



Last Updated: 4 March 2021

**FAMILY COURT OF AUSTRALIA****← COVINGTON & COVINGTON → (NO. 2)*****[2021] FamCA 24***

FAMILY LAW – PRACTICE AND PROCEDURE – Stay application – Where the mother seeks a stay pending appeal of final parenting orders made by consent – Where final parenting orders provide for equal shared parental responsibility, for the child to live with the mother and spend substantial time with the father, for the child to be vaccinated, to commence mainstream schooling, to obtain a passport and that the father be permitted to involve the child in the practice of his religion subject to certain constraints – Where the mother submits that she did not give valid consent to the orders made by consent as she was subject to pressure from her legal representatives at the time – Where the mother further submits that the child has a Constitutional right not to be vaccinated and that no one will be harmed if there is a stay of the orders, and that if the orders are not stayed and the father proceeds to vaccinate the child, the child may run away and this would be antithetical for to her best interests – Where the father submits that the final orders are in the best interests of the child and the father is entitled to act in accordance with those orders, that the mother’s prospects on appeal are weak, that the mother’s actions suggest that her bona fides should be called into question and that to stay these orders would undermine the Court’s process – Where the Independent Children’s Lawyer also submits that the mother’s application for a stay should be dismissed – orders made dismissing the mother’s application for a stay.

FAMILY LAW – CHILDREN – Where the father seeks orders pursuant to a reservation of liberty to apply to facilitate the implementation of the final orders particularly in relation to the child’s attendance at primary school, vaccinations, obtaining a passport for the child and imposing certain injunctions on the mother – Where the mother’s behaviour in resisting the

implementation of the existing orders and evidence that she has been involving the child in the proceedings supports the making of such orders – orders made to facilitate the implementation of the existing orders.

*Australian Passports Act 2005* (Cth)

*Family Law Act 1975* (Cth)

Australian Constitution

Family Law Rules 2004 (Cth)

*Aldridge & Keaton (Stay Appeal)* [2009] FamCAFC 106

*Mains & Redden* [2011] FamCAFC 184

<b>APPLICANT:</b>	Ms  Covington 
<b>RESPONDENT:</b>	Mr  Covington 
<b>INDEPENDENT CHILDREN'S LAWYER:</b>	Matthew Harper
<b>FILE NUMBER:</b>	MLC 9008 of 2019
<b>DATE DELIVERED:</b>	27 January 2021
<b>PLACE DELIVERED:</b>	Melbourne
<b>PLACE HEARD:</b>	Melbourne
<b>JUDGMENT OF:</b>	McEvoy J
<b>HEARING DATE:</b>	27 January 2021

## REPRESENTATION

**COUNSEL FOR THE APPLICANT:** Self-represented

**SOLICITOR FOR THE APPLICANT:** Self-represented

**COUNSEL FOR THE RESPONDENT:**

Ms Mallett

**SOLICITOR FOR THE RESPONDENT:**

Coulter Roache Lawyers

**INDEPENDENT CHILDREN'S LAWYER:**

Mr Harper

**SOLICITOR FOR THE INDEPENDENT CHILDREN'S LAWYER:** MMH Lawyers

## **ORDERS**

- (1) The Application in a Case filed by the mother on 14 January 2021 be dismissed.
- (2) In order to give effect to Orders 29 to 30 of the final orders dated 3 December 2020 ("the Final Orders"):
  - (a) Z attend F School with such attendance to be as agreed by the mother and father, and failing agreement each Tuesday, Wednesday, Thursday and Friday in term one of the 2021 school year from the commencement of school until 11.30 am on each day;
  - (b) Z's attendance at F School progress to full time attendance at the commencement of term two in the 2021 school year, unless otherwise agreed by the mother and father in writing; and
  - (c) Z commence her attendance at F School on 28 January 2021.
- (3) The mother be restrained by injunction from contacting any medical practitioner, or their servants and agents, attended by Z for the purpose of giving effect to Orders 22 to 27 of the Final Orders.
- (4) In the event the mother refuses to sign all necessary documents to obtain an Australian Passport for Z born in 2010 within seven days, pursuant to s 11 of the *Australian Passports Act* (Cth), the father be hereby authorised to execute all documents necessary to obtain an Australian Passport and travel documents for and on behalf of Z without the mother's consent AND IT IS REQUESTED THAT the Department of Foreign Affairs and Trade forthwith issue an Australian Passport for Z.
- (5) The passport be held by the father and provided to the mother no less than twenty-eight (28) days prior to any proposed travel in accordance with Order 16 of the Final Orders.
- (6) The mother and father be at liberty provide a copy of these Orders to:
  - (a) any school attended or to be attended by Z;
  - (b) any General Practitioner or Doctor attended by Z for the purpose of obtaining vaccinations or a referral for same; and
  - (c) the Magistrates' Court of Victoria in relation to Intervention Order matters.
- (7) The mother be and is hereby restrained by injunction from doing any of the following:
  - (a) discussing the issues in the legal proceedings both substantive and appeal, with Z;

