ERIN HARMONY (MOLICK) SULLIVAN,	IN THE COURT OF COMMON PLEAS FOR THE 26TH JUDICIAL DISTRICT, COLUMBIA COUNTY BRANCH, PENNSYLVANIA
Plaintiff	
Vs	CIVIL ACTION - CUSTODY
ANDREW ROBERT MOLICK,	
Defendant	CASE NO: 1312 OF 2005

APPEARANCES:
FRANKLIN E. KEPNER, JR., ESQUIRE, Attorney for the Plaintiff
ANDREW ROBERT MOLICK, DEFENDANT, Pro Se

May 15, 2012. JAMES, J.

FINDINGS OF FACT, DISCUSSION, AND OPINION

On January 30, 2012, plaintiff mother filed a Motion for Special Relief asking the court to prohibit the defendant father from immunizing the parties' minor child, A.M., born February 26, 2005. A hearing was held before this court on April 17, 2012.

At the hearing, plaintiff testified on her own behalf. Defendant testified, as did pediatrician, Jennifer Seidenberg, M.D.

FINDINGS OF FACT

The court finds that the following facts have been proven:

1. The parties were married on September 25, 1999; separated in August of 2005; and divorced on November 27, 2007. Their only child is a son, A.M. born February 26, 2005. Since the parties' separation, mother has had primary physical custody and the father has had regular and consistent partial physical custody. The parties have always had shared legal custody.

2. When the child was born the parties chose not to have the child immunized. Mother does not believe in immunizations based upon her sincerely held religious beliefs. Her grandfather was a physician who spoke against immunizations before the United States Congress at hearings on the subject in 1937.

3. Father conceded to not immunizing the parties' son because of what he had read about the nexus of immunizations and autism. With the recent revelations that the nexus was based on significantly flawed research, father changed his mind about immunizing the parties' son. Mother alleges that father wants the immunizations because father's finance' has multiple sclerosis and cannot risk being around the child without immunizations.

4. Father assured mother that he would keep her informed and would consult with her regarding immunizations, but, nevertheless, he wanted to assure the child had proper immunizations.

5. Pediatrician Jennifer Seidenberg, M.D. opined that it is very advisable for children to be immunized and that the risks associated with vaccinations are very rare and minimal, particularly compared to not being vaccinated at all.

6. When the child was four years old, mother executed a "Statement of Exemption to Immunization Law" requesting a religious exemption from the Pennsylvania immunization law. She wrote on the form that "I believe that immunizations devastate the body, therefore, destroy the church." (Exhibit Pet. #1). Father did not sign the form.

7. Both mother and father's positions concerning immunizations are sincere and are not vindictive or with impure motives.

8. All witnesses were credible.

DISCUSSION

The parties have shared legal custody. "Legal custody" is defined as "[t]he right to make major decisions on behalf of the child, including, but not limited to, medical, religious and educational decisions." 23 Pa.C.S.A. §5322(A). Immunization is a medical decision. The issue is whether or not the best interests of the child would be served by granting father sole legal custody for the limited medical purpose of determining whether the child should be immunized. Based on the facts, the court finds that the father should have such limited legal custody.

This case involves a hybrid of issues concerning the best interests of children, legal custody, immunization laws, and religious freedoms. Mother's request to prohibit immunizations is based on her religious beliefs.

> The guarantee of freedom of religion is intended to secure the rights of the individual as against the state. Underlying the guarantee is a principle of neutrality, a belief that religion is "not within the cognizance of civil government." Reynolds v. United States, 98 U.S. 145, 163, 25 L.Ed. 244 (1878); Barnhart, supra. Nevertheless, the right of the parent to control every aspect of a child's life is not absolute. When actions concerning a child have a

relation to that child's well-being, the state may act to promote these legitimate interests. Bykofsky v. Borough of Middletown, 401 F.Supp. 1242, 1262 (M.D.Pa.1975). The existence of such authority is evident in the remarks of the Court in Prince v. Massachusetts, 321 U.S. 158, 166-67, 64 S.Ct. 438, 442-43, 88 L.Ed. 645 (1944):

> ... the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include the liberty to expose the community or the child to communicable disease or the latter to ill health or death. The catalogue need not be lengthened. It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction. (Citations omitted)

Accordingly, in cases where harm to the physical or mental health of the child is demonstrated, these legitimate state interests may override the parents' qualified right to control the upbringing of their children.

