

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
PRESENT: HON. STACY D. BENNETT, A.J.S.C.

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S.M.,

Plaintiff, TRIAL/IAS PART 50

Index No.

xxxxxx/15

- against -

DECISION

AFTER HEARING

E.M.,

Defendant.

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Procedural History

The plaintiff, S.M. (hereinafter "mother") and the defendant, E.M. (hereinafter "father") were married on October 3, 2010. There are three children born of the marriage, namely, E.M., Jr., born xx-xx-08, I.M., born xx-xx-11, and J.M., xx-xx-12.

The mother commenced an action for divorce in 2015 which was thereafter settled via Stipulation of Settlement dated January 27, 2016 which was incorporated into the Judgment of Divorce dated September 2, 2016. The Stipulation of Settlement provided that the parties are to share equally legal and residential custody of the three minor children, with neither party having final decision making authority. Further, the Stipulation of Settlement did not provide for an access schedule.

On October 14, 2021, the father filed an Order to Show Cause (motion sequence #5) seeking to modify the parties' Judgment of Divorce and provide him with the following relief; (1) an award of sole legal and residential custody of the children, (2) an access schedule to the mother, (3) an award of child support, (4) an order directing the consolidation of the pending Family Court support proceeding, and (5) an order permitting him to have the eldest son (Eric, Jr.) vaccinated with the Covid-19 vaccine. On November 12, 2021, the father filed an emergency Order to Show Cause (motion sequence #6), seeking almost identical relief to motion sequence #5 and after oral arguments on the record, the parties agreed to consolidate the Family Court modification petitions (motion sequence #7 & 8) with the within action. The parties requested an immediate hearing on the limited issue of medical decision making.

On February 10, 2022, the parties appeared in Court and placed on the record a stipulated set of facts in an effort to streamline the limited issue

hearing. The stipulation provided in relevant part, as follows:

Pursuant to the terms of the parties' stipulation of settlement, the parties share joint legal and residential custody of the minor children. The stipulation of settlement did not provide the parties with a parenting schedule but only stated that the parties were to have equal time with the children. The defendant, E.M., has received the Covid-19 vaccination. The plaintiff, S.M., has not received a Covid-19 vaccination. The parties have a disagreement with regard to the children receiving the Covid-19 vaccination. The defendant wishes for all three of the children to be vaccinated. The plaintiff does not want the children to receive the Covid-19 vaccination at this time. The children's treating pediatrician has recommended that all three children receive the Covid 19 vaccination. (Transcript, page 4-5)

Further, the Court was advised by the father's counsel that since the limited issue hearing will not address his change of custody application, another hearing must be scheduled to address the remaining relief requested by the father is his application for sole legal custody. Accordingly, at the next conference, the parties will select hearing dates.

The limited issue hearing began on June 8, 2022 and continued on June 10, 2022, and June 13, 2022. On the first day of the hearing, June 8, 2022, the parties entered into a "So Ordered Parenting Agreement" which sets out a parenting schedule and therefore resolved that issue and relief requested in the father's motions sequence #5 & #6. The Parenting Agreement also provided, at paragraph 9, that the "parties shall notify each other prior to making a non emergency health related appointment." The mother is represented by 18-b assigned Counsel, Donna McCabe, Esq, the father is represented by Erica Sakol, Esq. and Matthew Weiss, Esq, and the children are represented by Patricia Latzman, Esq. The parties were the only witnesses at trial.

Findings of Fact

The Father

The father was the only witness during his case in chief. He is fully vaccinated and "boosted" and supports having the children who are eligible to be vaccinated. He testified the mother has refused to allow their children to receive the Covid-19 vaccine despite the recommendation of the children's treating pediatrician. Further, the father testified that the mother never contested having the children immunized and they have always received all required vaccines in order to attend school. In support of his application for medical decision making authority he explained that based upon the mother's recent conduct and behavior, he sought judicial intervention in both the Supreme Court and the Family Court. Specifically, he described three (3) incidents wherein he contends that the mother made decisions contrary to the children's best interest. The first was in 2018, wherein he alleged the mother

exposed the children to dogs and cigarettes despite her knowledge that they suffer from allergies. As a result, he filed a motion in the Family Court which resulted in a court order directing the mother not to allow the children to be exposed to pets, cigarettes and vaping. The second incident was in 2020 when the maternal grandmother mother was visiting from Arizona. The father argued that despite the fact that Arizona was classified as a "hot state" the mother did not seek to quarantine her mother prior to having her visit with the children. Although on cross examination, he admitted that the grandmother did in fact quarantine at a friend's house for 14 days and that was "the proper action to take." Finally, the father alleged that in 2020, when the mother had parenting time with the children, she developed Covid symptoms, fell asleep for four hours leaving the children unsupervised, then finally called the father to pick them up. She later came to the father's home on four different occasions demanding to take the children, acting irrational, banging on the door and trying to push her way inside his home. He explained that he did not feel the mother should have parenting time with the children until after the mandatory quarantine period. However, the father conceded on cross examination that the mother's decision to bring the children to him was in fact "the right thing to do."

In addition to the three incidents set forth above, the father described an incident in December, 2021 when he and the children were diagnosed with Covid-19, she wanted to take them during her Christmas parenting time and came to his house on December 26th with the police demanding to take the children. He explained that although it was in fact the mother's scheduled parenting time, he did not allow the children to go with her because he wanted to keep them at his home, he didn't want the mother to get Covid-19 and he "was concerned about her safety. As another recent example of what he referred to as the mother's "poor decision making," was when the mother took the children to the Mets baseball game on her birthday in May, despite the fact that the mother knew the child I.M. was not feeling well and kept her home from school.

The father further testified that the mother took the eldest child to Dr. Palevsky, a holistic doctor in Northport for a second opinion regarding vaccination alternatives. Although he objected, and even cancelled the appointment, the mother took the child (E.M. Jr.) to the doctor. The father testified that he would follow the recommendations of the children's pediatrician and if he were awarded medical decision making authority, he would immediately vaccinate the children who are eligible.

The Mother

The mother testified that she is the parent who routinely takes the children to all medical appointments. She believes she proactively communicates with the father while he tends to isolate and exclude her. She

claimed that the father has intentionally left her name off of school notification forms.

The mother testified that the children are "up to date with all mandatory vaccines" and on cross examination by the attorney for the children she further conceded that she followed all of the recommendations and directions of the children's pediatrician throughout their lives. However, with respect to the Covid-19 vaccine she believes the vaccine is at "its infancy stages" and more research is necessary. She admits to not being vaccinated and opposes the children being vaccinated at this time, despite the recommendations of the children's pediatrician. She believes, based upon her independent research, that more science and data is required before she can agree to vaccinate her children with the Covid-19 vaccine and she further believes that the adverse reactions from the Covid-19 vaccine "are more harmful than the virus." She further testified that having had Covid-19, she believes the risks of being vaccinated outweigh the health concerns. The mother did not deny taking the eldest child to a holistic doctor for a second opinion or suggestions related to alternative medicine.

The mother denied most of the testimony of the father and stated that on several occasions the father failed to advise her of health related issues regarding the children. Specifically, the parties' daughter I.M. needed surgery to repair two breaks in her arm and the father failed to advise her stating that she only learned this when she took the child to the doctor.

With regard to the incidents described by the father, the mother contends that she made decisions in the children's best interest. She contends that the father is controlling and has prevented her from exercising her scheduled parenting time. With regard to the incident when the children had Covid-19 during her parenting time, she wanted to care for them and wanted them to quarantine in her home however when she attempted to pick them up, the father refused to allow the children to go with her. She explained it was her parenting time, she could care for them and keep them quarantined but the father refused to allow them to leave his home. She testified that his claim to not wanting her to get sick as his reasoning for not allowing her to have her children during her parenting time is disingenuous. She explained that she did attempt to pick them up several times and was upset and frustrated since he refused to allow the children to go with her and therefore deprived her of her Christmas parenting time with her children and did not see them until January 6, 2022. With regard to the incident wherein she had the Covid-19 virus, she explained that once she realized she was sick, she immediately called the father and made arrangements for the children to stay with him. She is asking the court to grant her medical decision making authority.

Conclusions of Law

The parties' Stipulation and Judgment provides for joint legal custody and therefore joint decision making. However, it is clear that they have differing opinions specifically regarding the Covid-19 vaccine. Therefore, they are each asking the court to be awarded medical decision making authority on behalf of their children.

In lieu of expert medical testimony, the parties stipulated that the children's treating pediatrician has recommended that all three children receive the Covid-19 vaccination. The father seeks to follow the recommendation of the medical professional. The mother does not.

The paramount concern in making decisions regarding custody is the best interest of the children. *Eschbach v. Eschbach*, 56 NY2d 167, 56 NY2d 167 (1982). The court will not debate the efficacy of the vaccine but rather what is in the best interest of the children. The children's pediatrician, selected by both parents over ten years ago endorses and recommends vaccination for the children, as does their counsel.

In response to the COVID-19 pandemic, New York State is "transitioning towards a "new normal; citizens are taking precautions to balance staying safe from Covid-19 and its variants alongside the desire to return to some semblance of regular life". *J.F. v. D.F.*, 74 Misc. 3d 175 at 181 (2021). "The widespread availability of the Covid-19 vaccines, with their continued, proven efficacy in preventing the spread of the virus and the development of serious symptoms in those who contract it, has resulted in the expectation that one must be vaccinated to participate meaningfully in everyday society". *Id* at 181. Therefore "the paramount concern when making a parental access determination is the best interests of the child, under the totality of the circumstances." *Marino v. Marino.*, 183 A.D3rd 813 at 816 (2020). In *C.B. v. D.B.*, 73 Misc. 3d 702 at 708 (2021), The Court weighed the totality of circumstances of Covid-19 with a child being around her unvaccinated father. The Court granted suspension of the father's parental access, finding that the father's willful refusal to receive the Covid-19 vaccine or give a compelling rationale as to why he would not get the vaccine, threatens the child's health and safety. *Id* at 705. Whereas the mother "who is fully vaccinated and observant of Covid-19 protocols, not because it somehow benefits her, but because it serves to protect the health, safety, and well-being of the child." *C.B. v. D.B.*, 73 Misc. 3d 702 at 708.

Similarly, in *J.F. v. D.F.*, 74 Misc. 3d 175 at 183, the Court ordered the child to get the Covid-19 vaccine despite the father's objection holding that it was in the child's best interest to participate in the vaccination program. The Court heard testimony from the child's pediatrician, who "concluded that the child be vaccinated and that she would be best protected from Covid-19 by the vaccine, even though she was only 11 years old." *Id* at 178. Despite the argument of the vaccine being in an "infancy stage," the Court held "the imminent risk of contracting the disease is too high and the consequences of acquiring it potentially too dire." *Id* at 183. Further, the court opined that "the danger extends beyond this child and includes a risk of serious infection to

any person with whom the child comes into contact, including plaintiff, the child's classmates, and their families." *C.B. v. D.B.*, 73 Misc. 3d 702 at 705.

This Court is mindful of the allegations made by both parties and declines to award full medical decision making authority to either party. However, based on the testimony, evidence and articulated medical opinion of the children's long-time pediatrician, the father is awarded medical decision making authority solely and specifically regarding vaccinations.

All other applications, motions or requests not specifically addressed herein regarding medical decision making are hereby denied. The parties are directed to appear on July 28, 2022 at 9:30 am for a conference to select hearing dates regarding the remaining issues in the father's application for change of custody.

This Constitutes the Decision and Order of the Court.

DATED: June 28, 2022 ENTER:

A.J.S.C.

Hon. Stacy D. Bennett,