

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0506-22**

JENNA SCOTT,

Plaintiff-Appellant,

v.

GEOFFREY SCOTT,

Defendant-Respondent.

Argued April 17, 2023 – Decided April 28, 2023

Before Judges Whipple, Mawla and Walcott-Henderson.

On appeal from an interlocutory order of the Superior Court of New Jersey, Chancery Division, Family Part, Morris County, Docket No. FM-14-0635-21.

James M. Hirschhorn argued the cause for appellant (Sills Cummis & Gross, PC, attorneys; Sandra C. Fava, Kory A. Crichton and James M. Hirschhorn, on the briefs).

Alyssa M. Clemente argued the cause for respondent (Laufer, Dalena, Jensen, Bradley & Doran, LLC, attorneys; Alyssa M. Clemente and Gregory D.R. Behringer, of counsel and on the brief).

PER CURIAM

Plaintiff Jenna Scott appeals from an August 29, 2022 Family Part order denying her application to administer the COVID-19 vaccine to minor children she shares with defendant, Geoffrey Scott, over his objection. The trial court conducted an extensive plenary hearing and addressed the best interests of the children. We affirm the order, finding no abuse of discretion by the trial court.

The parties are parents of three minor children and, following their separation, they entered into a written custody and parenting agreement. Under this agreement, the parties share joint legal and physical custody of their children and all major decisions involving the children are to be made jointly. Plaintiff is designated the parent of primary residence (PPR) of the children. Within weeks of signing this custody agreement, plaintiff filed an order to show cause, seeking temporary sole legal custody so that the two elder children could be vaccinated over defendant's objection. The court denied the order to show cause and scheduled the matter for a plenary hearing.

The court held a four-day plenary hearing with both parties testifying along with two medical experts called by plaintiff: the children's pediatrician and a pediatric hospitalist, who had never examined the children. Both experts testified to the efficacy of the vaccine and recommended that it be administered to the children. Plaintiff testified that medical appointments were generally

within her purview and that the children have received all other recommended vaccines and have not had any major side effects. Defendant testified that while he generally supports vaccination against most diseases, he wished to avoid this one because of the novel nature of mRNA vaccines and the potential for unknown long-term side effects.

In a comprehensive written decision, the trial judge summarized the evidence and applied the best interests of the child factors set forth in N.J.S.A. 9:2-4(c). The court also noted that the children have all previously contracted COVID-19 and recovered, without issue, and that the parties otherwise agree that the children are permitted to travel, socialize, and attend school without masks or other restrictions.

In applying the best interests factors, the trial court concluded that plaintiff failed to meet her burden of proof that the COVID-19 vaccine is in the children's best interests. The trial court was not convinced by plaintiff's testimony that she wanted the children to be vaccinated because of fear of contracting the virus since neither party took any other precautions to prevent infection.

On appeal, plaintiff submits that the trial court ignored evidence and precedent regarding the weight to be given to guidance from the Centers for Disease Control and unchallenged testimony from her experts. Specifically, she

contends that: 1) the court failed to consider the children's "medical best interests" and instead applied a more general "best interests" standard that was inappropriate; 2) mischaracterized plaintiff's testimony as partially motivated by animosity towards defendant; and 3) failed to give proper weight to the testimony of her expert witnesses. Essentially, plaintiff's argument is that she should prevail based upon the uncontroverted testimony of her experts regarding the efficacy of the vaccine and her role as PPR.

We accord "great deference to discretionary decisions of Family Part judges[,]" Milne v. Goldenberg, 428 N.J. Super. 184, 197 (App. Div. 2012) (citation omitted), "in recognition of the family courts' special jurisdiction and expertise in family matters" Cesare v. Cesare, 154 N.J. 394, 412-13 (1998). This deference extends to matters of child custody. N.J. Div. of Youth & Fam. Servs. v. W.F., 434 N.J. Super. 288, 294 (App. Div.), certif. denied, 218 N.J. 275 (2014). Purely legal questions, however, are reviewed de novo, without special deference. N.J. Div. of Child Prot. & Permanency v. N.B., 452 N.J. Super. 513, 521 (App. Div. 2017). Finally, a family court's decision must be supported by competent evidence in the record. M.G. v. S.M., 457 N.J. Super. 286, 293-94 (App. Div. 2018) (citing Cesare, 154 N.J. at 411-12).

I.

In this matter, the parties share joint legal custody of their three children, by agreement. Under such an agreement, all decisions regarding the children, including those concerning their health, must be shared equally, regardless of the fact that plaintiff is the PPR. See Pascale v. Pascale, 140 N.J. 583, 596 (1995).

