

YOU CAN'T UNRING A BELL: THE UNPLANNED CONSEQUENCES OF TAKING COVID-19 VACCINE DISPUTES TO FAMILY COURT AND ALTERNATIVE METHODS TO RESOLVE THESE DISPUTES

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INTRODUCTION

The repercussions of the COVID-19 pandemic are both severe and far-reaching. They have been felt across the globe and right here at home. As of January 15, 2023, the United States (U.S.) has seen over 101 million total cases of COVID-19 and over 1.1 million deaths.¹ Millions of jobs were lost, industries were ruined, and schools were closed.² Extreme levels of poverty went up for the first time in twenty years due to COVID-19.³ While the U.S. economy did rebound faster than expected, thanks to the fiscal support of the government, these consequences will be long felt and have a vast impact on the lives of every American.⁴

COVID-19 touched nearly every aspect of life: physical, social, emotional, financial, and relational. Lives were lost. Weddings, birthdays, and births went uncelebrated while we all hunkered in place. Families were broken up⁵, income was lost while bills continued,⁶ and many relationships ended from the stress of the situation.⁷ In a survey done by the Pew Research Center, 41% of Americans

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1. *Coronavirus in the U.S.: Latest Map and Cast Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/us/covid-cases.html> (last visited Aug. 17, 2023).

2. *From Equality to Global Poverty: The COVID-19 Effects on Societies and Economies*, WELLCOME (June 29, 2021), <https://wellcome.org/news/equality-global-poverty-how-COVID-19-affecting-societies-and-economies>.

3. *Id.*

4. *The Economic Report of the President: The U.S. Economy and the Global Pandemic*, WHITE HOUSE (April 2022), <https://www.whitehouse.gov/wp-content/uploads/2022/04/Chapter3.pdf>.

5. Holly Ellyatt, *Arguing with Your Partner over Covid? You're Not Alone, with the Pandemic Straining Many Relationships*, CNBC (Jan. 21, 2022, 3:02 AM), <https://www.cnn.com/2022/01/21/covid-has-put-pressures-and-strains-on-relationships.html>.

6. Nadia S. Al-Amin et al., *Covid-Related Stressors and Psychological Distress Among Chicago Residents: The Moderating Role of Race*, J. RACIAL & ETHNIC HEALTH DISPARITIES (2023), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9987389/pdf/40615_2023_Article_1544.pdf.

7. Ellyatt, *supra* note 5.

said that the pandemic had a negative effect on their personal relationships.⁸ Additionally, 28% said the pandemic had a negative effect on the physical and mental health of themselves or others.⁹ Finally, 23% said the pandemic had a negative effect on their job, or the jobs of the people they know.¹⁰

The pandemic also affected the legal profession in many ways. Several practice areas saw exponential growth during the pandemic because of pandemic-related behavior.¹¹ An increased workload resulted in high demand for attorneys across the U.S.¹² One area of law that saw an increase in demand during the pandemic was family law. The past two years saw an increase in divorces and separations,¹³ parents defying court orders by modifying custody arrangements on their own,¹⁴ and parental concerns and disputes over the COVID-19 vaccine.¹⁵

This Note will begin by exploring the dynamics between federal family law and state family law, their limitations in the area of public health, and their foundational principles. Disagreements over vaccines can happen in many family structures. The three disagreements this Note will focus on are between married parents, between parents going through a divorce, and between parents who have already divorced and have a custody agreement in place with the courts.

Next, this Note will walk through the history of the anti-vaccination movement as it began in the 1800s in England, caught fire in the U.S. in 1998 thanks to the internet and a discredited paper, and took on a new life at the beginning of the COVID-19 pandemic. This vaccine hesitancy, or hostility towards vaccines, has led to disputes between parents on whether to vaccinate their child against COVID-19. Law firms that specialize in family law across the country have seen an increasing number of parents calling in with this very issue.¹⁶ As these cases have begun to find their way into courts, judges have begun to weigh in on the issue.¹⁷

8. *In Their Own Words, Americans Describe the Struggles and Silver Linings of the COVID-19 Pandemic*, PEW RSCH. CTR. (Mar. 5, 2021), <https://www.pewresearch.org/2021/03/05/in-their-own-words-americans-describe-the-struggles-and-silver-linings-of-the-COVID-19-pandemic/>.

9. *Id.*

10. *Id.*

11. Carol Schiro Greenwald, *COVID-19 and Its Lasting Impact on the Legal Profession*, NYSBA (Oct. 13, 2021), <https://nysba.org/COVID-19-and-its-lasting-impact-on-the-legal-profession/>.

12. Michelle Foster, *The Effect of the Pandemic on the Legal Industry*, FORBES (Nov. 8, 2021), <https://www.forbes.com/sites/forbesbusinesscouncil/2021/11/08/the-effects-of-the-pandemic-on-the-legal-industry/?sh=7f78006c7f77>.

13. Ellyatt, *supra* note 5.

14. *COVID-19 Pandemic has an Impact on Family Law*, LAWRENCE L. BLOG (Mar. 19, 2020), <https://lawlawfirm.com/COVID-19-pandemic-has-an-impact-on-family-law/>.

15. Debra Kamin, *You Want Your Child Vaccinated, but Your Ex Says No*, N.Y. TIMES (Apr. 4, 2022), <https://www.nytimes.com/2022/04/04/well/covid-vaccine-divorced-parents.html>.

16. Cassandra Lybrink et al., *Parents Prepare for Legal Battles Following Vaccine Approval for Young Children*, HOLLAND SENTINEL (Nov. 10, 2021, 6:00 AM), <https://www.hollandsentinel.com/story/news/coronavirus/2021/11/10/parents-prepare-legal-battles-after-vaccine-approval-young-children/6356911001/>.

17. Patricia Fersch, *Vaccine Custody Wars: Update Part Two*, FORBES (Nov. 1, 2021, 3:42 PM), <https://www.forbes.com/sites/patriciafersch/2021/11/01/vaccine-custody-wars-update-part-two/?sh=31e0955d3acc>.

This Note will continue by looking at how vaccine disputes over the COVID-19 vaccine are currently playing out in family courts across the country. While the majority of these cases end up with a favorable ruling for the pro-vaccine parents, some judges have decided to take things a step further, inserting themselves into the vaccine dispute with sometimes damaging results.

Finally, this Note will focus on options for keeping these disputes out of family court all together. Instead of taking these issues to court there are other methods to resolve these disputes. One option is to seek out mediation or arbitration. Families may also choose to visit a therapist or family counselor to help work through these issues. Another option would be visiting the child's pediatrician to work through issues of misinformation and disinformation. Pediatricians are the most trusted source for information regarding each specific child's health needs.¹⁸ They will be able to provide parents with concrete data about the vaccine and determine if the vaccine is right for the child and their health needs and goals.

Keeping vaccine disputes outside of the court will save couples time and money and the possibility of a drastic change in the existing parenting plan or custody arrangement. If both parties are willing to work through the issue and speak candidly about their reasoning, this issue can be dealt with together, utilizing a variety of mediums. This issue is likely to be seen again in the future—the next time we deal with a global health crisis. Anything that can be done now to mitigate future issues will help all involved.

BACKGROUND

Family law has traditionally been an area controlled at the state level.¹⁹ State legislatures define what constitutes a family and create laws that regulate everything from marriage and divorce to child custody and child welfare.²⁰ Starting in the 1930s the federal government intervened to address problems that states had been unwilling or unable to tackle.²¹ As early as 1923, in *Meyer v. Nebraska*, the Supreme Court of the United States (SCOTUS) held that the Due Process Clause of the Fourteenth Amendment protects a parent's right "to marry, establish a home, and bring up children."²² This trend continued in 1925 with *Pierce v. Society of Sisters*, where SCOTUS, relying on *Meyer*, held an Oregon statute that required parents to send their children to public schools instead of private or parochial

18. See Liz Hamel et al., *KFF COVID-19 Vaccine Monitor: Parents and the Pandemic*, KFF 14 (Aug. 11, 2021), <https://files.kff.org/attachment/TOPLINE-KFF-COVID-19-Vaccine-Monitor-Parents-and-the-Pandemic.pdf>. See also Gary L. Freed et al., *Sources and Perceived Credibility of Vaccine-Safety Information for Parents*, 127 AM. ACAD. OF PEDIATRICS S107, (May 2011).

19. *Comparing Federal & State Courts*, UNITED STATES COURTS, <https://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts> (last visited Aug. 17, 2023).

