

## Should parental vaccination status matter in a custody determination?



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Vaccination disputes are not new to family law practitioners. Bolstered by television doctors, celebrities and widely shared misinformation on the internet, the anti-vaccination movement that has rooted itself in this country often rears its head in custody disputes.

Prior to 2020, the vaccination dispute largely centered on whether one parent could require or prevent a minor child from receiving a vaccine.

Courts addressed these disputes on a case-by-case basis by looking at the child's best interests and the reasoning behind the denial of the vaccination. Generally, unless the anti-vaccination parent could show demonstrable proof that a vaccine would cause harm to the child, the court erred on the side of vaccination.

In a 2019 case, *In re K.Y-B.*, the Court of Special Appeals, noting the "known serious risks of harm to infants from infectious diseases" and the effectiveness of immunizations,

upheld a lower court's mandate to vaccinate an infant over the religious objections of its mother.

The court, in examining similar cases, explained that while a "parent is free to believe as she wishes," she cannot act on those beliefs in a way that would "pose a serious danger to the child's life or health or impair or endanger the child's welfare."

The pandemic has shifted this debate slightly, with a new focus on whether the parent's COVID-19 vaccination status should be a consideration in awarding custody or visitation.

This was recently highlighted in a well-publicized case coming out of Chicago. The judge inquired as to each parent's vaccination status during a child support hearing. The mother answered in the negative and explained that a doctor had advised her not to get the coronavirus vaccination and that she had suffered adverse reactions to vaccinations in the past.

The court was apparently not persuaded by mother's reasoning and removed the minor child from mother's custody until she could show proof that she was vaccinated. Despite being later reversed on procedural grounds, this ruling forced the discussion of whether a parent's vaccination status is an appropriate consideration in a custody determination.

Looking at *In re K.Y-B.*, it seems likely that a Maryland court may consider vaccination status as a factor. The *In re K.Y-B.* ruling actually builds on a framework of cases that hold that where a parent's beliefs and practices pose harm to a child's health

and welfare, they are not acting in the child's best interest.

In *Levitsky v. Levitsky*, the mother refused a potentially lifesaving blood transfusion for one of her children based on her religious beliefs. The Court of Appeals held that a court may bar custody where those beliefs and acts pose a serious danger to the minor child.

Similarly, in *Bienenfeld v. Bienenfeld*, the Court of Special Appeals held that a court may consider views and practices which "bear upon the physical or emotional welfare of a child" in a custody proceeding.

Following these lines of reasoning, a trial court could consider a parent's vaccination status in its best interest analysis and the failure to obtain a vaccination as evidence of posing serious danger to a child's physical or emotional welfare.

Making this particularly difficult is that this line of considerations is only now developing during the pandemic, while access to and recommendations concerning the vaccination are constantly updating and evolving.

There are a number of questions left open, such as what about the parent that is not able to receive the vaccine for health reasons, such as being immune compromised? Should a parent whose immune system is depleted due to chemotherapy not be granted custody or visitation?

What is certain is that we practitioners now need to consider our client's vaccination statuses and how to address that with the court.

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