



To jab or not to jab, that is the question!

An exploration of the rules on Covid-19 and flu vaccinations for looked after children.

By Natalie Cross.

Introduction

1. To jab or not to jab, that is the question!
2. As we recover from the Covid-19 pandemic and the vaccination programme continues to roll out, practitioners are likely to face increased questions as to the rules on whether children currently looked after by the local authority can be vaccinated against Covid-19 in the absence of consent of all those with parental responsibility. Similar questions are likely to arise in relation to the flu vaccination given we have been told since the onset of the pandemic that getting that vaccination is more important than ever.
3. Yet what are the rules when there is a disparity between all those who hold parental responsibility for the child? Further, what is the correct approach when the child is of such age and understanding to have their own views and they are regarded as Gillick competent? Read on ...

The case law

4. ***C (Looked after child) (Covid-19 Vaccination) [2021] EWHC 2993*** is a High Court case concerning this very issue – should a child in the care of the local authority be vaccinated against Covid-19 and flu in the absence of parental consent? C was almost aged thirteen and subject to a care order. He was clear in his wish to have both vaccinations, and that was a view supported by his father, the local authority and the children’s guardian. His mother, however, opposed such.
5. In consequence, the local authority applied to the High Court for a determination on the issue. Specifically, it relied on the provisions of section 33(3) Children Act 1989 which provides that it has the power, whilst a care order is in force, to determine the extent to which parental responsibility may be met for that child. It was acknowledged that the authority may not exercise such powers unless satisfied that it is necessary to do so to safeguard or promote that child’s welfare – section 33(4) Children Act 1989. If that argument failed, the local authority applied for a declaration under the inherent jurisdiction that C should have the vaccinations.

6. The earlier case of ***Re H (Parental Responsibility: Vaccination) [2020] EWCA Civ 664*** was considered at length in the judgment, but that case had not specifically had regard to vaccinations against Covid-19 and the flu.
7. The court noted the strength of opposition from the mother. She averred that the vaccinations were unsafe and not tried and tested like many other childhood vaccinations. She produced generalised evidence which the Judge determined was anti-Covid-19 vaccination propaganda which was considered to lack rational argument. To the contrary, C maintained that he wished to receive both vaccinations and felt that the opposition of his mother was “not smart”.
8. The court concluded that C should be vaccinated.

The principles

9. It is clear from this case that it will be a rare occasion when a court will determine that a looked after child should not receive the vaccinations in question. A summary of the principles can be found below:
 - (1) Local authorities can continue to determine the exercise of parental responsibility in relation to a child it looks after and can do so when satisfied it is necessary to safeguard or promote the welfare of that child.
 - (2) A local authority can arrange, and consent on a looked after child’s behalf, to vaccination against Covid-19 and the flu where the vaccination is part of a national ongoing programme approved by the UK Health Security Agency. This is so even if there is objection from another parental responsibility holder.
 - (3) Local authorities should not use the powers under section 33 Children Act 1989 to override the wishes of parents in relation to serious or grave matters. However, decisions for a child to undergo routine vaccinations are not to be regarded as ‘grave’ – it falls within the remit of the local authority under section 33 Children Act 1989 in conducting an effective exercise of its parental responsibility. In ***Re H***, Lady Justice King was clear that the giving of a vaccination under the UK public health programme cannot be regarded as ‘grave’ where there is no contra-indication in relation to the subject child.
 - (4) If a child who was Gillick competent refused vaccination, that would raise questions as to whether the local authority could override their wishes and feelings – in such instances, the safest option is likely to be an application to the court.

- (5) As such, if the vaccination is approved, the child is either not Gillick competent or is competent and consents, and the local authority is satisfied the vaccination is necessary to safeguard and promote his welfare, there is NO requirement for an application to be made to the court to authorise a decision to vaccinate. In such circumstances, it would be for the parent to make the application to prevent.
- (6) It is not the function of the court to investigate the merits of whether a nationally approved vaccination programme is in the best interests of a child. Expert evidence is only likely to be necessary where the individual circumstances and health of the subject child suggest the vaccination would not be in their best interests, or where research develops which casts doubt on the efficacy or safety of the vaccinations. The mere assertion that a vaccination is unsafe falls short of satisfying the court that expert evidence is necessary. In ***M v H (Private law vaccination) [2020] EWFC 93***, whilst in the context of private law proceedings, MacDonald J deprecated information that was “tendentious, partial or partisan” that had been gathered from the internet to support a particular view and which does not undermine the efficacy or safety of the vaccinations otherwise approved by the NHS.
- (7) It was emphasised that a local authority does not have complete freedom to arrange vaccinations and, if it would have enduring or profound consequences for the child, it may cause the decision to be regarded as a ‘grave’ one which may, in turn, justify an application to court. Neither the cases of ***Re H*** nor ***C*** should be read in a way which gives a local authority blanket permission to allow vaccinations. Effectively, a local authority should make an ‘individualised’ welfare decision when applying the powers of section 33(4) Children Act 1989.

Conclusion

10. The case of ***C*** does not depart from the earlier principles laid out in ***Re H*** and remains entirely consistent with section 33 Children Act 1989. When advising any party in an issue of this kind, the answer is likely to be that the child will be vaccinated when it has been approved by a national rollout plan UNLESS there is some individual reason particular to that child that would suggest vaccination would not be in their best interests (health complications being the most obvious example, or the child’s own opposition when Gillick competent).
11. The court has been clear that, even with vehement opposition to a vaccination, this will not equate to the court simply denying permission to vaccinate. There must be sound and cogent evidence on which to base such an assertion on, and those must be specific to the child in question.
12. Put simply, the concluding remarks of Poole J were these:

In the great majority of cases involving looked after children, no application will need to be made by the local authority to the court in respect of decisions to proceed with Covid-19 and/or flu virus vaccinations provided under a national programme, even where there is parental objection.

13. The message? Local authorities should concentrate on carrying out the effective exercise of parental responsibility when this has been sanctioned by the appropriate health agencies. Parental responsibility holders who object should only therefore make an application where there is EVIDENCE on which to justifiably base such an objection on. After all, evidence is the way in which the Family Court can properly exercise its functions in serving children in the best way possible, and the court does not wish to be burdened by applications when, in most cases, the looked after child should be vaccinated.
14. To jab or not to jab, that is the question! The answer? Overall, and for local authorities at least – to jab!



Natalie Cross
ST IVES CHAMBERS

Law is correct as of 28th February 2022

Whilst every effort has been taken to ensure that the law in this article is correct, it is intended to give a general overview of the law for educational purposes. Readers are respectfully reminded that it is not intended to be a substitute for specific legal advice and should not be relied upon for this purpose. No liability is accepted for any error or omission contained herein.

www.stiveschambers.co.uk | +44 (0)121 236 0863 | @StIvesFamily
St Ives Barristers Ltd t/a St Ives Chambers: Registered Office Address: 1-3 Whittall Street, Birmingham,
B4 6DH: Company Registered in England No: 13730994: Registered for VAT No: 397 020 883