20. Linda D. Elrod, *The Federalization of Family Law*, AM. BAR ASS'N (July 01, 2009), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol36_2009/summer2009/the_federalization_of_family_law/.

21. *Id.*

22. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

schools, was unconstitutional because it unreasonably interfered “with the liberty of parents and guardians to direct the upbringing and education of children under their control.”²³ This new progressive movement ended what was essentially a property-like system of parentage.²⁴ It replaced the old system with a system that gave parents control over the decisions in their children’s lives, in which the government’s role was that of paternalistic oversight.²⁵

More recently, in 2000, SCOTUS, in *Troxel v. Granville*, declared unconstitutional a Washington State statute that allowed any person to petition the court for visitation rights.²⁶ The Court stated, “The liberty interest at issue in this case - - the interest of parents in the care, custody, and control of their children -- is perhaps the oldest of the fundamental liberty interests recognized by this Court.”²⁷ The fundamental right to raise children as one deems appropriate as a parent, is a long-held belief in this country. This right is not explicitly mentioned in the text of the U.S. Constitution, which means it is an unenumerated right. However, it is often left out of conversations pertaining to eliminating other more controversial substantive due process rights such as the right to contraception and the right to marry someone of the same sex.²⁸ In June of 2022, when the Court handed down its opinion in *Dobbs v. Jackson Women’s Health Organization*, which overturned *Roe v. Wade* and eliminated the fundamental right to access an abortion, many Americans were alarmed by Justice Thomas’s concurrence in which he signaled that other substantive due process rights could be in jeopardy in the future.²⁹ Just because constitutional parental rights were not explicitly mentioned as a target of future SCOTUS decisions does not mean they are safe. As one reporter theorized, “Eliminating a landmark decision,” like *Roe v. Wade*, “is like cutting a hole in a tapestry, and we don’t know yet how much of constitutional law will unravel.”³⁰

The right to raise children as one deems appropriate is not absolute. SCOTUS has created some important exceptions to this fundamental right.³¹ The principle, *paren patriae*, Latin for “parent of the country or homeland,”³² dictates that the

23. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925).

24. Elizabeth S. Scott, *History of Children and the Law*, THE ALI ADVISER (July 7, 2017), <http://www.thealiadviser.org/children-law/history-children-law/>.

25. *Id.*

26. *Troxel v. Granville*, 530 U.S. 57, 67 (2000).

27. *Id.* at 65.

28. Aviam Soifer, *Parental Constitutional Rights: Undercut or Overstated?*, THE HILL (Sept. 15, 2022, 6:00 PM), <https://thehill.com/opinion/judiciary/3644625-parental-constitutional-rights-undercut-or-overstated/>.

29. Zach Beauchamp, *Could Clarence Thomas’s Dobbs Concurrence Signal a Future Attack on LGBTQ Rights?*, VOX (June 24, 2022, 2:36 PM), <https://www.vox.com/2022/6/24/23181723/roe-v-wade-dobbs-clarence-thomas-concurrence>.

30. Robert L. Tsai, *What Rights Could Unravel Next*, POLITICO (May 3, 2022, 12:52 PM), <https://www.politico.com/news/magazine/2022/05/03/supreme-court-abortion-draft-other-preceden-ts-00029625>.

31. Mark R. Ashton, *Vaccination Wars go to Custody Court*, JD SUPRA (Sept. 1, 2021), <https://www.jdsupra.com/legalnews/vaccination-wars-go-to-custody-court-5510519/>.

32. Legal Information Institute, *Parens Patriae*, CORNELL L. SCH., https://www.law.cornell.edu/wex/parens_patriae (last updated May 2022).

state has a protective or paternal role over its citizens.³³ The courts have used this doctrine to hold that religious and parental rights are subordinate to society's right to protect children and keep them safe.³⁴ In 1944, SCOTUS held that a parent's right to practice religion freely "does not include liberty to expose the community or its children to communicable disease or the latter to ill health or death."³⁵ SCOTUS stated, "[p]arents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children."³⁶ These decisions help create and define boundaries in how parental rights interact with public health.³⁷

The cases above show how courts deal with disputes between parents and third parties, or non-parents. When cases involve two individuals with parental rights the court has a harder time balancing the rights of both parties. Under English common law, for custody determinations, the father was presumed the owner of his children (property) and using a one-size-fits-all method was always given custody of the children.³⁸ This later changed to the "tender-years presumption," which found that women were the best caretakers for younger children.³⁹ This presumption was later overturned as a violation of the Equal Protection Clause.⁴⁰ Currently, all states use the "best interests of the child" test when determining who should get custody of the children.⁴¹ We saw this in action in *McIntosh v. McIntosh* out of the Court of Appeals of Michigan.⁴² In this case, the plaintiff father requested a custody modification to bring custody back to an equal split with defendant mother, claiming the court ignored a psychological evaluation which concluded that an equal custody split would be best for the child.⁴³ The appeals court noted that when analyzing what is in the best interest of the child no one single factor should be dispositive.⁴⁴ The court pointed out that the psychological evaluation should be one of many factors balanced when looking to modify a custody agreement. The court affirmed the custody arrangement finding the fact that the plaintiff father was an alcoholic and was prone to violent outbursts when drinking meant the child would be better off living with his mother.⁴⁵

33. *Id.*

34. Mark R. Ashton, *Vaccination Wars go to Custody Court*, JD SUPRA (Sept. 1, 2021), <https://www.jdsupra.com/legalnews/vaccination-wars-go-to-custody-court-5510519/>.

35. *Id.*

36. *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

37. While many parents disagree with vaccination for religious reasons, I will not be discussing in depth religious exceptions to vaccinations in this Note.

38. ROBERT E. OLIPHANT & NANCY VER STEEGH, *WORK OF THE FAMILY LAWYER* 149 (5th ed. 2020).

39. *Id.* at 149.

40. *Id.*

41. *See Marriage and Divorce Act*, *infra* note 51.

42. *McIntosh v. McIntosh*, 768 N.W.2d 325, 328 (Mich. Ct. App. 2009).

43. *Id.* at 327.

44. *Id.*

45. *Id.* at 331.

Once the courts and legislatures created lists of factors for the best interest of the child inquiry to be used when determining custody, they also needed to determine what factors should not be used. In *Palmore v. Sidoti*, SCOTUS overturned a lower court's ruling that took away custody from a mother after she started dating and eventually married a man of a different race.⁴⁶ The lower court found that removing the child from the mother's custody would be in the best interest of the child because her mother had chosen "a life-style unacceptable to the father and to society."⁴⁷ SCOTUS commented on how the lower court did not focus on any party's ability to parent but instead choose to candidly argue that race was the determining factor in the best interest of the child inquiry.⁴⁸ The modification of custody was reversed because it violated the mother's Fourteenth Amendment right by creating a racial classification that allowed private biases to enter the law.⁴⁹ Because of this ruling and others like it, courts will no longer consider race, gender, or other non-related characteristics of the parents when ruling on custody.

I. THE FAMILY LAW STRUCTURE IN STATE COURTS

Because family law is primarily dealt with at the state level, there is wide latitude between how states handle these issues. Each state has their own statutes, terms, and procedures they use in family court. For example, some states call the time granted to the non-custodial parent "visitation," while other states call it "parenting time."⁵⁰ Although states use different words to describe the same concepts, this Note will apply language that is most commonly used amongst the states. In an attempt to streamline and create uniformity, the Uniform Law Commission created the Model Marriage and Divorce Act (MMDA) in 1973,⁵¹ which has been fully adopted by six states,⁵² and partially adopted in a handful of other states.⁵³ Since its creation it has had an immense impact on divorce and marriage laws in all fifty states.⁵⁴

Family law revolves around the foundational idea that the court will always do what is in the best interest of the child.⁵⁵ This concept is used when determining custody arrangements and parenting plans during the divorce process or when custody becomes an issue. The court will also use this standard when looking to

46. *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984).

47. *Id.* at 431.

48. *Id.* at 432.

49. *Id.* at 433.

50. *Visitation*, AM. BAR ASS'N (Dec. 3, 2020), https://www.americanbar.org/groups/legal_services/milvets/aba_home_front/information_center/family_law/children/visitation/.

51. *Marriage and Divorce Act*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=c5a9ecec-095f-4e07-a106-2e6df459d0af> (last visited Aug. 17, 2023).