We recognize that "[t]he most troublesome aspect of a joint custody decree is the additional requirement that the parent exhibit a potential for cooperation in matters of child rearing." Beck v. Beck, 86 N.J. 480, 498 (1981). Therefore, where separated parents who share custody cannot agree on a "major" custody issue—such as health, education, or religion—the best interests of the child are the paramount consideration for a court to determine which course of action to follow. Id. at 497; Asch v. Asch, 164 N.J. Super. 499, 505 (App. Div. 1978) (directing application of best interests analysis when shared custody parents could not agree on a religious issue). When the child's best interests are stymied by the inability of parents to compromise, the court is obligated to step in, essentially serving as a tiebreaker. Horswell v. Horswell, 297 N.J. Super. 94, 104 (App. Div. 1997); Sacharow v. Sacharow, 177 N.J. 62, 79-80 (2003) (holding that the court may impair one party's parental rights to effectuate a decision in the best interests of the child).

Precedent definitively establishes that consideration of a child's best interests is appropriate in vaccination disputes. N.J. Div. of Child Prot. & Permanency v. J.B., 459 N.J. Super. 442, 457-58 (App. Div. 2019) (finding "no meaningful distinction between the power to order prophylactic medical care in the form of vaccinations to prevent a child from contracting infectious diseases and medical treatment for diseases already contracted."). Moreover, in any custody matter, the best interests of the child(ren) are a paramount consideration. Beck, 86 N.J. at 497. And, the court may exercise its sound discretion in determining a custody arrangement that addresses the specific circumstances and the welfare of children. Pascale, 140 N.J. at 596. This authority is firmly rooted in the court's *parens patriae* role as protector of the interests of children. Fawzy v. Fawzy, 199 N.J. 456, 474-75 (2009). Thus, when presented with a choice between parents' rights and those of children, the court must choose the children's best interests. In re J.R. Guardianship, 174 N.J. Super. 211, 224 (App. Div. 1980).

The parties' custody and parenting time agreement provides in pertinent part as follows: "[T]he parties shall make all major decisions respecting the children's health . . . and general welfare in a united fashion. Neither party shall have any greater decision-making power with respect to such matters" This

language is clear evidence of the parties' intent at the time they entered into the custody agreement.

Given the parties' dispute regarding the vaccine, the trial court undertook an analysis of each of the N.J.S.A. 9:2-4(c) best interests factors, which controlled here. For these reasons, we reject plaintiff's argument that a different standard of the children's "medical best interests" should have applied and superseded the statutory factors. The best interests standard set forth in the statute already includes factors that speak to a child's medical wellbeing, including "the needs of the child" N.J.S.A. 9:2-4(c). The trial court neither abused its discretion nor erred as a matter of law in considering the statutory best interests factors.

II.

As to witness credibility, family court factfinding is "binding on appeal when supported by adequate, substantial, credible evidence." Thieme v. Aucoin-Thieme, 227 N.J. 269, 283 (2016) (quoting Cesare, 154 N.J. at 413). The trial court observed that neither party had taken significant precautions against the virus, and that the impetus for the present suit was—at least partially—plaintiff's desire to take the children to a sporting event, which required attendees be vaccinated. Our review of the record does not convince us the judge misinterpreted plaintiff's testimony.

Finally, as to expert testimony, a finder of fact is free to accept or reject the testimony of any party's expert or accept only a portion of an expert's opinion. Brown v. Brown, 348 N.J. Super. 466, 478 (App. Div. 2002). "[T]he weight to be given to the evidence of experts is within the competence of the fact-finder." LaBracio Fam. P'ship v. 1239 Roosevelt Ave., Inc., 340 N.J. Super. 155, 165 (App. Div. 2001). We "defer to the trial court's assessment of expert evaluations." N.J. Div. of Youth & Fam. Servs. v. H.R., 431 N.J. Super. 212, 221 (App. Div. 2013).

The trial judge explained his reasoning in declining to follow the recommendation of plaintiff's experts as follows:

While [the experts] stated the vaccine is well-tested and safe, the [c]ourt recognizes the ages of the children and the fact that the vaccine is not mandatory is critical to this analysis.


.....

[T]he experts did not go into depth in their testimony [to describe] how the vaccine works, potential side effects[,] or even how the research was conducted to develop the vaccine.

The judge's ultimate assessment of the testimony was explained and supported by the record. We discern no abuse of discretion in either the credibility findings or the factual findings warranting our intervention.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION