

2021 NY Slip Op 21268

C.B., Plaintiff, v. D.B., Defendant.

Supreme Court, New York County.

Decided October 7, 2021.

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***Attorney(s) appearing for the Case***

Berkman Bottger Newman & Schein, LLP, By [Evan Schein, Esq.](#) & [Samantha Cooper, Esq.](#), 521 Fifth Avenue, 31st Floor, New York, New York 10175, Attorney for Plaintiff.

Wisselman, Harounian & Associates, P.C., By [Lloyd Rosen, Esq.](#), 346 Westbury Avenue, Suite 200, Carle Place, NY 11514, Attorney for Defendant.

[Karen B. Rosenthal, Esq.](#), Bender & Rosenthal, LLP, 451 Park Avenue South, 8th Floor, New York, NY 10016, Guardian Ad Litem.

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**MATTHEW F. COOPER, J.**

Throughout most of modern medical history, the advent of a vaccine was almost universally embraced as a means of protecting ourselves and our children from deadly or debilitating disease. In my lifetime, I need only think of how polio was eradicated in this country as a result of the vaccine first developed by Jonas Salk, with other diseases, such as measles, rubella, and diphtheria, having been similarly eliminated.

Then came COVID-19. Fortunately, most people, heeding expert medical opinion, have availed themselves of vaccines that promise not only to protect them and others from the ravages of COVID-19, but ultimately to completely vanquish the virus. Unfortunately, and to my mind, incomprehensibly, a sizeable minority, seizing upon

misinformation, conspiracy theories, and muddled notions of "individual liberty," have refused all entreaties to be vaccinated.

In this ongoing divorce case involving a three-year-old child, the issue of COVID-19 vaccination is now before me. The issue is not one of whether the child should be vaccinated; she is still too young to receive any of the vaccines. Nor is it one of whether I can require an adult to be vaccinated; to do so would stretch the authority of a matrimonial court to unprecedented lengths. Instead, the issue is whether the plaintiff-mother, who has *de facto* custody of the child and is fully responsible for her care and upbringing, can condition the defendant-father's access with the child, which is limited and supervised, on defendant and his supervisor being vaccinated, or at the very least, submitting to a testing regimen prior to each of the access periods.

## **BACKGROUND**

The parties were married in 2015, and their child, a daughter, was born in 2018. After intense marital discord, plaintiff commenced this action for divorce in September of 2019. Since that time, the high-conflict nature of this action has only increased. Plaintiff, recounting defendant's history of substance abuse and untreated mental health issues, as well as the significant periods where he had not seen the child at all, sought to have defendant's access subject to supervision. Sharing plaintiff's concerns for the child's safety and well-being while in defendant's care, I directed, by an order dated May 13, 2021, that his parental access be supervised by Comprehensive Family Services, an independent parenting services agency. I later modified the order to permit supervision by defendant's parents.

Although there has yet to be a final determination as to custody, plaintiff is the residential parent, with the child living exclusively with her in Manhattan, where the parties lived prior to their separation in 2019 and where the child attends preschool. Defendant lives with his parents on Long Island. His parenting time with his daughter is limited to daytime access every other weekend and continues to be supervised by his

parents, mainly his mother. The child is represented by a Guardian ad Litem (the "GAL") appointed by the court.

On September 2, 2021, plaintiff, joined by the GAL, made an emergency oral application for defendant and any supervisor utilized for defendant's access to be vaccinated against COVID-19. On that date, I issued a Temporary Restraining Order (TRO) suspending defendant's in-person access on an interim basis until he was vaccinated. Plaintiff, as directed, subsequently brought a formal motion by Order to Show Cause seeking the same relief, with defendant having submitted his affidavit and his attorney's affirmation in opposition, and the GAL having submitted an affirmation in support.

I heard oral argument on the motion virtually on September 15, 2021. At argument, both plaintiff and the GAL stipulated on the record that, in lieu of defendant showing proof of his being vaccinated, they would accept his agreeing to a regular protocol of COVID-19 testing as a condition for the resumption of in-person parenting time. Defendant, for reasons that seemed more connected to his animosity to plaintiff than anything else, refused this reasonable proposal.

Following the argument, I continued the TRO but amended it to provide that defendant's in-person access with the child would remain suspended until he and any approved supervisor either received a first dose of a COVID-19 vaccine or submitted to a COVID-19 testing regimen that included a PCR test once per week and a COVID-19 antigen test (AKA "rapid test") within 24 hours of any in-person visit. As with the original TRO, defendant was to continue to have liberal virtual and telephone access.

## **DISCUSSION**

It is well-established that there is a "rebuttable presumption that visitation by a noncustodial parent is in the child's best interest and should be denied only in exceptional circumstances" where "compelling reasons and substantial evidence show that visitation would be detrimental to the child" (*Matter of Josephine F. v Rodney*

W., [168 A.D.3d 486](#) at 486 [1st Dept 2019]) or is otherwise "inimical to the welfare of the child" (*Matter of Granger v Misercola*, [21 N.Y.3d 86](#), 90 [2013]). Further, "[t]he 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.D.3d 813, 816 [2d Dept 2020], quoting *Matter of Velasquez v Kattau*, [167 A.D.3d 912](#), 913 [2d Dept 2018]).

