

Child Custody Sticking Point: Vaccinations, Mandates, & Court Orders

Hon. Charmaine H. Buehner, Ventura County Superior Court

1

Preliminary Comments

The purpose of this discussion is to provide an overview of federal and state cases and legislation that relate to issues of vaccines and custody disputes in family law cases.

Judge Buehner expressly declines to offer her personal opinions regarding vaccines or vaccine mandates, nor to represent the personal opinions of any judicial officers, or positions of the Ventura County Superior Court.


2

Smallpox & The First Vaccine

Edward Jenner (1749-1823)

*“On the Origin of the Vaccine Inoculation”
(1801)*

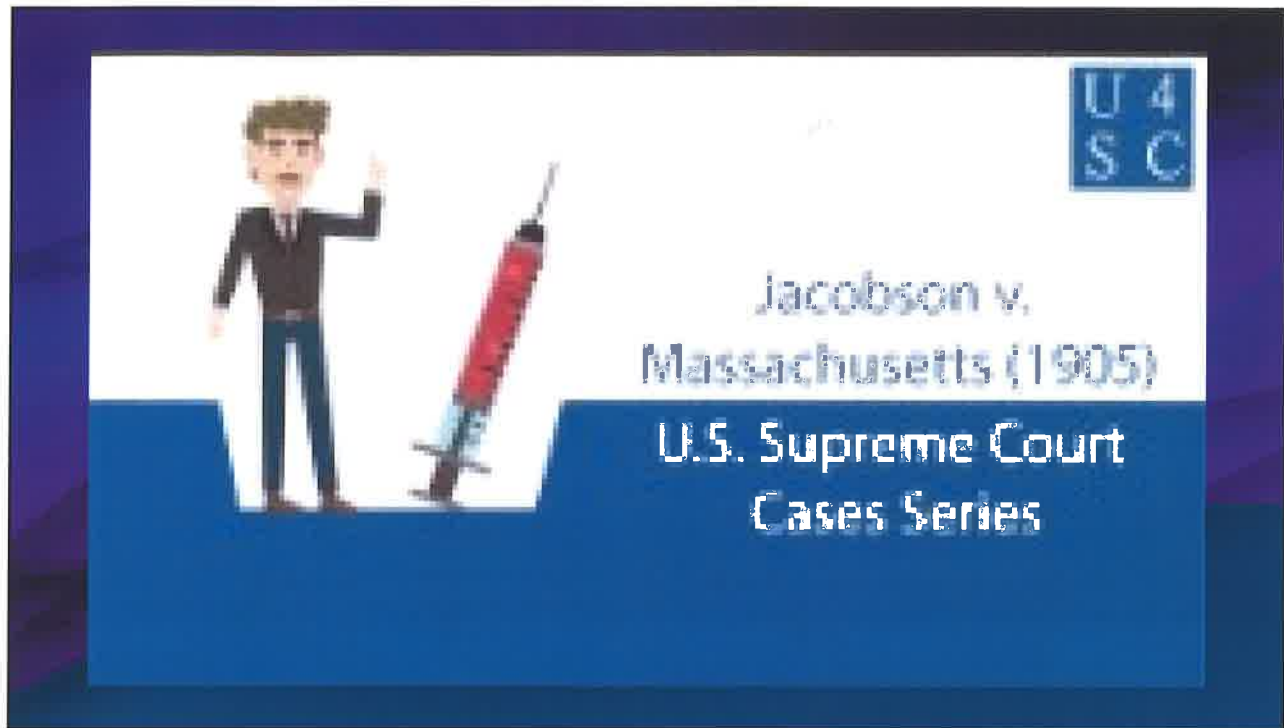
Janet Parker (d. 1978)



3

<p><i>Hypothetical A:</i></p> <p>Parent A: <i>Wants to enroll five-year old child in public school for the upcoming school year and has discovered child is not up to date on vaccinations.</i></p> <p>Parent B: <i>Opposes because of child’s health condition. Wants to home school child and for the court to consider medical information from my own research.</i></p>	<p><i>Hypothetical B:</i></p> <p>Parent A: <i>Wants 13-year old to receive COVID vaccine before continuing in-person school.</i></p> <p>Parent B: <i>Is okay with all vaccines but not the Covid-vaccine because it is authorized on an emergency basis only and wants child to attend in-person school.</i></p>
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4



5

Federal Authority:

Jacobson v. Massachusetts (1905) 197 U.S. 11

- 14th Amendment & Equal Protection Claims;
- Police Power of the State & Public Health Crises;
- Will pass muster if a statute enacted to protect the public health, morals and safety has a substantial relation or does not, beyond all question effect a plain & palpable violation of fundamental rights (e.g., 1) Necessity; 2) Reasonable means; 3) Proportionality; 4) Harm Avoidance);
- Footnote 1

6

Federal Authority:

Zucht v. King (1922) 260 U.S. 174

- Ordinance of the City of San Antonio, Texas prohibited any child from attending public school unless vaccinated.
- Challenge: Compulsory vaccinations deprive liberty interest without due process and equal protection of the Fourteenth Amendment.
- The law is well-settled under *Jacobson* that the police power of a state extends to compulsory vaccinations, and that a state may delegate authority to a municipality to determine when health regulations shall become effective.
- Cited in two recent vaccine mandate cases with differing results:
 - *Biden v. Missouri* (Jan. 13, 2022) 595 U.S. ___, 142 S. Ct. 647 [upholding mandate by Secretary of Health & Human Services under 42 U.S.C. sec. 1302]
 - *Brnovich v. Biden* (D. Ariz. Jan 27, 2022) 2022 U.S. Dist. Lexis 15137 [striking mandate issued by President Biden under Procurement Act, 40 U.S.C. sec. 101.].

7

Federal Authority:

Prince v. Massachusetts (1944) 321 U.S. 158

- State labor law prohibited boys under 12 and girls under 18 from selling newspapers, periodicals or any other merchandise in any street or public place, and prohibits guardians from permitting or compelling minors from engaging in such activity under penalty of fine of \$10 or up to 4 days in jail;
- Two liberties at issue: Freedom of Religion & Due process
- Court upheld Massachusetts law as valid exercise of state police power.
- The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment.
- Cited in *Doe v. San Diego Unified School District* (9th Cir Dec. 4, 2021) 2021 U.S. App. Lexis 35760

8

State Authority: *Abeel v. Clark* (1890) 84 Cal. 226

- California Vaccination Act of 1889 required that all students be vaccinated against smallpox, except those who have a medical exemption certified by a physician.
- Abeel challenged the law as violating his rights under the California constitution and his rights as a parent.
- California Constitution, Article 19, section 1, authorizes the legislature to enact laws that secure and maintain the health and prosperity of the state by subjecting both persons and property to such reasonable restraints and burdens as will effectuate such objects.
- The Court easily upheld the mandate as consistent with the California constitution. The legislature properly decided issues of public good, public purposes and permissible public burden.

9

State Authority: *French v. Davidson* (1904) 143 Cal. 658

Challenge to the California Vaccination Act of 1889 out of San Diego.

Violation of the Fourteenth Amendment of the United States Constitution.

"When we have determined that the Act is within the police power of the State, nothing further need be said. The rest is left up to the discretion of the law-making power."

"Where the legislation affects all persons similarly situated, no violation of the Fourteenth Amendment will be had."

10

State Authority: Mandatory Vaccinations for Children

California requires all children who attend school, whether private or public, be vaccinated against 10 diseases:

1. Diphtheria
 2. Hemophilus Influenza type b (Hib)
 3. Measles
 4. Mumps.
 5. Rubella
 6. Pertussis (Whooping Cough)
 7. Poliomyelitis (Polio)
 8. Tetanus ("Lockjaw")
 9. Hepatitis B
 10. Varicella
 11. ANTICIPATED upon full FDA approval, COVID-19
- (<https://www.gov.ca.gov/2021/10/01/california-becomes-first-state-in-nation-to-announce-covid-19-vaccine-requirements-for-schools/>)

11

State Authority: *Love v. Dept. of Education* (2018) 29 Cal.App.5th 980

Senate Bill 277 eliminated the personal belief exemption from requirement that all students be vaccinated in California.

Challenge on grounds that Bill violated their rights under the California Constitution to: 1) substantive due process (art. I, section 7); privacy (art. I, sec. 1); and a public education (art. IX, sec. 5).

Passes muster whether under a strict scrutiny (narrowly tailored to promote a compelling state interest) or rational-basis review (law bears a rational relation to a legitimate government interest).

12

State Authority:

In re S.P. (2020) 53 Cal.App.5th 13 (2nd Appellate District, Div. 6)

Question: Does a juvenile court have the authority to order vaccinations for dependent children under its jurisdiction?

Answer: Yes.

Courts in W&I section 300 cases "may make any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the child, **including medical treatment. . .**" *In re Christopher I.* (2003) 106 Cal.App.4th 533, 554-555.

Substantial evidence supports the court's findings: e.g., opinions of regular treating physicians, opinion of specially hired doctor properly disregarded medical exemption letter (H&S Code 120370, subd. (a)(1),

13

Legal Custody in California

- *Joint Legal Custody, Family Code section 3003*
- *Best Interests of a Child, Family Code section 3011(a)*
- *Legislative Declarations of Public Policy, Family Code section 3020*
- *Contents & Construction of a Joint Legal Custody Order, Family Code section 3083*

14

Legal Custody in California

- *In re Montenegro v. Diaz* (2001) 26 Cal.4th 249, 256 [custody decisions made according to best interests of the child];
- *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32;
- *F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 15;
- *Cassady v. Signorelli* (1996) 49 Cal.App.4th 55, 62;
- *In re Marriage of McLoren* (1988) 202 Cal.App.3d 108, 115-116
- *In re Marriage of Furie* (2017) 16 Cal.App.5th 816, 827
[change in legal custody on limited issue does not require finding of changed circumstances]

15

Vaccination-Related Legislation on the Horizon

Senate Bill 871

Would add COVID-19 vaccines to California's list of required inoculations for attending K-12 schools, which can be skipped only if a student receives a rare medical exemption.

Senate Bill 866

Would permit children 12 and older to choose to be vaccinated, including against COVID-19, without a parent's consent or knowledge.

16

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17

Final Note

California Rule of Court 3.672(e)
Family Code Section 6308
Local Rule of Court
Zoom Appearances in Depts. 31, 32, 33
& 35

18

