

Court of Queen's Bench of Alberta

Citation: TRB v KWPB, 2021 ABQB 997

Date: 20211214
Docket: 4806 019703
Registry: Lethbridge

Between:

TRB

Plaintiff/
Cross-Respondent

- and -

KWPB

Defendant/
Cross-Applicant

**Memorandum of Decision
of the
Honourable Madam Justice J.C. Kubik**

The names of the parties and the children have been initialized in order to protect the medical privacy interests of the children and the general privacy interests of the family in light of the subject matter of the litigation.

Introduction

[1] BPB and ARB are children aged 12 and 10. Their parents divorced in 2014, share parenting, and enjoy joint decision making for them. In fulfilling that responsibility, their parents have ensured that they receive all of their childhood immunizations and annual flu vaccinations. Unfortunately, their parents disagree as to whether they should be vaccinated against COVID-19.

[2] BPB and ARB's mother wishes them to be vaccinated for a number of reasons, which include: to prevent them from contracting COVID-19, to allow them to return to more regular activities in safety, and to teach them social and community responsibility.

[3] Their father opposes their vaccination as he is concerned that the risk associated with the vaccine outweighs the risk to the children should they contract COVID-19. He asks that their vaccination be delayed until further evidence is available regarding the safety of the vaccine. He also suggests that they could be tested to determine whether they have antibodies to COVID-19.

[4] BPB and ARB's parents tried, for a number of months, to resolve the issue of vaccination. During that time the children were exposed to vaccine misinformation and age-inappropriate vaccine related material. This has caused stress and anxiety for the children. Their legal counsel, acting as their best interests advocate, recommends they be vaccinated.

Issues

[5] The three issues before me for determination are as follows:

- whether the parties' joint decision-making status should be varied such that the mother becomes the sole decision maker in relation to all medical and health related matters. This turns on what is in the best interests of the children.
- whether it is in the children's best interests to be vaccinated against COVID-19.
- whether a letter to the court from counsel for the children should be sealed on the court file.

Evidence and Findings of Fact

[6] It is not my intention to wade into the polarizing debate surrounding COVID-19 vaccination. In this case, however, the parties approach the issue of COVID-19 and vaccination from very different perspectives. As a result, it is necessary to establish the factual and legal matrix in which this application is being made, and to assess the weight which should be ascribed to evidence relied upon by the parties in their affidavits and concise letters.

[7] The parties have had "joint custody" (as it was then termed) of the children since their divorce on November 17, 2014. Over the past 7 years they have worked together and have agreed that vaccination is an important part of the overall healthcare for their children.

[8] In June 2020, the mother applied to vary the custodial relationship, seeking sole custody and primary day-to-day care of the children. Her application was dismissed by Miller J on August 25, 2020. His order required the parties to engage a parenting coach to help them address communication issues and modification of their parenting arrangement. The issue of vaccination was canvassed in discussions between the parties in a meeting with the parenting coach in June 2021, and with the assistance of legal counsel. No compromise could be reached.

[9] The content of the discussion and in particular text communications between the parents, as well as screen-shots of information the father provided to BPB about vaccination for COVID-19 are in the materials. These materials illustrate the father's engagement with vaccine misinformation. The father's affidavit references the vaccine as experimental. During argument his counsel also made reference to the experimental nature of the vaccine, the "purported

pandemic”, a lack of debate in the Legislature and Parliament to establish the existence of the pandemic, and a failure of transparency on the part of government in providing accurate information with respect to both COVID-19 illness related outcomes and vaccine safety.

[10] Much of this material is refuted by evidence attached to the mother’s filed materials, including publications of both the governments of Canada and Alberta relating to the vaccine, its approval, its side effects, and its efficacy. While the father’s counsel argues that government publications are propaganda, there is no evidence before me to prove that the government is willfully misleading its citizens about the safety and efficacy of COVID-19 vaccines and in particular the Pfizer-BioNTech vaccine, which has been approved for use in children age 5-11, and 12-17.

[11] There are at least two cases regarding the use of judicial notice in the context of COVID-19 vaccinations in children under 18: *Saint-Phard v Saint-Phard*, 2021 ONSC 6910; and *OMS v EJS*, 2021 SKQB 243. In both of those cases, the courts were presented with significant documentation from publicly accessible government sources, prior cases, and relied upon their own knowledge to take judicial notice of certain facts relating to COVID-19 and the Pfizer-BioNTech vaccine, including the fact of vaccine approval, recommendations for use, risk, safety, and efficacy.

[12] Since early 2020, Canadians have been living in the midst of a global pandemic caused by the SARS-CoV-2 virus. I take judicial notice of this fact which is so notorious and indisputable as to not require proof. I also take judicial notice of the regulatory approvals and directives issued by the various governments and agencies in Canada and Alberta. I accept that as a consequence of the pandemic, Alberta has, from time to time, invoked a state of public health emergency during which the Chief Medical Officer of Health has issued directives. At the time of this decision, Alberta is in a state of public health emergency, declared on September 15, 2021. On September 16, 2021 Health Canada approved the Pfizer-BioNTech vaccine for use in children aged 12-17, and on November 19, 2021, approved the same vaccination (with an adjusted dosage) for use in children aged 5-11. By virtue of its approval by the regulatory authority responsible for testing and approval of drugs for use in Canada, the vaccine is not experimental. It is deemed safe and effective for use in children aged 5-11, and 12-17. While not mandatory in Alberta, vaccination of children aged 5-11 and 12-17 is recommended by the Chief Medical Officer of Health for Alberta.

[13] Further, I have considered the scientific evidence in the Canadian context, which includes the regulatory approvals of the Pfizer-BioNTech vaccination, and the recommendations of government health officials, including the Chief Medical Officer for Health in Alberta. I accept that evidence as an accurate reflection of the current state of scientific knowledge regarding both the virus and the vaccine. I prefer this evidence to the American documentation provided by the father, noting that the state of regulatory approval of the vaccine in the United States is different than that in Canada. I have ascribed no weight to publications relating to vaccine mandates, which are not in issue in these proceedings. The documentation provided by the Canadian Covid Care Alliance is not a peer-reviewed, scientific publication, and, in the context of this special chambers application, its author was neither qualified as an expert nor subject to examination and cross-examination as to his opinion. Accordingly, I ascribe less weight to this documentation than I do to the regulatory approvals and the recommendations of public officials in Canada, who are tasked with protecting public health.

[14] From the various documents and affidavit evidence before me I also find the following facts:

- Vaccination is prophylactic medical treatment. Its primary purpose is to prevent the vaccine recipient from contracting illness. Vaccination also serves the purpose of limiting the spread of illness by limiting its transmissibility. Finally, vaccination of eligible recipients protects those who cannot be vaccinated due to contraindications to the vaccine or health conditions which might prevent vaccination.
- Vaccination, like all medical treatment, comes with risk. In the case of the Pfizer-BioNTech vaccine those risks include transitory symptoms such as injection site pain, fatigue, and headache (to name a few), and more serious side effects such as myocarditis. Myocarditis was not observed in any of the clinical trials associated with testing of the vaccine on children aged 12-17. To the extent that there have been reports of myocarditis in the 12-17 age group outside of clinical trials, Health Canada has recommended continued surveillance with respect to the side effect and a requirement that vaccine recipients in this age group receive information about this particular risk, as well as the other side effects. This ensures informed consent. It should be noted that the Pfizer-BioNTech vaccination had 100% clinical efficacy amongst 12-17-year-olds engaged in the clinical trial. Additionally, vaccination for COVID-19 has not caused the death of any children in clinical trials.
- Illness from COVID-19 also comes with risk, including transitory flu-like symptoms, more serious pneumonia-like symptoms, and the need for hospitalization including mechanical ventilation, and in some cases long-term health consequences. Children in Canada have died from COVID-19.
- BPB and ARB are both healthy children who have received all of their regular childhood immunizations and receive an annual flu shot. Their family physician has provided a letter in this proceeding, advising that neither child suffers from a medical condition which would prevent them from receiving the COVID-19 vaccine or cause the vaccine to be harmful. While the father objects to their doctor's letter as improperly tendered expert opinion, it should be noted that the doctor makes no recommendation as to whether they should be vaccinated, and the information provided by him is consistent with the parents' own description of their children as healthy, and having robust immune systems.

Best Interests Framework

[15] As the parents have joint decision making, variation of the current order requires the mother to demonstrate that there has been a material change in the circumstances of the children since the making of that order: section 17(5) *Divorce Act*, RSC 1985, c 3 (2nd Supp) [*Divorce Act*].

[16] As noted in *Gordon v Goertz*, [1996] SCR 27 [*Gordon v Goertz*], the threshold is met when there is a change in the needs or circumstances of the children which materially affects them and was not foreseen at the time of making the original order.

[17] I am satisfied that the availability of the vaccine, in the context of an ongoing global pandemic, coupled with the fact that the parties have exhausted all forums for discussion and are unable to reach an agreement, is a change in circumstances which allows me to consider both the

application seeking sole decision making on health and medical matters and authorization to vaccinate the children.

[18] Section 7.1 of the *Divorce Act* provides that a person to whom decision making responsibility has been allocated shall exercise that responsibility in a manner that is consistent with the best interests of the children.

[19] Parties to a dispute also have a duty to protect the children from conflict arising from that proceeding: section 7.2 of the *Divorce Act*.

[20] Sections 16.1 and 16.3 of the *Divorce Act* empower me to make a parenting order providing for the allocation of decision-making responsibility between parents, and to impose any terms, conditions, and restrictions as well as specify the circumstances or time period during which the order applies.

[21] In doing so, my only consideration is the best interests of the children: section 16(1), and primary consideration is to be given to the children's physical, emotional, and psychological safety, security, and wellbeing: section 16(2).

[22] Section 16(3) of the *Divorce Act* sets out the factors to be considered in assessing the best interests of the children, which are child-focused in nature. Of relevance to this application, are the children's needs given their ages and stages of development; the history of care of the children, including past decision making; the children's views and preferences, weighted to the children's age and maturity levels; and the ability and willingness of each person to care for and meet the needs of the children, and to communicate and cooperate with one another on matters affecting the children.

[23] The past conduct of the parents is not to be taken into account, unless relevant to the issue of decision making.

[24] Once the threshold is met, the best interests analysis is framed by the requirements of section 16.1 of the *Divorce Act* and a recognition that each case turns on its unique circumstances and reflects the best interests of the children, not the interests and rights of the parents: *Gordon v Goertz*.

[25] As noted in *Young v Young*, 1993 4 SCR 3 [*Young*]: "...the child has a right to a parent who will look after his or her best interest... and ensure, protect and promote the child's best interests. That duty includes... the responsibility to oversee all aspects of day-to-day life and long-term well-being."

[26] Further in *Young*: "The best interests of the child cannot be equated with the mere absence of harm: it encompasses a myriad of considerations. Courts must attempt to balance such considerations as the age, physical and emotional constitution and psychology of both the child and his or her parents and the particular milieu in which the child will live."

Issue One: Sole Decision-Making

[27] The first aspect of this application is whether the mother should have sole decision making with respect to medical and healthcare related matters. The underlying argument is that the father's position with respect to vaccination is underpinned by misinformation and conspiracy theories, and his willingness to share this with the children demonstrates that he is not able to make decisions in their best interests.

[28] In assessing the best interests of the children, the history is one of joint decision making. There is no evidence that the father and mother, historically, have been unable to agree about medical and health decisions for their children, or that the father has, in the past, engaged in any inappropriate decision making with respect to the children's health. The issue of COVID-19 and vaccination appears to be a single issue of disagreement.

[29] That issue, however, has exposed both the questionable resources the father is relying on in his decision-making process, and the fact that he has shared that information with the children, increasing their stress and anxiety about vaccination. The children are young and at an impressionable age. Apart from some needle anxiety experienced by ARB there is no indication that either child was ever vaccine hesitant, and indeed BPB initially expressed a desire to receive the COVID-19 vaccination. The father's actions in this regard are contrary to the emotional and psychological safety, security, and well-being of the children. I am mindful of the fact that COVID-19 vaccination has become a significantly polarizing topic, and the father's behaviour must be considered in the context of the larger societal picture. While he has not exercised his decision-making responsibility regarding COVID-19 in the best interests of the children, I am not satisfied that there is a sufficient evidentiary record to remove the father from joint decision-making with respect to all medical and health related matters. That said, in the event of conflict there needs to be a mechanism for dispute resolution short of a court application. As a result, I direct that in the event of an impasse, and after exhausting all other good-faith attempts at resolution, including the assistance of the parenting coach, the mother will have final decision-making authority on all health and medical matters, not related to COVID-19.

Issue Two: Vaccination Against COVID-19

[30] In relation to the issue of whether the children should be vaccinated, I make a further, specific direction that the mother is authorized to have the children vaccinated against COVID-19, without the consent of the father. I also direct that the mother will have sole decision-making authority with respect to any medical and health related decisions associated with COVID-19 vaccination or treatment, now and in the future.

[31] Given its most generous interpretation, the father's position is to take a "wait and see" approach to vaccine safety. This is not in the children's best interests for the reasons set out below.

[32] The vaccine is approved by Health Canada and is safe and effective for use in children age 5-11 and 12-17. The risks associated with vaccination are minimal and are outweighed by the risk of serious illness and death to unvaccinated individuals, including children. Vaccination is the children's best protection against the illness given that we are living in a state of public health emergency, during a global health pandemic. It is important to recognize that the risk of illness at this particular point in time continues to be high, and that vaccination reduces the risk of contracting COVID-19 and suffering serious consequences as a result.

[33] Vaccination will limit the risk of transmission and will allow the children to fully participate in school, extra curricular activities, social activities, and travel opportunities. This is important for their mental and emotional health and well-being.

[34] Vaccination is consistent with the children's historic healthcare and should be encouraged as a means of protecting their health and the health of others in their family and community.

[35] As such, vaccination serves the children's best interests by protecting their physical health, fostering their psychological and emotional needs and imparting important social lessons to them about maintaining and protecting their health for the sake of themselves and those around them.

[36] Each of these children is unique. BPB wishes to consult with his doctor regarding the vaccine, which is a reasonable request given his age and the fact that he may have questions generally, and arising from the misinformation which was shared with him.

[37] ARB suffers vaccine anxiety, but also expressed concern that the COVID-19 vaccine might hurt or kill her. This is directly related to the misinformation she received from her father, as well as from her friends.

[38] The children's mother has proposed that she will take the necessary steps to ensure that BPB and ARB are emotionally ready to proceed with vaccination, whether that requires consultation with their family doctor, pediatrician, or child psychologist. I make no direction in this regard. The mother has demonstrated best interests decision making on behalf of the children and she is best placed to determine how their questions should be answered, what supports they require, the timing of their vaccination and any subsequent booster shots.

[39] Further, I direct on the recommendation of children's counsel, the following:

1. That the father will not discuss, or permit any third party to discuss, the issue of the COVID-19 vaccination or COVID-19 generally with the children, or supply social media or other information about the vaccine or the disease to the children.
2. That neither parent, or any third parties on their behalf, will discuss this litigation with the children.
3. That neither parent will speak negatively about the other in front of the children, or allow any third parties to speak negatively about the other parent in front of the children. This is a term of general application but also relates specifically to the issue of COVID-19 and the vaccination.

[40] Given the stress and anxiety this matter has already caused the children, these directions are made to protect them from receiving further misinformation about COVID-19 and the vaccine, and to shelter them from any ongoing discussion about this litigation.

Issue Three: The Sealing of Correspondence from Children's Counsel

[41] Finally, counsel for the children asked that her letter to the court be sealed on the basis that it includes private information with respect to the children's health and their consultations with her, which was communicated to the court solely for the purposes of fulfilling her role as a best interests advocate. This application to seal the letter was supported by the mother's counsel, but opposed by father's counsel on the basis that to do so would be a failure of transparency.

[42] The order appointing children's counsel in this case established her role to provide independent legal services for the purposes of ascertaining the children's views and protecting the children's interests without being bound by the children's directives or objectives. It also directed that the views and preferences of the children be provided to the court, in writing, without the need to be presented as evidence through sworn testimony. In this case, children's counsel provided a copy of her correspondence to parent's counsel on the express trust condition

that while the contents of the letter could be shared with the parents, a copy could not be provided to them. As a result, neither parent has a copy of the letter. The communications between the children and their counsel as described in the letter are confidential and contain private information.

[43] The test for granting a sealing order in the civil litigation context is a reframed *Dagenais/Mentuck* test: *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41. This test requires the Court to balance the real and substantial risks posed to the interests of the parties by publication of the information against the public interest in open and accessible court proceedings.

[44] Publication of the letter presents a real and substantial risk to the children's confidentiality interest in their private communications with their lawyer. There is a public interest in protecting solicitor-client communications, which is long-recognized at law. There is no alternative method which would allow the publication of the letter while protecting that interest.

[45] Furthermore, the Court record, including the parents' affidavits, and this decision sufficiently inform the public of the subject matter of the dispute and the outcome, such that there is no harm done to the open court principle by sealing the letter from children's counsel.

[46] Accordingly, the Clerk of the Court is directed to place Ms. Cork's letter dated November 16, 2021 into a sealed envelope, which shall not be opened except by another Justice of any Court in Alberta, or further Court order.

Conclusion

[47] Accordingly, I order as follows:

1. The mother is authorized to have the children vaccinated against COVID-19 at such time as she deems appropriate. She may take such other steps as she deems necessary to ensure the children are physically and emotionally prepared for vaccination. She has sole decision-making authority for any and all medical and health care decisions relating to COVID-19 vaccination and/or treatment.
2. The mother and father will continue to share joint decision making with respect to all other medical and health related decisions. I direct that in the event of an impasse, and after exhausting all other good-faith attempts at resolution, including the assistance of the parenting coach, the mother will have final decision-making authority on all health and medical matters.
3. The father will not discuss, or permit any third party to discuss, the issue of the COVID-19 vaccination or COVID-19 generally with the children, or supply social media or other information about the vaccine or the disease to the children.
4. Neither parent, or any third parties on their behalf, will discuss this litigation with the children.
5. Neither parent will speak negatively about the other in front of the children, or allow any third parties to speak negatively about the other parent in front of the children. This is a term of general application but also relates specifically to the issue of COVID-19 and the vaccination.

6. The Clerk of the Court is directed to place Ms. Cork's letter dated November 16, 2021 into a sealed envelope, which shall not be opened except by another Justice of any Court in Alberta, or further Court order.

Costs

[48] If the parties are unable to agree as to costs within 30 days of this decision, they may arrange a ten-minute meeting with me to speak to the issue.

Heard on the 19th day of November, 2021.

Dated at the City of Lethbridge, Alberta this 14th day of December, 2021.

J.C. Kubik
J.C.Q.B.A.

Appearances:

Kurt Schlachter, Stringam LLP
for the Applicant

Katherine Kowalchuk, Getz, Collins & Associates
for the Respondent

Vanessa Cork, Legal Aid Alberta
for the Children