Matter of Cabrera, 381 Pa.Super. 100, 107-108, 552 A.2d 1114, 1118 (Pa.Super. 1989)

Mother cites In re Green, 448 Pa. 338, 292 A.2d 387 (1972) for her position that the parent has the right to make medical

decisions. However, the precepts announced by the Green court in 1972 are not absolute. In Commmonwealth v. Cottam, 420 Pa.Super. 311, 333-336, 616 A.2d 988, 999-1000 (Pa.Super. 1992), the court explained the parameters of a parent's right to make medical decisions for their minor children, while distinguishing the Green and Zummo cases:

> Appellants first argue that the court erred in failing to instruct the jury that if the jury found Eric and Laura Cottam, to be of sufficient intellect and maturity, and to have voluntarily refrained from eating based on their religious beliefs, then they must conclude that appellants did not have a legal duty to provide food. For support, appellants cite to In re Green, 448 Pa. 338, 292 A.2d 387 (1972) and Zummo v. Zummo, 394 Pa.Super. 30, 574 A.2d 1130 (1990).
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> In Green, supra, a state hospital filed a petition seeking to have Ricky Green declared a "neglected child" under the then Juvenile Court Law (presently found at 42 Pa.C.S.A. § 6302 (1982)) and have it appointed Green's guardian. Green, who was seventeen-years-old, suffered from severe curvature of the spine which prevented him from standing. Doctors recommended an operation known as "spinal fusion." Green's mother agreed to the operation but refused to permit Green to have a blood transfusion based on her religious beliefs. This refusal prompted the hospital to seek court relief. This court reversed the lower court's denial of the hospital's petition seeking to have Green declared a neglected child and the hospital named guardian. Our Supreme Court reversed this court, determined that Green was of age to make the decision without parental intervention, and remanded to permit Green to express an opinion on whether he wanted the operation.
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> In Zummo, supra, the father of three minor children appealed from a custody order which prohibited him from taking his children to religious services which were "contrary to the Jewish faith" during periods of

lawful custody and visitation. The father contended that the order violated his First Amendment free exercise rights. In ordering the prohibition, the trial court reasoned inter alia that the children had chosen the Jewish faith and thus, should continue in their chosen course. A panel of this court disagreed. The panel held that a legally cognizable religious identity will only be established when the child herself asserts a religious identity and then, only when the child has reached "sufficient maturity and intellectual development to understand the significance of the assertion." Id. at 67, 574 A.2d at 1149. This court noted that although no uniform age of discretion had been set, children twelve or older are generally considered mature, while children eight and younger are not. Id. The panel then concluded that the children in the case at hand, who were ages three, four and eight, respectively, were too young to assert religious identity for themselves, and thus the trial court had erred in determining that they had chosen the Jewish faith.

Appellants argue that both Green and Zummo indicate that if a child is of sufficient maturity and intellect, then she can assert her own religious identity and thus, can voluntarily refrain from eating on the basis of her religious beliefs. Therefore, appellants argue, that, if a jury found that both Laura and Eric Cottam were of sufficient maturity and intellect and voluntarily refrained from eating on the basis of their religious beliefs, the appellants did not have a duty to provide food for them. Consequently, appellants contend that the jury should have been so instructed. We disagree.

First, appellants' reliance on Green and Zummo is misplaced. Green, supra, did not involve a life-threatening decision. Our Supreme Court expressly stated that Green could survive without the operation. Id. 448 Pa. at 345, 292 A.2d at 390. Consequently, the Court's remanding so that Green could state his position on whether he wanted to undergo the operation—or assert the same religious objections as his mother—was not a decision to permit Green to jeopardize his life. Moreover, the presumption raised in Zummo, that children twelve years old or greater are mature enough to assert a religious identity, has no bearing on whether these

> children are mature enough to decide to refrain from eating for forty-two consecutive days.
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> Second, we agree with the trial court that, even if Laura and Eric were considered mature enough to freely exercise their religious beliefs, this does not dispel appellants' duty while the children are in their care, custody and control to provide them with parental care, direction and sustenance.

Here, A.M lacks the maturity to make his own medical decisions. However, his medical condition is not an emergency or life-threatening, although an argument could be made that if he contracts a serious illness that could have been prevented by immunization, it would be too late. Nevertheless, the issue in this case does not involve two parents refusing immunizations for their child. The parents cannot agree on this particular medical treatment. Thus, the court must employ a custody analysis, i.e., what is in the best interest of the child.