52. *Id.*

53. *Uniform Marriage and Divorce Act Law and Legal Definition*, US LEGAL, <https://definition.uslegal.com/u/uniform-marriage-and-divorce-act/> (last visited Aug. 17, 2023).

54. *Id.*

55. *See* North, *infra* note 71.

modify an existing custody arrangement or parenting plan. This is often the case when parents come to court over a disagreement about the COVID-19 vaccine.

The number of factors courts must look at to determine what is in the best interest of the child is extensive, and courts have a tough path to walk when balancing parental and religious rights against public safety. In the vast majority of custody cases, 90% of parents are able to come to an agreement on their own and there is no dispute for the court to decide.⁵⁶ When there is a dispute between the parents, as mentioned above, the court will use the best interest of the child standard.⁵⁷ At the time of divorce the court will review a list of factors, often listed in the state's statute, to determine which parent to grant physical custody and legal custody. For example, Ohio's Revised Code states:

[T]he court shall consider all relevant factors, including, but not limited to:

- (a) The wishes of the child's parents regarding the child's care....
- (c) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;
- (d) The child's adjustment to the child's home, school, and community;
- (e) The mental and physical health of all persons involved in the situation;
- (f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship right....⁵⁸

The court will use these factors to create a parenting plan. A parenting plan sets out which parent will be granted physical custody, and which will be granted legal custody.⁵⁹ The court can also choose to grant joint physical or legal custody to both parents.⁶⁰ Physical custody was defined by the Supreme Court of Nevada in *Rivero v. Rivero*.⁶¹ "Physical custody involves the time that a child physically spends in the care of a parent. During this time, the child resides with the parent and that parent provides supervision for the child and makes the day-to-day decisions regarding the child."⁶² In most cases the parent who is not awarded physical custody of the child is given the opportunity to spend time with the child.⁶³ This time is often referred to as visitation, however many states are changing the phrase

56. *Guidelines for Child Custody Evaluations in Family Law Proceedings*, AM. PSYCH. ASS'N (2010), <https://www.apa.org/practice/guidelines/child-custody>.

57. Jade Yeban et al., *Focusing on the "Best Interests" of the Child*, FINDLAW, <https://www.findlaw.com/family/child-custody/focusing-on-the-best-interests-of-the-child.html> (last reviewed May 30, 2023).

58. OHIO REV. CODE ANN. § 3109.04 (West 2011).

59. Christy Bieber, *Child Custody: Types, Laws & Parental Rights*, FORBES ADVISOR (Mar. 23, 2023, 5:02 AM), <https://www.forbes.com/advisor/legal/child-custody/child-custody/>.

60. *Id.*

61. *Rivero v. Rivero*, 216 P.3d 213, 218 (Nev. 2009).

62. *Id.* at 222.

63. E.A. Gjelten, *Child Visitation Guidelines*, NOLO, <https://www.nolo.com/legal-encyclopedia/child-visitation-faq.html> (last visited Aug. 18, 2023).

to parenting time, reflecting the importance of the time spent between parent and child.⁶⁴

In *Rivero* the court also defined legal custody: “legal custody involves having basic legal responsibility for a child and making major decisions regarding the child, including the child’s health, education, and religious upbringing.”⁶⁵ Here, the cases at issue in this Note look at the grant of legal custody because the ability to make medical decisions for children falls under the legal custody rights of a parent.

Once the court has made a custody determination, there is an opportunity to modify it. However, the bar to get back in front of a judge is significantly higher. Courts prefer to maintain their original custody arrangement in order to promote stability and continuity for the children involved.⁶⁶ The burden of proof for a custody modification varies from state to state. Most family courts will only consider modifying a custody arrangement if there is a material or substantial change in circumstances affecting the welfare and interest of the children since the original custody arrangement was entered.⁶⁷ Many states also apply a one-or two-year moratorium on bringing modification actions.⁶⁸ A request to modify legal custody is the rarest type of modification action and is often coupled with a request to modify physical custody.⁶⁹ One area where parents are increasingly prone to disagreement is over vaccinations for their children.⁷⁰

II. THE HISTORY OF THE ANTI-VACCINATION MOVEMENT AROUND THE WORLD AND IN THE UNITED STATES

Parental hesitance towards vaccines is not a new phenomenon. The origins of what is known as the anti-vaccination movement began as early as the nineteenth century in England when the government mandated the smallpox vaccine for children.⁷¹ Some say that the anti-vaccination movement is as old as vaccines themselves.⁷² The movement has seen many shifts throughout history, times when it was strong and forceful and others when it was virtually non-existent. For example, when the British government, in 1907, began to grant exemptions to the smallpox mandate for almost any reason, the anti-vaccination movement nearly died overnight.⁷³ In the U.S., in 1905, SCOTUS weighed in on

64. Susan J. Mundahl, *Scheduling Parenting Time When Parents Live in Different States*, MUNDAHL LAW, PLLC (Mar. 14, 2022), <https://www.mundahlaw.com/scheduling-parenting-time-when-co-parenting-in-different-states/>.

65. *Rivero*, 216 P.3d at 221.

66. OLIPHANT & VER STEEGH, *supra* note 38, at 239.

67. *Sanchez v. Hernandez*, 45 So.3d 57, 60-61 (Fla. Dist. Ct. App. 2010).

68. OLIPHANT & VER STEEGH, *supra* note 38, at 239.

69. *Id.* at 238.

70. Kamin, *supra* note 15.

71. Anna North, *The Long, Strange History of Anti-Vaccination Movements*, THE GOODS BY VOX (Mar. 4, 2022, 7:30 AM), <https://www.vox.com/the-goods/22958419/covid-vaccine-mandate-pandemic-history>.

72. *Id.*

73. *Id.*

vaccine mandates when they ruled on *Jacobson v. Massachusetts*.⁷⁴ The court held that the liberty granted to U.S. citizens by the Constitution is not free from restraint and that the police power of the state allows it to enact safeguards to public health and public safety.⁷⁵ As the twentieth century began, the medical field saw significant advancements in technology and Americans began to have an increased respect for doctors.⁷⁶ When the polio vaccine was introduced in 1955,⁷⁷ it received far less pushback than the smallpox vaccine.⁷⁸ This ushered in the highest level of trust by Americans in medical science to date.⁷⁹

It is important to note that advancements in medical technology did not benefit all Americans equally: “Black, Indigenous, and other Americans of color were often ignored and victimized in health care settings.”⁸⁰ Experiments, like the Tuskegee experiment, rooted in the racist idea that Black bodies were essentially different from their white counterparts are often cited as a reason for vaccine hesitancy in Black communities.⁸¹ The Tuskegee Study of Untreated Syphilis in the Negro Male (now referred to as the USPHS Syphilis Study at Tuskegee) ran from 1932 to 1972 and involved 600 Black men, 399 of which were infected with syphilis without their informed consent and without offering them treatment even though it was widely available at the time.⁸² “Tuskegee was far from the first instance of medical racism targeting Black Americans, nor would it be the last. The history of American medicine is full of examples like Tuskegee, dating back to slavery.”⁸³ The longstanding racist history in the U.S. medical system was one of many events that led to a further erosion of trust in vaccines.

The reasons behind vaccine hesitancy—fear of government overreach, a preference for natural remedies, and a fear of side effects—have not changed very much since the nineteenth century.⁸⁴ What has changed is the amount of and speed at which misinformation and disinformation travel through the minds of the general public.

The modern iteration of the anti-vaccination movement has two pivotal events to thank. The first was the wider use of the internet to spread information.⁸⁵ Second was a paper written in 1998 by Andrew Wakefield, a British physician who

74. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

75. *Id.* at 26.

76. North, *supra* note 71.

77. *History of the Polio Vaccine: A Crippling and Life-Threatening Disease*, WORLD HEALTH ORG., <https://www.who.int/news-room/spotlight/history-of-vaccination/history-of-polio-vaccination> (last visited July 12, 2023).

78. North, *supra* note 71.

79. *Id.*

80. *Id.*

81. *Id.*

82. *The U.S. Public Health Service Syphilis Study at Tuskegee: About*, CDC, <https://www.cdc.gov/tuskegee/about.html> (last updated Nov. 3, 2022); *The U.S. Public Health Service Syphilis Study at Tuskegee: The Syphilis Study at Tuskegee Timeline*, CDC, <https://www.cdc.gov/tuskegee/timeline.htm> (last reviewed Dec. 5, 2022).

