccirilli