



Vaccinating Problems

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When Jacob Holmes turned one, his pediatrician administered the MMR II vaccine in conformity with the recommendations set by the Centers for Disease Control and Prevention. Within nine days, he was having seizures. Six months later Jacob was dead.¹

After the whooping cough vaccine was invented in the 1940s, many thought the highly contagious disease had been conquered. Yet in 2010, a whooping cough outbreak in California killed ten infants and hospitalized hundreds.² Studies would later prove that unvaccinated children fueled the California tragedy.³

With each new school year, some parents argue whether to immunize their children⁴ and the majority do.⁵ However, a minority of parents object to vaccinations.⁶ A few objectors assert their individual liberties.⁷ Others are risk averse to the potential impact of vaccinations.⁸ Celebrity anti-vaccination campaigns, a new form of McCarthyism, confuse many.⁹ Primarily though, objecting parents hold sincere religious beliefs against immunization.¹⁰

There are two vaccination opinions in Florida, and the facts in each are strikingly similar. In both cases, the parents shared parental responsibility. Both involved chiropractors as parents who were involved in their children's health care. Moreover, in both cases the health care professional parent opposed vaccinations.¹¹ Ironically, the outcomes in the two cases were very different.

This article briefly examines the parental responsibility statute, the two Florida cases in which the decision to vaccinate a child was an is-

sue brought to trial, and traces the development of religion as a factor in parental responsibility cases.

Getting to the Point: Ultimate Responsibility

Generally, shared parental responsibility is a relationship ordered by a court in which both parents retain their full parental rights and responsibilities. Under shared parental responsibility, parents are required to confer with each other and jointly make major decisions affecting the welfare of their child.¹²

In Florida, shared parental responsibility is the preferred relationship between parents when a marriage or a relationship ends. In fact, courts are instructed to order parents to share parental responsibility of a child unless it would be detrimental to the child.¹³

Issues relating to a child's physical health and medical treatment, including vaccinations, are major decisions affecting the welfare of a child. When parents cannot agree, the dispute is resolved in court.¹⁴ At the trial, the test applied is the best interests of the child.¹⁵

Determining the best interests of a child is no longer entirely subjective. Instead, the decision is based on an evaluation of 20 statutory factors, and one equitable catch-all factor, affecting the welfare and interests of the child and the circumstances of the child's family.¹⁶

The legislature has given a booster to the statute by authorizing one parent to have ultimate responsibility for certain decisions.¹⁷ For example, health care is an area of ultimate responsibility a court can award. When a decision on vaccination goes to trial, the court does not make the decision to vaccinate a child. Instead, the court grants one parent ultimate responsibility to make that decision.

Double Dose: *McGrath* and *Winters*

McGrath v. Mountain was a paternity action.¹⁸ The parents entered into a partial agreement but could not agree on whether the child should be immunized. The parents went to court on the immunization issue alone.¹⁹

The Father's case-in-chief focused on the health benefits of immunization. The Mother, a chiropractor who used holistic medicine and homeopathy in treating her son, opposed immunization. The Mother's case consisted of evidence to support her position on both medical and religious grounds.

The trial court ruled that it would be in the child's best interest to allow the mother to make the ultimate decision regarding the child's immunization. The court did not offer any further findings on the religious or public safety controversy over vaccinations.

The Fifth District affirmed. Applying a competent, substantial evidence standard, the *McGrath* court ruled that the trial judge had sufficient evidence before it to support the decision and declined to substitute its judgment for that of the trial judge's.

It is important to remember that in *McGrath*, the Mother introduced evidence to support her position *on medical grounds*, not just religious grounds. Unfortunately, the *McGrath* panel did not address the impact of the Mother's religious views, or the risk of harm to the child that vaccinations may or may not cause.

In *Winters v. Brown* the Mother was also a chiropractor and proponent of holistic medicine.²⁰ A tenet of the Mother's beliefs was that God created the human body with an innate immune system that enabled the body

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to heal itself. Anything introduced into the body to prevent disease or treat illness is against the will of God. The Mother fervently opposed vaccinations on religious grounds.

The Mother was not only a health-care professional, she was also very involved in her child's health care. The Mother never vaccinated the child, but instead obtained Florida's lawful exemption from immunization.²¹ Evidence introduced at trial confirmed that the child was healthy without vaccinations, and that the child had suffered no harm to date from not being immunized.

Conversely, the Father wanted the child to receive traditional medical care, including vaccinations, and the issue was brought to trial. The trial court held three hearings to determine responsibility for the minor child's health care. Both parties introduced experts to testify about the life safety and effectiveness of vaccinations.

The Father's expert testified that vaccinations are safe and effective and that children who are not vaccinated are at increased risk for problems with infections. Moreover, children who are not vaccinated put other children at risk of harm in their schools and where they play.

The Mother's expert testified that one in five children in this country suffer from some form of neurodevelopmental disorder, so we have to question the role vaccines play in introducing toxic materials into the brain, and impairing the protection that children have with the blood-brain barrier. The Mother's expert concluded that "it's less harmful for a child not to be vaccinated than it is for a child to be vaccinated."

The trial court found the issue was not "simply exposing the minor child to the mother's religious beliefs and practices," but an issue "that could

cause physical and serious harm to the minor child." Based on the finding of harm, the judge determined that it was in the best interests of the child to award the Father ultimate responsibility regarding vaccinations.

The Fourth District affirmed based solely on a substantial competent evidence review. The opinion did note that court ordered restrictions on religious practices have generally been overturned, but concluded that religious practices can be restricted when there is a clear, affirmative showing that they "will be harmful to the child." As will be discussed below, *Winters* is not the first time that religion needled its way into a marital dispute.

Injecting Religion into Parental Responsibility Decisions

Religion, religious beliefs, and religious practices are not specific statutory factors in determining parental responsibility. Nor are they areas in which a parent may be granted ultimate responsibility. Instead, the weight religion plays in custody disputes incubated over time in various cases.²²

The earliest Florida case in which religion was a factor in deciding parental responsibility was the First District case of *Rogers v. Rogers*.²³ In *Rogers*, the appellate court considered a final judgment restricting one parent from exposing the children to that parent's religion.

The Mother was a member of The Way International, and the Father introduced evidence that The Way made the Mother an unfit parent. He alleged The Way psychologically brainwashed her, that she had become obsessed, and was neglecting the children.

The trial judge awarded custody to the Mother provided that she sever all connections, meetings, tapes, visits, communications, or financial support with The Way, and not subject the children to any of its dogmas.

The Mother appealed the restrictions as a violation of her free exercise of religion.

The First District reversed, and held the trial judge's restrictions were unconstitutionally overbroad and expressly restricted the Mother's free exercise of her religious beliefs and practices. However, the *Rogers* court approved consideration of the Mother's religious beliefs as "one of several factors aiding in its child custody determination." The panel concluded that the trial judge could not condition custody on her curtailment of a religious activity or belief.

Mesa v. Mesa, was a case of first impression in Florida.²⁴ In *Mesa*, the court considered a trial order which chose between two parents' religious beliefs and practices. The parents were members of different churches. The Mother's church was found to be more "charismatic," but there was never evidence the Mother's church was harmful to the children.

After a trial, the judge awarded primary residence to the Father, prohibited the children from attending the mother's religious services and prohibited the Mother from educating the children in her religious practices.

The Fourth District overturned the trial court's prohibition. The *Mesa* panel noted that courts around the country had been consistently overturning restrictions on religion unless there was a clear, affirmative showing that these religious activities will be harmful to the child.²⁵

The rationale for the *Mesa* holding is that allowing a court to choose between two parents' churches, religious beliefs and practices – in the absence of a clear showing of harm to the child – violates the First Amendment as established in *Rogers*.

In *Abbo v. Brislin*, the same court that decided *Mesa*, held that a trial judge cannot order a parent to raise a child in a particular faith – even if there was an agreement between the two parents to raise the child in a particular religion.²⁶

When the parents met, the Mother



was Catholic and the Father was Jewish. Prior to marrying, the Mother verbally agreed to convert to Judaism. Shortly after the birth of their daughter, the mother converted back to Catholicism and filed for divorce. The principal dispute at trial was the child's religion.

While the trial judge designated the Mother as the primary custodial parent, he ordered her to raise the child Jewish based on her prior verbal agreement to convert to Judaism. After rehearing, the judge also ordered her not to interfere in the child's Jewish upbringing or to influence the child's religious training in any direction other than Judaism. The Mother appealed.

Abbo is unique because the ruling was based on the parents' agreement, not the 'best interests of the child.' The *Abbo* panel held that the court could not compel raising a child in a certain religion based on the parents' agreement that one of the parents convert – especially after the parent has had a good faith change of religious conscience.²⁷ Contrary to the *Rogers* line of cases, the *Abbo* court found “[t]here is absolutely nothing in the statutory listing that expressly makes the religious training of the child a factor that the court should consider.”

Parting Shots

Vaccinations are safe but carry risks parents want to avoid. The increasing outbreaks of vaccine preventable illnesses, such as the 2010 California whooping cough epidemic show it can be more lethal not to inject. Given the high risk of harm from being unvaccinated, finding the refusal to vaccinate is not in a child's best interest seems like a sure shot.

However, cases are never so sterile. For instance, not every parent objecting to vaccinations is going to be a cigarette company spokesperson who lectures people about public health in her free time.²⁸ More likely, the object-

ing parent will have deep religious beliefs about vaccinations.

In considering the religious practices and beliefs of a parent, courts have to avoid religious discrimination, yet protect children from harmful religious practices. Vaccination disputes are interesting and high-stakes cases to watch for as the new school year approaches.

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Endnotes

- 1 See *Holmes v. Merck & Co., Inc.*, 697 F.3d 1080, 1081 (9th Cir. 2012).
- 2 See Kathleen Winters MPH, *California pertussis epidemic, 2010*, *The Journal of Pediatrics* (Dec. 2012).
- 3 See Mary MacVean, *Unvaccinated children helped fuel whooping cough outbreak, data show*, *Los Angeles Times*, (October 5, 2013).
- 4 There is a difference between vaccinations and immunizations. A vaccination is an injection of a killed or weakened organism that produces immunity against that organism. Immunization is the process by which a person becomes protected from a disease. See *Basics*, available at <http://www.vaccines.gov/basics/>.
- 5 See §1003.22, Fla.Stat. (2014). See also, Ryan Jaslow, *CDC: Vaccination rates among kindergartners high, but exemptions worrisome*, *CBS News* (August 1, 2013) (CDC researchers found 94.5% received the MMR doses.) Available at <http://www.cbsnews.com/news/cdc-vaccination-rates-among-kindergartners-high-but-exemptions-worrisome/>
- 6 See *The History of Vaccines: a Project of the College of Physicians of Philadelphia*, available at <http://www.historyofvaccines.org/content/articles/cultural-perspectives-vaccination> (last visited November 11, 2013).
- 7 See *Jacobson v. Mass.*, 197 U.S. 11 (1905) (Finding Cambridge's compulsory vaccination for smallpox was a legitimate exercise of police powers.).
- 8 See 42 U.S.C. §300aa-10(a) (Establishing the National Vaccine Injury Compensation Program, more popularly known as “vaccine court”, in which compensation may be paid for vaccine-related injuries or deaths.).
- 9 See e.g. Generation Rescue available at www.generationrescue.org (listing Jenny McCarthy, as president, and issuing a statement in support of the Andrew Wakefield paper linking vaccinations and autism.) But see Brian Deer, *Wakefield's “autistic enterocolitis” under the microscope*, *British Medical Journal* (2010) (Noting Andrew Wakefield's paper linking autism to the MMR vaccination was retracted

after he was found guilty of deliberate fraud.) Available at <http://www.bmj.com/content/340/bmj.c1127?view=long&pmid=20395277>.

10 See §1003.22(5)(a), Fla.Stat. (2013) (“The parent of the child objects in writing that the administration of immunizing agents conflicts with his or her religious tenets or practices.”). But see Steve Leblanc, *Parents use religion to avoid vaccines*, *USA Today*, October 18, 2007. Available at http://usatoday30.usatoday.com/news/health/2007-10-18-religion-vaccines_N.htm?csp=34

11 It is no coincidence the objecting parents were both chiropractors. The primary belief of the chiropractic profession is in natural methods of health care. Chiropractors believe the human body has the ability to heal itself without surgery or medication. See *Chiropractic Philosophy*, American Chiropractic Association, available at http://www.acatoday.org/lev-el3_css.cfm?T1ID=13&T2ID=61&T3ID=149

12 See §61.046(17), Fla.Stat. (2014).

13 See §61.13(2)(c)(2), Fla.Stat. (2014).

14 See *Tamari v. Turko-Tamari*, 599 So.2d 680, 681 (Fla. 3d DCA 1992).

15 See *Sotnick v. Sotnick*, 650 So.2d 157 (Fla. 3d DCA 1995).

16 See *Id.*

17 See §61.13(2)(c)(2)(a), Fla.Stat. (2013).

18 784 So.2d 607 (Fla. 5th DCA 2001).

19 *Id.* at 608.

20 51 So.3d 656 (Fla. 4th DCA 2011).

21 *Id.* at 657.

22 See Deborah Marks, *Religious Freedom v. Parental Responsibility Determinations*, 72 Fla.B.J. 62 (Aug. 1998).

23 490 So.2d 1017 (Fla. 1st DCA 1986).

24 652 So.2d 456 (Fla. 4th DCA 1995)

25 See *Id.* at 457.

26 660 So.2d 1157 (Fla. 4th DCA 1995).

27 See also *Sotnick v. Sotnick* 650 So.2d 157, 160 (Fla. 3d DCA 1995) (Finding “the great weight of legal authority is against enforcement of such [religious training] agreements” and that “the statutory procedure for shared parental responsibility is controlling instead.”).

28 In addition to speaking out against immunizing children against deadly infectious diseases, Jenny McCarthy is helping to introduce a new generation of youth to nicotine addiction as the spokesperson for Blu e-cigarettes. See *E-cigarette use more than doubles among U.S. middle and high school students from 2011-2012*, *CDC Press Release*, (September 5, 2013) available at <http://www.cdc.gov/media/releases/2013/p0905-ecigarette-use.html>. The irony of Jenny McCarthy speaking out against toxic vaccines, yet promoting toxic nicotine inhalers for a ‘Big Tobacco’ company, is not lost on many. See e.g. Michael Sebastian, *Jenny McCarthy to Star in Latest Blu E-Cig Commercials*, *Ad Age*, (Aug. 2013) (“I don’t think that it’s their finest marketing hour,” said Peter Hamm, of the Campaign for Tobacco-Free Kids.”) available at <http://adage.com/article/media/jenny-mccarthy-star-latest-blu-e-cig-commercials/243420/>.