The legislature has recognized that parents have the right to raise their children in accordance with their religious beliefs and, in fact, have specifically allowed children an exemption from the Commonwealth's immunization laws "in the case of any child whose parent or guardian objects in writing to such immunization." 24 P.S. §13-1303(d).[1] However, the courts have often stated that "... even if [the children] were

[1] The court notes that the statute refers to only one "parent or guardian." This 1972 statute predates the concepts of sole and shared legal custody.

considered mature enough to freely exercise their religious beliefs, this does not dispel [defendants'] duty while the children are in their care, custody and control to provide them with parental care, direction and sustenance." Commonwealth v. Nixon, 718 A.2d 311 (Pa.Super. 1998), citing Commonwealth v. Cottam, 420 Pa.Super. 311, 337, 616 A.2d 988, 1000 (1992).

Parents have a duty of "care, direction, and sustenance." The courts and the legislature have determined that parents can forgo their children's immunizations for religious reasons. However, there is a certain cognitive dissonance that arises when determining the best interests of the child, particularly when two parents disagree about immunizing their child. Although there is a religious exception, the legislature clearly believes that it is in the public interest that a child be immunized. It has promulgated this statute:

> 24 P.S. § 13-1303a. **Immunization required; penalty**
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> (a) It shall be the duty of all school directors, superintendents, principals, or other persons in charge of any public, private, parochial, or other school including kindergarten, to ascertain that every child, prior to admission to school for the first time has been immunized, as the Secretary of Health may direct, against such diseases as shall appear on a list to be made and from time to time reviewed by the Advisory Health Board. All certificates of immunization shall be issued in accordance with the rules and regulations promulgated by the Secretary of Health with the sanction and advice of the Advisory Health Board.

> (b) Any person who shall fail, neglect, or refuse to comply with, or who shall violate, any of the provisions or requirements of this section, except as hereinafter provided, shall, for every such offense, upon summary conviction thereof, be sentenced to pay a fine of not less than five dollars ($5) nor more than one hundred dollars ($100), and in default thereof, to undergo an imprisonment in the jail of the proper county for a period not exceeding sixty (60) days. All such fines shall be paid into the treasury of the school district.
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> (c) The provisions of this section shall not apply in the case of any child deemed to have a medical contraindication which may contraindicate immunization and so certified by a physician. Such certificates may be accepted in lieu of a certificate of immunization.
>
> (d) The provisions of this section shall not apply in the case of any child whose parent or guardian objects in writing to such immunization on religious grounds.

The courts themselves have also recognized the importance of immunizations for children. In Adoption of K.J., 936 A.2d 1128, 1134 (Pa.Super. 2007), the court terminated the mother's parental rights. Although there were many other severe and significant reasons to terminate parental rights, the court found it significant enough to note the "[t}he children were also not receiving adequate medical care. K.J.'s immunizations were not up to date and his two front teeth were rotted and broken. J.J. had no immunizations."

Moreover, in our specific case, a pediatrician testified that it was certainly advisable for the minor child to be immunized. Specifically, Dr. Seidenberg said: "I advise parents to have their children vaccinated. I think that CDC has also agreed that the pros of vaccinating definitely outweigh the cons. We still see these vaccine preventable diseases in our country and worldwide so that's why we're continuing to vaccinate against them. There are always risks involved but the risks are small and the benefits outweigh the risks." (Hrg. Tr. p.).

In this case, father is seeking to immunize the child in the best interests of the child. Mother is seeking to prevent immunization for sincerely held religious reasons. The legislature has mandated immunization for children, with medical and religious exceptions. The courts have said that parents who do not immunize their children, when coupled with other factors, risk termination of parental rights. A qualified physician has opined that immunizations for children are advisable and that the benefits greatly outweigh the risks. Moreover, the child is now only 7 years old and does not have the maturity to make such a crucial decision about his health. The child's best interest and care and welfare are paramount.

After consideration of the pediatrician's opinion, the age of the child, the legislative immunization policy, and appellate courts' views on immunization in child welfare cases, this court finds that father should have legal custody to make decisions as to whether the child should be immunized.

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ANDREW ROBERT MOLICK,	CASE NO: 1312 OF 2005
Defendant	

APPEARANCES:
FRANKLIN E. KEPNER, JR., ESQUIRE, Attorney for the Plaintiff
ANDREW ROBERT MOLICK, DEFENDANT, Pro Se

ORDER

AND NOW, this 15th day of May 2012, it is ORDERED and DECREED that the custody order dated January 20, 2012, regarding the minor child Adam Robert Molick, born February 26, 2005, is amended to the effect that **father Andrew Robert Molick shall have sole legal custody for the medical purpose of determining whether or not the minor child should be immunized.** In all other respects the January 20, 2012, custody order shall remain in affect, as amended hereby, and the parties ARE DIRECTED to comply with the terms thereof.

BY THE COURT

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HONORABLE THOMAS A. JAMES, JR., J.