83. North, *supra* note 71.

84. *Id.*

85. *Id.*

claimed to have found a link between the measles, mumps, and rubella vaccine (MMR) and autism.⁸⁶ Since then, his paper has been widely discredited.⁸⁷ The study was so small, with only twelve subjects observed, that it could hardly produce concrete conclusions.⁸⁸ Yet, its findings still reverberate around the world today.⁸⁹ There was hope that other scientists would see the flaws in the study and attempt to reproduce its findings in a less imperfect way, instead, the media treated Wakefield as the mouthpiece for one side of the ongoing debate on vaccines.⁹⁰

The movement has only grown since that time. With growing anti-government sentiment and social media's ability to amplify conflict and controversy, the movement saw another peak when the COVID-19 vaccine was first released.⁹¹

III. COVID-19'S PLACE IN THE ANTI-VACCINATION MOVEMENT

The anti-vaccination movement has been given new life during the COVID-19 pandemic. The reaction to the COVID-19 vaccine looked strangely similar to the reaction to the smallpox vaccine in the nineteenth century. Protestors marched in the streets, those skeptical of traditional medicine sought out natural remedies, and some even tried to "undo" their vaccines⁹² once they gave in and complied with vaccine mandates.⁹³ A July 2022 survey conducted by the Kaiser Family Foundation (KFF) found 43% of parents with children aged six months to four years would "definitely not" get their child vaccinated from COVID-19.⁹⁴

In an attempt to determine what differentiates pro-vaccine parents and anti-vaccine parents, a study was conducted and published in *Nature Human Behaviour* in December of 2017.⁹⁵ The study found that campaigns created to encourage vaccination often backfire when their focus is on fairness or preventing harm but may succeed when focused on other moral values like individual liberty and purity.⁹⁶ "The new study used a social psychology theory known as Moral Foundations Theory to assess the underlying moral values most strongly associated

86. *Id.*

87. *Id.*

88. *Id.*

89. Moises Velasquez-Manoff, *The Anti-Vaccine Movement's New Frontier*, N.Y. TIMES (May 25, 2022), <https://www.nytimes.com/2022/05/25/magazine/anti-vaccine-movement.html>.

90. *Id.*

91. North, *supra* note 71.

92. Parents in the nineteenth century actually attempted to suck the vaccine out of their children. *E.g.*, North, *supra* note 71.

93. North, *supra* note 71.

94. Craig Palosky, *43% of Parents with Children Under 5 Newly Eligible for a COVID-19 Vaccine Say They Will "Definitely Not" Get Them Vaccinated*, KFF (July 26, 2022), <https://www.kff.org/coronavirus-COVID-19/press-release/43-of-parents-with-children-under-5-newly-eligible-for-a-COVID-19-vaccine-say-they-will-definitely-not-get-them-vaccinated/>.

95. Lena H. Sun, *The Moral Differences Between Pro- and Anti-vaccine Parents*, WASH. POST (Dec. 4, 2017, 11:00 AM), <https://www.washingtonpost.com/news/to-your-health/wp/2017/12/04/anti-vaccine-parents-have-very-different-moral-values/>.

96. *Id.*

with vaccine-hesitant parents.”⁹⁷ For many years, campaigns to encourage vaccination concentrated on education, but these have proven to be ineffective.⁹⁸ Instead, the study suggests possible interventions such as including a message that vaccines help keep children pure of infections, or that getting children vaccinated allows parents to take control of their lives and liberty.⁹⁹ While these messages could appear in numerous locations including pediatrician offices or schools, they will have a hard time overcoming the amount of information available to parents on the internet.

The existence of the internet and social media have created the problem of misinformation and disinformation regarding vaccines.¹⁰⁰ A recent study conducted by KFF found that nearly eight in ten Americans believe or are unsure about at least one common falsehood regarding COVID-19 or the vaccine.¹⁰¹ The same study also found that the amount of misinformation that someone believed was tied to where they got their news.¹⁰² Large shares of those who got their news from conservative news media were more likely to believe misinformation about COVID-19 and its vaccine.¹⁰³ “[N]early [four] in [ten] of those who trust Fox News (36%) and One America News (37%), and nearly half (46%) of those who trust Newsmax, [say] they believe or are unsure about at least half of the eight” most common false statements regarding COVID-19.¹⁰⁴

A law review article from the First Amendment Law Review looked at how social media websites attempted to regulate misinformation and disinformation on their platforms.¹⁰⁵ “The most common of the myths shared on Facebook tend to suggest ineffective or potentially harmful remedies for COVID-19, such as drinking bleach or disinfectant, or taking unproven and potentially harmful drugs such as hydroxychloroquine.”¹⁰⁶ Companies such as Twitter, Facebook, Google, and YouTube took proactive measures to prevent the spread of this information but were overwhelmed by the amount of information that needed to be reviewed and then removed.¹⁰⁷ These companies chose to prioritize the removal of

97. *Id.*

98. *Id.*

99. *Id.*

100. The UN Refugee Agency, *Factsheet 4: Types of Misinformation and Disinformation*, UNHCR, <https://www.unhcr.org/innovation/wp-content/uploads/2022/02/Factsheet-4.pdf> (last visited Aug. 17, 2023) (explaining that misinformation is false or inaccurate information. Examples include rumors, insults, and pranks. Disinformation is deliberate and includes malicious content such as hoaxes, spear phishing and propaganda. It spreads fear and suspicion among the population).

101. Craig Palosky, *COVID-19 Misinformation is Ubiquitous: 78% of the Public Believes or is Unsure About At Least One False Statement, and Nearly a Third Believe At Least Four of Eight False Statements Tested*, KFF (Nov. 8, 2021), <https://www.kff.org/coronavirus-COVID-19/press-release/COVID-19-misinformation-is-ubiquitous-78-of-the-public-believes-or-is-unsure-about-at-least-one-false-statement-and-nearly-at-third-believe-at-least-four-of-eight-false-statements-tested/>.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. Dawn Carla Nunziato, *Misinformation Mayhem: Social Media Platforms' Efforts to Combat Medical and Political Misinformation*, 19 FIRST AMEND. L. REV. 32, 40-41 (2020).

107. *Id.*

information that was not only incorrect but could actually harm users if they attempted to follow the advice.¹⁰⁸ While the measures taken by social media companies were not 100% effective in removing all misinformation and disinformation, their efforts did make a noticeable difference.¹⁰⁹ Joining in on the fight, the State of California passed Assembly Bill No. 2098 in September of 2022 that classified misinformation provided by physicians and surgeons as unprofessional conduct.¹¹⁰ Along with existing law (the Business and Professions Code), the Bill required any supervisory board to take action against any licensed physician or surgeon who was charged with unprofessional conduct.¹¹¹ Even before the pandemic began in 2019 the World Health Organization (WHO) listed vaccine hesitancy as one of its top ten threats to global health and referred to the high amount of misinformation that makes this threat worse as an “infodemic.”¹¹²

Pediatricians across the country have noticed a difference in parents’ and guardians’ attitudes towards vaccinations in general.

The mother of four brought her children, ranging in age from grade school to high school, to the doctor’s office last summer for their annual checkup. When their pediatrician, Robert Froehlke, said that it was time for shots and several boosters and then mentioned the Covid vaccine, her reaction stunned him. “I’m not going to kill my children,” Froehlke recalls her saying, as she began to shake and weep. He ushered her out of the examination room, away from her children, and tried to calm her. “We’re just trying to help your kids be healthy,” he told her. But he didn’t press the issue; he sensed that she wasn’t persuadable at that moment. And he didn’t want to drive her away from his practice altogether. “That really shook me up,” he says.¹¹³

Parents are more consistently questioning the advice provided to them by their doctors and insisting on doing their own research. The misinformation around the COVID-19 vaccine even has parents questioning established childhood vaccines, and some parents are choosing not to vaccinate their children at all.¹¹⁴ If this trend continues, we could see decades of progress towards fighting infectious diseases threatened.¹¹⁵ According to the Centers for Disease Control and Prevention (CDC) childhood vaccinations have dropped 1% since the beginning of the pandemic, meaning 35,000 fewer children were vaccinated this year.¹¹⁶ This drop puts the CDC below its target of having 95% of American kindergartners up to date on their vaccinations.¹¹⁷

108. *Id.*

109. *Id.*

110. 2022 Cal Stats. ch. 938.

111. *Id.*

112. Velasquez-Manoff, *supra* note 89.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

On November 2, 2021, the CDC approved Pfizer's COVID-19 vaccine for children five to eleven years old.¹¹⁸ Many parents jumped at the opportunity to vaccinate their children. According to data compiled by KFF, on December 5, 2021, 16.7% of eligible children, 4.8 million of the approximately 28 million children in that age group, had received at least one dose of the vaccine.¹¹⁹ This period of increased interest in childhood vaccines, however, did slow considerably in the following month.¹²⁰

On June 17, 2021 the Food and Drug Administration (FDA) authorized emergency use of two COVID-19 vaccines for children ages six months to five years and the following day the CDC recommended their use.¹²¹ The vaccine roll out for children six months to five years was similar to the roll out for children ages five to eleven, the eagerness to vaccinate saw a steady decline after the first two weeks.¹²²

While many parents jumped at the chance to get their kids vaccinated, most parents were hesitant. A survey conducted by KFF found 43% of parents with children aged six months to four years would "definitely not" get their child vaccinated from COVID-19.¹²³ Only 17% of the parents surveyed said they already had their child vaccinated or planned to in the near future.¹²⁴ Additionally, 27% of parents said they would prefer to wait and see what happens with the vaccine roll out, and 13% said they would only vaccinate their children if they were required.¹²⁵

Doctors have also seen a correlation between the political party of a parent and their hesitancy towards vaccination. "David Broniatowski, an associate professor at George Washington University who studies online misinformation, says that because Covid vaccines have become so charged politically, one of the largest groups in the country, white conservatives, may have also become the most susceptible to the skullduggery swirling around vaccines."¹²⁶ A survey by KFF found that while 21% of democrats or those who lean democrat claimed they would "definitely not" get their children vaccinated, the number of republican or republican leaning parents were three times higher, at 64%.¹²⁷

IV. COVID-19'S EFFECTS ON FAMILY LAW IN GENERAL

Healthcare and vaccinations are not the only areas to be greatly affected by the COVID-19 pandemic. Family law experts and psychologists have seen an increase in relationships being pushed to their breaking point, with the number of

118. Jennifer Kates et al, *An Update on Vaccine Roll-Out for 5-11 Year-Olds in the U.S.*, KFF (Dec. 8, 2021), <https://www.kff.org/coronavirus-COVID-19/issue-brief/an-update-on-vaccine-roll-out-for-5-11-year-olds-in-the-u-s/>.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. Palosky, *supra* note 94.

124. *Id.*

125. *Id.*

126. Velasquez-Manoff, *supra* note 89.

127. *Id.*

couples seeking divorces rising across the world.¹²⁸ The U.S. website *Legal Templates*, that sells legal forms created by attorneys, saw a 34% increase in the sales of its divorce documents in the first half of 2020, as compared to that same time period in 2019.¹²⁹ The picture these numbers paint of divorce might be more nuanced than they lead us to believe. One study out of Bowling Green State University suggests that both marriage and divorce rates fell across five U.S. states in 2020.¹³⁰ However, this might be attributable to courthouses across the U.S. closing for months during the pandemic.

Lisa Beth Older, a New York City divorce lawyer, told CNBC the most common type of conflicts she has seen involve disagreements over COVID-19, with children as a distinct minefield.¹³¹ COVID-19 has shaped how lawyers deal with custody and divorce disputes. Older shared that often the spouse that is against getting their children vaccinated does not even believe that COVID-19 exists. This means they feel that their children should be free to travel and live their lives without wearing a mask.¹³² In contrast, the parent who wants their children vaccinated prefers their children not travel in order to avoid unnecessary risks of being exposed to COVID-19.¹³³ Another family lawyer, based in Miami, has also seen a sharp increase in disputes between parents take place during the pandemic.¹³⁴ One of the three issues that this attorney is seeing most often in his practice is, again, dispute over whether to vaccinate children.¹³⁵ While some parents question the efficacy of the vaccine and whether it would be beneficial for their children, there is a very small minority of parents who do not even believe that COVID-19 exists.¹³⁶

V. HOW THE STATE FAMILY COURT SYSTEMS ARE CURRENTLY PROCESSING COVID-19 VACCINE DISPUTES

While most disputes over vaccines do not make it into a courtroom the cases that do make it to court are often adjudicated in favor of the parent seeking to have their child vaccinated.¹³⁷ Tim Miranda, a partner at a family law firm in San Diego tells his clients that the court will use the best interest of the child standard when deciding if a parent should be granted or maintain legal custody.¹³⁸ Although the

128. Ellyatt, *supra* note 5.

129. *Id.*

130. Wendy D. Manning & Krista K. Payne, *Marriage and Divorce Decline during the COVID-19 Pandemic: A Case Study of Five States*, 7 *SOCIUS* 1, 3 (2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8302068/pdf/nihms-1724907.pdf>.

131. Ellyatt, *supra* note 5.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. Ellyatt, *supra* note 5.

137. Vipal Monga, *Divorced Parents Fight Over Their Kids' COVID-19 Vaccination*, *THE WALL ST. J.* (Feb. 3, 2022 5:30 AM), <https://www.wsj.com/articles/COVID-19-vaccinations-for-kids-spark-battles-between-divorced-parents-11643884208>.

138. Velasquez-Manoff, *supra* note 89.

nuances of how this can play out vary from state to state, he acknowledged that “it’s a pretty high bar with something like a vaccination. If you’re going to oppose it, you’d have to have a pretty good reason, like a religious conviction or a medical condition.”¹³⁹ A New York family lawyer told the *New York Times* things are even more cut and dry in her state. She has seen a sizeable increase in parents reaching out to her office who are opposed to vaccinating their children and asking what she can do to help, “[t]he answer, at least in New York State, is not much.... If the pediatrician recommends the vaccine, that’s what the court will rule.”¹⁴⁰

Many of these cases look similar to *J.F. v. D.F.*, settled in December of 2021 in the Supreme Court of New York.¹⁴¹ The opinion starts with a quote which epitomizes family law, “When joint custodial parents can’t agree on the best interests of their child, a court is thrown into the middle, that uncomfortable—but ultimately necessary—position of making an important decision for someone else’s child.”¹⁴² This case involved a dispute between divorced parents with three children.¹⁴³ The couple agreed without issue to have their seventeen- and nineteen-year-old daughters vaccinated against COVID-19.¹⁴⁴ When the vaccine became available for their eleven-year-old, the mother brought a motion to show cause, asking the court for an order to require their daughter be vaccinated, which the father, a college professor, opposed.¹⁴⁵ The mother reached out to their child’s pediatrician who advised that their child be vaccinated.¹⁴⁶

In his affidavit the father expressed concerns over the lack of information regarding long term side effects of the vaccine, the fact that at the time the vaccine was not mandated, and fear that the short-term side effects would change their upcoming Thanksgiving plans.¹⁴⁷ While he did challenge the science involved, he did not dispute the child’s pediatrician favoring the vaccination for their child.¹⁴⁸ This couple had been in front of this court on multiple occasions adjudicating disputes, and the father felt like the mother had “jumped the gun” with her motion to show cause.¹⁴⁹

As mentioned before, courts often weigh the opinion of the child’s pediatrician very heavily in these types of cases. In this case the court required the mother to set up a conference call between the court and the child’s pediatrician.¹⁵⁰ After hearing from the doctor, the court requested that the child’s attorney discuss the question of being vaccinated with the child herself. The attorney expressed to

139. Kamin, *supra* note 15.

140. *Id.*

141. In the state of New York, the Supreme Court is the trial court level. *J.F. v. D.F.*, 74 Misc. 3d 175, 175 (N.Y. Sup. Ct. 2021).

142. *J.F. v. D.F.*, 74 Misc. 3d 175, 175-76 (N.Y. Sup. Ct. 2021).

143. *Id.* at 176.

144. *Id.*

145. *Id.*

146. *Id.* at 178.

147. *Id.* at 177.

148. *Id.*

149. *Id.*

150. *Id.* at 178.

the court on behalf of the child that although she understood the concerns voiced by her father, she wished to be vaccinated like her sisters.¹⁵¹

The court was very explicit about the “judicial dilemma” they were addressing in this case.¹⁵² They made clear they were not dealing with government-imposed mandates on adults,¹⁵³ vaccine mandates made by private businesses,¹⁵⁴ or parental disputes over vaccines which are required for attendance in public schools.¹⁵⁵ The court then pointed to a long list of cases from courts around the country who had dealt with a dispute between joint custodial status parents when one parent did not approve of vaccination for their child.¹⁵⁶ The court acknowledged that while its sister courts had addressed this issue in the past this was a new question for a court of New York to answer.¹⁵⁷ Ultimately the court decided that they were unwilling to take the father’s wait-and-see approach and “kick this can down the road” to be dealt with later, noting that it could be years before enough data was gathered in regard to COVID-19 vaccines in children.¹⁵⁸ This is the way that almost all COVID-19 vaccination disputes are resolved. There are, however, a handful of cases from across the country that took these disputes a step further, levying fines or punishments on the parents who chose to bring these vaccination cases to court.

It seems clear that New York state in particular has taken COVID-19 very seriously. In May 2021 then Governor Cuomo signed into law Senate Bill S1034B, also known as the HERO Act, to enforce even stricter COVID-19 restrictions than the federal government was willing to legislate.¹⁵⁹ In the previous case, *J.F. v. D.F.*, the court drew insight from another New York case, *C.B. v. D.B.*, a much more controversial case because of its holding. The court held that visitation rights can be contingent on the non-custodial parent’s willingness to get vaccinated or tested against COVID-19 on a regular basis.¹⁶⁰ The court quoted a few lines from their *C.B. v. D.B.* decision that epitomizes how the court in New York views the vaccination issue,

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

151. *Id.*

152. *J.F. v. D.F.*, 74 Misc. 3d 175, 179 (N.Y. Sup. Ct. 2021).

153. *See, e.g., Missouri v. Biden*, 571 F. Supp. 3d 1079, 1085 (E.D. Mo. 2021) (holding that the Centers for Medicaid and Medicare Services mandate for COVID vaccines by Dec. 6 was unenforceable).

154. *J.F.*, 74 Misc. 3d at 179. *See also* *Sambrano v. United Airlines, Inc.*, No. 4:21-cv-1074, 2021 WL 5445463, *1 (N.D. Tex. Nov. 19, 2021) (denying injunction to enjoin United from placing Plaintiffs, and other similarly situated employees, on unpaid leave).

155. *J.F.*, 74 Misc. 3d at 179.

156. *Id.*

157. *Id.* at 180.

158. *Id.* at 182.

159. N.Y. Lab. Law § 218-b (Consol., 2023).

160. *C.B. v. D.B.*, 73 Misc. 3d 702, 708 (N.Y. Sup. Ct. 2021).

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.¹⁶¹

It is clear that New York and their courts took the COVID-19 pandemic very seriously and because of that, they sometimes took their decisions a step further than simply ruling in favor of vaccination.

In *C.B. v. D.B.* the plaintiff-mother along with the child's Guardian *ad Litem* (GAL) made an emergency oral application that the defendant-father, and any supervisor overseeing the defendant's parenting time, be vaccinated against COVID-19.¹⁶² Shortly after, the plaintiff brought a formal motion seeking the same relief.¹⁶³ The defendant and his attorney filed an affidavit in opposition and the GAL filed an affirmation in support of the order.¹⁶⁴ At oral arguments both the plaintiff and the GAL agreed that instead of getting vaccinated the defendant could instead agree to regular testing protocol for COVID-19, an offer the defendant-father refused.¹⁶⁵

The defendant's arguments against vaccination were unconvincing to the court. He claimed that because he had already tested positive for COVID-19, he had sufficient antibodies.¹⁶⁶ Later he adopted a new position, that his Catholic beliefs excluded him from being vaccinated.¹⁶⁷ The court pointed out that this belief fell flat considering that Pope Francis himself encouraged all Catholics to be vaccinated for "the common good."¹⁶⁸

It is not important, however, to analyze all of the defendant's reasons for not wanting to be vaccinated because he was offered an alternative to the vaccination in the form of regular testing. The court even went so far as to say that they believed the defendant's refusal to agree to the testing regime was based purely on his animosity towards the plaintiff.¹⁶⁹ The court noted that there was a well-established "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."¹⁷⁰ Further, when making parental access determinations, the best interest of the child is the paramount concern.¹⁷¹ The judge ultimately concluded that parental access by the defendant-father was not in the best interest of the child.¹⁷²

161. *Id.* at 705-06.

162. *Id.* at 704.

163. *Id.*

164. *Id.*

165. *Id.* at 704-05.

166. *Id.* at 706.

167. *Id.* at 704-05.

168. *Id.* at 706-07.

169. *Id.* at 707.

170. *Matter of Josephine F. v Rodney W.*, 168 A.D.3d 486, 486 (N.Y. App. Div. 2019).

171. *Marino v. Marino*, 123 N.Y.S.3d 638, 644 (N.Y. App. Div. 2020).

172. *C.B. v. D.B.*, 73 Misc. 3d at 705.

The judge ultimately granted the plaintiff-mother's motion requiring the defendant-father and anyone who supervised his visits with his child to be vaccinated or undergo regular testing.¹⁷³ This case was quick to hit the headlines of newspapers across the country, but it wasn't the last time a vaccine dispute would catch the eye of the media.

The question of whether or not a parent's vaccination status should affect their parenting time was also addressed in California. In Los Angeles County Superior Court, a vaccinated mother and an unvaccinated father going through a divorce agreed that their child should be vaccinated against COVID-19.¹⁷⁴ During the court proceeding the judge gave a stern warning to the father that if he didn't choose to also get vaccinated, he could lose time with his child.¹⁷⁵ In response, the father shared with the judge that he could not be vaccinated because of a medical issue.¹⁷⁶ Unfortunately, the judge did not buy it. He said he would need to see the medical evidence to prove it and finished by saying "this child needs to be protected."¹⁷⁷ The father's attorney said that he believed if a parent had a legitimate medical reason preventing them from getting vaccinated the court could not "use that disability to say that [they were] somehow unable to parent [their] child."¹⁷⁸ The mother's attorney on the other hand was impressed that the judge brought the issue up on his own, without being prompted and stated that if the warning was ignored, he would seek a custody modification in the future.¹⁷⁹

In Chicago, a judge made a novel decision and was forced to almost immediately rescind his controversial order.¹⁸⁰ In August 2021, Rebecca Firlit signed into a virtual court proceeding with Judge James Shapiro and her ex-husband to discuss child support.¹⁸¹ Almost immediately, Judge Shapiro asked Firlit if she was vaccinated.¹⁸² She explained that due to adverse reactions to vaccines in the past, and her doctor advising her against receiving the vaccine, she was not vaccinated against COVID-19.¹⁸³ At that time Judge Shapiro made the decision that Firlit would not be able to see her eleven-year-old son until she was vaccinated.¹⁸⁴ The child's father was vaccinated.¹⁸⁵

173. *Id.* at 707-08.

174. Karen Kaplan, *Coronavirus Today: No Vaccine, No Custody?*, L.A. TIMES (Jan. 18, 2022, 7:14 PM), <https://www.latimes.com/science/newsletter/2022-01-18/coronavirus-today-covid-vaccine-parents-child-custody-coronavirus-today>.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. Jaclyn Peiser, *A Judge Asked a Mother if She Got the Coronavirus Vaccine. She Said No, and He Revoked Custody of Her Son*, THE WASH. POST (Aug. 30, 2021, 4:47 AM), <https://www.washingtonpost.com/nation/2021/08/30/chicago-vaccine-custody-rebecca-firlit/>.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

Firlit's lawyer viewed this decision as judicial overreach.¹⁸⁶ "The father did not even bring this issue before the court. So, it's the judge on his own making this decision that you can't see your child until you're vaccinated."¹⁸⁷ Six days later, Judge Shapiro vacated his judgment citing precedent showing that judges are not allowed to modify custody arrangements on their own.¹⁸⁸ However, this battle may not be over just yet. The attorney for the father stated he plans on filing an emergency motion to reinstate the original order.¹⁸⁹

Losing parenting time or requiring regular testing before parenting time are not the only judicial reprimands that have been handed down in family court. Many family lawyers have warned that if parents who share joint legal custody cannot come to an agreement over an issue, like vaccination, judges may consolidate the decision-making power to one parent.¹⁹⁰ This means that parents would need to be prepared to argue why they are the best decision-maker for their child and why decision-making power should be taken away from their co-parent.¹⁹¹

Moreover, it is not just the parents who disagree with vaccination who risk facing legal consequences. One mother, quoted in a *New York Times* article, decided that although her husband did not agree with allowing their children to be vaccinated against COVID-19, and despite the fact that they shared legal custody and were required to make medical decisions together, she took her daughters to get vaccinated.¹⁹² Her plan was thwarted when her daughter called her father to let him know what was happening, and they left before they could receive the vaccine.¹⁹³ A lawyer and mediator in West Michigan, Thomas Kates, advised against this exact situation saying:

If one parent forges ahead and gets the child vaccinated because they think it's the right thing to do, that's a violation of a joint legal custody order.... The court could potentially strip that parent of their legal custody. It's dangerous. If my client told me they were considering doing that, I'd tell them to watch out. You could be fined, you could be jailed, you could lose legal custody.¹⁹⁴

These are consequences that someone unfamiliar with family court proceedings might not expect. However, when a court order is in place it is much better to ask for permission than forgiveness.

Bringing a vaccine dispute to family court will cost both time and money and, as shown above, there is a chance a parent could lose more than just their motion.

186. *Id.*

187. *Id.*

188. John Keilman, *Cook County Judge Rescinds Order Stripping Unvaccinated Pilsen Woman of Child Custody Rights, but Fight May Not be Over*, CHI. TRIBUNE (Aug. 30, 2021, 7:08 PM), <https://www.chicagotribune.com/coronavirus/vaccine/ct-covid-child-custody-vaccine-judge-20210830-pcgg4sznzzfd7mqadk4yztzisa-story.html>.

189. *Id.*

190. Kamin, *supra* note 15.

191. *Id.*

192. *Id.*

193. *Id.*

194. Lybrink et al., *supra* note 16.

On top of the possibility of losing visitation rights or parenting time there is also the cost and the time spent taking the issue to court. Hiring lawyers and taking a vaccine dispute to court can easily cost over \$10,000 per side and can last over a year.¹⁹⁵ Taking a dispute to family court can also exacerbate issues of interpersonal strife in families. Courts are limited in the way they resolve issues. They punish those acting in bad faith with fines or jail time, they do not and cannot address the underlying issues that may have led to that behavior.¹⁹⁶ With all of these risks, is it even worth bringing a vaccine dispute to family court to oppose the vaccine?

PROPOSAL

I. ALTERNATIVE METHODS OF DISPUTE RESOLUTION FOR COVID-19 VACCINE DISPUTES

If a parent disagrees with their co-parent over vaccinating their child against COVID-19 there are many ways they can move forward. Attorney Thomas Kates said:

Don't go to court at all, if you can avoid it. Before you contact an attorney, reach out to the other parent in good faith and try to come to an agreement. . . . If you can't come to an agreement, call a mediator or ask to meet with your caseworker at Friend of the Court. You can also meet with your pediatrician together and ask what they recommend. Basically, try to come to an agreement and put it in writing before going to court.¹⁹⁷

Not only will this save the parents time and money, but this is also the best way to keep the decision in the hands of the parents and not pass that decision along to the court.

A married couple who shares children unfortunately has the fewest options to resolve their issues in a court of law. When a couple is married, they share custody of their children and any decisions regarding those children are assumed to be decided together.¹⁹⁸ The court will not interfere in parental decisions until the couple decides to divorce. However, out-of-court options discussed in this Note are still available to married parents who disagree about the vaccine.

If a couple with children is going through a divorce, it would be in the couple's best interest to include a provision in their parenting plan regarding vaccines. Although one or both parents will ultimately be chosen to make medical decisions, adding specifics to a parenting plan can reduce parental disagreements

195. Sarah Gibson, *What Happens When Divorced Parents Disagree on Vaccinating Their Child?*, NPR (Dec. 26, 2021, 8:04 AM), <https://www.npr.org/2021/12/26/1068063571/what-happens-when-divorced-parents-disagree-on-vaccinating-their-child>.

196. Gary Robinson, *The Underlying Problem with our Family Law System*, FAM. LAW. MAG. (Jan. 5, 2021), <https://familylawyermagazine.com/underlying-problem-our-family-law-system/>.

197. Lybrink et al., *supra* note 16.

198. *See Mother's Rights - What Custody Rights Does a Mother Have?*, GRECO LAW, <https://www.grecoatlaw.com/child-custody-rights/> (last visited Aug. 8, 2023).

and trips back to family court in the future.¹⁹⁹ It may be tempting to include a caveat specifically about the COVID-19 vaccine, however, as shown above, the anti-vaccination movement is not new and shows no signs of slowing down. When creating a parenting plan, parents can choose to use some of the other out-of-court resources and options to cement the details they can both agree on.

Some lawyers may argue that parenting plans are purposefully vague and/or broad and that one parenting plan cannot possibly be expected to account for every issue that may arise. That being said, if the parents already know that vaccines are an area of disagreement between them, it may be best to include this caveat in the parenting plan to prevent a return to court in the future.

For couples who already have a parenting plan with the court and disagree about the vaccine, there are options to settle the dispute outside of the courtroom. These options include arbitration or mediation, speaking to a therapist or family counselor, or discussing the issue with the child's pediatrician.

These options will not work for everyone. Some parents will not walk away until they have had their day in court and that is fine. It is important, however, for lawyers and advocates to advise their clients of these lurking consequences they may not be aware. After knowing and understanding these consequences, even if they are rare, if a client still wants to proceed to court, they have that right.

II. ARBITRATION AND MEDIATION

Arbitration and mediation are methods of alternative dispute resolution.²⁰⁰ Both involve a neutral third party to help facilitate dialogue and negotiations.²⁰¹ The main difference between the two options is a final decision from that neutral third party.²⁰² In arbitration, the arbitrator makes a final decision that becomes legally binding if neither party objects.²⁰³ In mediation, the final decision is created by all parties involved, under the premise that if the agreement is created jointly, the parties are more likely to abide by it.²⁰⁴

There are numerous benefits to utilizing arbitration or mediation instead of family court. The process is faster, less expensive, and less formal than appearing before a judge in family court.²⁰⁵ Family issues are well suited for mediation. "In

199. *Adding Specifics to Your Parenting Plan Can Minimize Conflict*, THE L. OFFS. OF PETER VAN AULEN, <https://www.pvalaw.com/adding-specifics-to-your-parenting-plan-can-minimize-conflict.html> (last visited July 13, 2023).

200. *Alternative Dispute Resolution Overview*, U.S. OFF. OF SPECIAL COUNS.: SERVS., <https://osc.gov/Services/Pages/ADR.aspx> (last visited Aug. 26, 2023).

201. *Id.*

202. *Arbitration as an Alternative to Family Court*, NEW DIRECTION FAM. L.: SEPARATION AND DIVORCE, <https://newdirectionfamilylaw.com/blog/separation-divorce/arbitration-as-an-alternative-to-family-court/> (last visited Aug. 17, 2023).

203. *Id.*

204. OSBA Committees & Sections, *Law Facts: Divorce Mediation*, OHIO BAR (July 6, 2018), <https://www.ohiobar.org/public-resources/commonly-asked-law-questions-results/law-facts/law-facts-divorce-mediation/>.

205. *Advantages of Mediation*, U.S. OFF. OF SPECIAL COUNS.: SERVS., <https://osc.gov/Services/Pages/ADR-Advantages.aspx> (last visited Aug. 17, 2023).

a trial, when a judge decides a case, no matter how carefully they listen, they will not have as much information as you do to create a plan that ends your marriage and allows you to continue to be the best parents possible for your children.”²⁰⁶ Many lawyers believe that family law matters are also very well suited for arbitration. In 2016, the Uniform Law Commission created the Uniform Family Law Arbitration Act (UFLAA), which has been enacted in four states and the District of Columbia and has been introduced in two additional states.²⁰⁷ Every state has an arbitration statute that is used to a large extent for labor and commercial law but has little to say about family law arbitration.²⁰⁸ The UFLAA sought to clarify how family law fits into the existing arbitration statutes across the country.²⁰⁹

There are drawbacks to these methods of dispute resolution as well. For example, because a mediator does not have the power to impose a final resolution if mediation does not result in a final agreement, the couple might have wasted their time and money and will still need to go to court.²¹⁰ Additionally, mediation and arbitration require both parties to want to come to an agreement. If both parties cannot come to the table ready to make a deal, time with neutral third parties might be wasted. Finally, when a dispute makes its way to family court, the judge is bound by the best interest of the child standard set forth in the state’s statute. Although the assumption is that an arbitrator or mediator will use the best interest standard, they are not forced to use that standard. This could mean a lack of consistency on which some may rely.²¹¹

Although issues like vaccinations can be hard to discuss between parents on opposite sides of the issues, involving someone who is trained in dispute resolution can be extremely helpful. If this option still seems too formal there are still other professionals that can be used to help facilitate productive conversations.