Here, in-person parental access by defendant is not in the child's best interests, and there are exceptional circumstances that support its suspension. The danger of voluntarily remaining unvaccinated during access with a child while the COVID-19 virus remains a threat to children's health and safety cannot be understated. Although some children infected with the virus experience mild symptoms, others are subject to serious illness and long-term health effects. Children under the age of 12 have not yet been approved to receive COVID-19 vaccines, so they are dependent upon the vaccination and health status of the adults around them. 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.

New York is transitioning towards a "new normal" where 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. The widespread availability of three different no-cost 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 in order to participate meaningfully in everyday society. As of August 17, 2021, New York City requires everyone over the age of 12 to provide proof of vaccination to enter bars, restaurants, indoor entertainment, and gyms. New York City public employees, public school teachers, police officers, health care workers, and others are being required to be vaccinated in order to continue their employment. The Federal Government has mandated proof of vaccination or a recent negative COVID-19 test policy for workplaces with over 100 employees, and the same or both is required to travel to many foreign countries. Unvaccinated individuals can even be precluded from serving

on juries before the U.S. Federal Court. And as of the last few weeks, the New York's Unified Court system is mandating vaccination for all court employees, including judges, clerks, and court officers, with those qualifying for a narrow range of exemptions required to submit to weekly testing.

Most relevant to this case, the child's preschool requires that teachers, staff, and any parent who participates in pick-ups or drop-offs or is otherwise involved in any school activity all be vaccinated. Defendant professes to love his daughter with all his being, and he asserts that he wants nothing more than to play an active and meaningful role in her life, which, presumably, would include dropping her off and picking her up from school and being part of her school community. Nevertheless, he adamantly refuses to do what his daughter's schoolmates' parents have all been required to do—be vaccinated.

Defendant's arguments against vaccination are unconvincing. In response to plaintiff's emergency oral application on September 2, 2021, defendant stated that because he already had COVID-19, he believed he carries sufficient antibodies to the virus. To this end, he asserted he would consult with his doctor and provide expert medical opinion as to if he should receive the vaccine, and if so, when. In his affidavit in opposition, however, defendant abandoned that argument and seemingly never consulted with a medical professional about being vaccinated. Instead, he adopted the novel position that his "religious beliefs as a Roman Catholic" precluded him from receiving the vaccine. This justification rings hollow given that Pope Francis, the head of the Catholic Church, is vaccinated and has encouraged Catholics everywhere to be vaccinated for "the common good." Defendant also sought to depict any vaccination requirement as an unreasonable intrusion on his rights as an American citizen. In doing so, he failed to recognize that those rights are not absolute but are subject to his duty as a citizen to other citizens and his duty as a parent to his child.

It is not necessary to more fully address defendant's reasons for not being vaccinated, be they medical, religious, or constitutional. This is because he was offered an alternative to vaccination: submit to regular COVID-19 testing. When presented with

this option, defendant rejected it outright unless the plaintiff was subject to the same testing regimen. Given that plaintiff is fully vaccinated, and she has daily in-person contact with the child as her full-time residential parent, it is apparent that defendant's ultimatum was motivated by a desire to burden the plaintiff as opposed to a commitment to keeping his child safe.

In suspending defendant's in-person access on an interim basis, I am, of course, cognizant of the pronouncement of our Court of Appeals in *S.L. v. J.R.*, [27 N.Y.3d 558](#) (2016) that even temporary custody determinations should generally be made only after a plenary hearing. The Court recognized, however, that the "general" right to a hearing is not an absolute one" (*id.* at 563). There are multiple reasons here not to deprive plaintiff and the GAL of the relief they seek without having to wait weeks or months for a plenary hearing. These include the exigency of the circumstances with the risk of imminent harm to the child, the already extensive experience I have with the parties and my familiarity with their issues involving defendant's parental access, and the fact that, by necessity, matrimonial courts routinely determine temporary access schedules—unlike determining custody—on motion papers and argument alone.

## **CONCLUSION**

In the final analysis, the fundamental question in this dispute between the child's two parents is this: What matters more to each of them, his or her own interests or those of their child? On one hand, there is the defendant-father, who is unable to offer any reasonable, let alone compelling, reason why he should not be vaccinated or even undergo testing, resisting both simply because he sees it as his "right" to do so. On the other hand, there is the plaintiff-mother, who is fully vaccinated and observant of COVID-19 protocols, seeking the imposition of reasonable conditions on defendant's access not because it somehow benefits her, but because it serves to protect the health, safety, and well-being of the child.

Inasmuch as I find that requiring defendant and anyone regularly supervising his access to be vaccinated against COVID-19 or else undergo regular testing to be in the child's best interests, plaintiff's motion is granted. Accordingly, defendant's in-person parental access with the child is suspended until such time as he complies with the terms of the amended Temporary Restraining Order. Defendant shall continue to enjoy liberal virtual and telephone access with the child.

This constitutes the decision of the court.