III. THERAPIST OR FAMILY COUNSELOR

Often when couples have issues communicating with partners or former partners, they seek out the help of a therapist or family counselor. These professionals can work with both parties and the entire family to ensure they are focusing on what is in the best interests of the children.²¹² It is important, for this endeavor, to find a therapist who is trained in working with children. While there

206. OSBA Committees & Sections, *supra* note 204.

207. *Family Law Arbitration Act*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?communitykey=ddf1c9b6-65c0-4d55-bfd7-15c2d1e6d4ed> (last visited July 13, 2023).

208. *Id.*

209. *Id.*

210. *The Pros and Cons of Mediation*, MATTHEWS, SHIELS, KNOTT, EDEN, DAVIS & BEANLAND, L.L.P., <https://www.mssattorneys.com/litigation-faq-archives/the-pros-and-cons-of-mediation/> (last visited Aug. 17, 2023).

211. *What are the Advantages and Disadvantages of Arbitration?*, UPCOUNSEL, <https://www.upcounsel.com/what-are-the-advantages-and-disadvantages-of-arbitration> (last visited Aug. 17, 2023).

212. *The Role Counselors and Therapists Can Play in Divorce*, DADSDIVORCE (May 27, 2015), <https://dadsdivorce.com/articles/the-role-counselors-and-therapists-can-play-in-divorce/>.

are many therapists out there, many work exclusively with adults and may not have a full understanding of family dynamics and how children fit into the picture. Going to therapy or counseling with a partner or former partner can be expensive.²¹³ There are some insurance plans that will help cover that cost,²¹⁴ and depending on how long it takes to come to a decision it may end up being less expensive than the other available options mentioned above.

This option sometimes overlaps with mediation. When meeting with a therapist for the first time, it is important to share the ultimate goal—coming to an agreement that both parties can live with and abide by. There is a difference between martial counseling and marital mediation. Often a martial mediator is certified by the state to perform this role.²¹⁵ “The mediator is trained in noticing the disconnects and misunderstandings between the couple. Also, because the martial mediator is educated in the divorce process, the mediator can give a disputing couple an education on what divorce looks like from a financial and emotional perspective.”²¹⁶

There are some drawbacks to this method. If either of the parties to the dispute are currently seeing a therapist on their own it is important that, for reasons of partiality, the parents choose a neutral therapist to see. This will also help with trust in the room and make sure that both parties are starting from square one. Parties may be able to reach a verbal agreement regarding their dispute with their therapist present, but this agreement is only legally binding so long as both parties acknowledge the agreement later in court.²¹⁷ If there is any fear that one partner may agree in front of the therapist and later change their mind, this may not be the best option.

Finding someone both parents feel comfortable speaking to and who makes sure both parties feel heard can be very helpful in dispute resolution. Therapists and family counselors have more time and opportunity to listen to both sides and help them come to an agreement.

IV. SPEAKING WITH A PEDIATRICIAN

When it comes to a vaccine dispute between partners, who better to discuss the vaccine with than a person who knows and understands the child’s medical history best? Many family courts have what is called a *Friend of the Court* office

213. The average cost to see a therapist in the US in 2023 is between \$100 and \$200 per session. Ashley Laurretta, *How Much Does Therapy Cost In 2023?*, FORBES HEALTH (May 4, 2023, 4:37 AM), <https://www.forbes.com/health/mind/how-much-does-therapy-cost/>.

214. *Id.*

215. DADSDIVORCE, *supra* note 212.

216. Jennifer Warren Medwin, *What is the Difference Between Traditional Marriage Counseling and Marital Mediation?*, SEEKING EMPOWERMENT, <https://seekingempowerment.com/how-is-martial-mediation-different-than-therapy/> (last visited Aug. 17, 2023).

217. *Why Verbal Agreements Don't Work in Family Law Cases*, KENNY LEIGH & ASSOCIATES, <https://blog.menonlyfamilylawonly.com/blog/bid/371716/why-verbal-agreements-don-t-work-in-family-law-cases> (last visited Aug. 17, 2023).

that prepares and assists families with family court issues.²¹⁸ One such *Friend of the Court* office is located in Allegan County, Michigan. This office states that their first step whenever a call comes in regarding a vaccine dispute is to encourage the family to discuss the issue with their pediatrician.²¹⁹

Many pediatricians consider it part of their job to provide vaccine-hesitant parents with clear scientific information and clear up misinformation that is currently being spread on the internet and other media platforms.²²⁰ Thankfully, according to data from KFF and *Pediatrics* when it comes to vaccine information pediatricians are among the top trusted sources of information.²²¹ Pediatricians also follow news of these vaccines closely. One of the top reasons that parents are hesitant to vaccinate their children is because they would like to wait and see what issues may arise long-term as a result of being vaccinated.²²² To counter this fear, pediatricians can share with parents the nearly two years' worth of data that has been collected on the vaccine.²²³

While some pediatricians want to enter the vaccine debate, others choose to stay out of it entirely. As the number of vaccine-hesitant parents increases so do the number of pediatricians willing to dismiss patients from their practice entirely if they choose to forgo the vaccine.²²⁴ Some doctors may be stretched thin and unable to give full attention to or address hyper-specific inquiries from their patients.²²⁵ Finally, some doctors may fear the repercussions of vaccinating a patient who eventually does show adverse effects.²²⁶ Céline Gounder, an infectious disease expert at New York University, posited “[y]ou’re not going to get sued for not vaccinating somebody; you’re going to get sued for a complication.”²²⁷

These methods of resolving a vaccine dispute, that avoid the courtroom, may not work for everyone, but they are alternatives that could save parents time, money, and the possibility of losing custody of the children. While those cases are rare, they have happened and should serve as a warning to those wanting to pursue a vaccine dispute in family court.

218. *Friend of the Court Overview*, MICHIGAN LEGAL HELP, <https://michiganlegalhelp.org/resources/family/friend-of-court-overview> (last visited Aug. 26, 2023).

219. Lybrink et al., *supra* note 16.

220. Melissa Suran, *Why Parents Still Hesitate to Vaccinate Their Children Against COVID-19*, JAMA NETWORK: MED. NEWS & PERSP. (Dec. 15, 2021), <https://jamanetwork.com/journals/jama/fullarticle/2787289>.

221. See Hamel et al., *supra* note 18. See also Freed, *supra* note 18.

222. Suran, *supra* note 220.

223. *Id.* at 24.

224. Susan Leib et al., *Pediatricians’ Experience with and Response to Parental Vaccine Safety Concerns and Vaccine Refusals: A Survey of Connecticut Pediatricians*, NAT’L LIBR. MED.: PUB. HEALTH REPS 13 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3113426/pdf/phr126s20013.pdf>.

225. Olga Khazan, *When ‘Talk to Your Doctor’ Goes So, So Wrong*, THE ATLANTIC: POLS. (Sept. 10, 2021), <https://www.theatlantic.com/politics/archive/2021/09/doctors-tell-patients-not-vaccinate-d-COVID-19/620024/>.

226. *Id.*

227. *Id.*

CONCLUSION

When it comes to vaccine disputes between any family type it is desirable to keep these disputes out of court. Pro-vaccine parents are far more likely to win in court but can save time and money by choosing an outside-of-court option to resolve the dispute. Anti-vaccine parents are very unlikely to win their motions in court, and they risk having the judge decide it is in the best interests of their child to alter the current parenting plan. In order to avoid this outcome alternative dispute resolutions and speaking to respected figures in your community may be the best option.

The anti-vaccination movement started over a century ago and has seen new light with the creation and roll out of the COVID-19 vaccine.²²⁸ With nearly eight in ten Americans believing or being unsure about a common piece of COVID-19 misinformation the problem seems to be getting worse.²²⁹ With the large amount of misinformation circulating, it only makes sense that some will be unsure about getting their child vaccinated. While many may think this is a dispute best suited for the courtroom, after seeing the way some family law judges have ruled on this very issue, it may be best to seek dispute resolution outside of the courtroom. Whether parents choose a neutral third party to assist in mediation or arbitration, seek the advice of a family counselor or therapist, or even go to the most trusted source of medial information for the child, their pediatrician, if both parties are willing to come to an agreement, they will save time and money by handling this issue outside of court.

228. North, *supra* note 71.

229. Palosky, *supra* note 101.