(b) requesting or requiring Z to produce written opinions or views on the issues involved in the Court Orders;

(c) in any event further filing or relying upon any documents purporting to have been written by Z in these proceedings;

(d) having any discussions regarding these proceedings, in particular involving any official or unofficial advisors or her McKenzie friend with Z present or within hearing.

NOTATION:

1. In the event the mother does not facilitate compliance with the Final Orders or these Orders, then the father and the Independent Children's Lawyer have liberty to apply to the Chambers of Justice McEvoy for an urgent hearing of the matter.

Note: The form of the order is subject to the entry of the order in the Court's records.

**IT IS NOTED** that publication of this judgment by this Court under the pseudonym **Covington & Covington** has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

Note: This copy of the Court's Reasons for Judgment may be subject to review to remedy minor typographical or grammatical errors (r 17.02A(b) of the *Family Law Rules 2004* (Cth)), or to record a variation to the order pursuant to r 17.02 *Family Law Rules 2004* (Cth).

FAMILY COURT OF AUSTRALIA AT MELBOURNE

FILE NUMBER: MLC 9008 of 2019

**Ms Covington**

Applicant

And

**Mr Covington**

Respondent

### EX TEMPORE REASONS FOR JUDGMENT

1. The Court has before it an Application in a Case filed by the mother on 14 January 2021. The application is supported by an affidavit affirmed by the mother on 31 December 2020. Attached to that affidavit are various documents referred to as “files”. They are said to be in support of and associated with the mother’s appeal of orders made by the Court as presently constituted on 11 December 2020. Those “files” comprise:





1. Notice of Appeal;
2. Grounds of Appeal;

100. Application in a Case dated 30 December 2020;

4. Orders of 11 December 2020;
5. A bundle of documents which the mother says provides evidence of her former Counsel’s failures in her duty of care.

2. These documents are prolix, and in the main difficult to follow. It would seem however, and this was orally confirmed by the mother this morning, that the mother’s application in a case which is presently before the Court seeks a stay of the orders of the Court made on 11 December 2020 and made by consent on 3 December 2020.

3. It may at this point be useful to say something about the proceeding in which these orders were made. In the Court’s reasons for judgment dated 11 December 2020, which accompanied the 11 December 2020 orders, the following observations were made by way of introduction:

[1] The parties to these proceedings are the applicant father, Mr  **Covington**  and the respondent mother, Ms  **Covington** . The proceedings have concerned parenting arrangements for the one child of the relationship Z born in 2010 (“the child”), currently 10 years of age.

[2] Originally in issue was the question of parental responsibility and whether the child should be immunised or vaccinated, whether she should transition from home schooling to mainstream schooling, and whether the father should be permitted to involve the child in the practice of his religion.

[3] The trial commenced before me on 30 November 2020 by way of Microsoft Teams, and ran for four days. Both the applicant father and the respondent mother gave evidence and were cross examined.

[4] In broad terms the mother contended that she should have sole parental responsibility, that the child should not be immunised or vaccinated, that the child should continue to be home schooled, and that the father should be restrained from involving the child in any activity relating to his membership of the C Church or exposing her to any C Church material.

[5] For his part the father maintained that the parties should have equal shared parental responsibility, that the child should be vaccinated in accordance with a vaccination schedule recommended by a paediatrician, that the child's home schooling should come to an end and that she should be enrolled in a mainstream school commencing in 2021, albeit on a staged basis, and that he should be permitted to involve the child in the activities of the C Church. The father conceded that the child should not have to participate in door to door knocking, prior to attaining the age of 12 years, and only then should she agree to do so.

[6] During the course of the trial the issues separating the parties narrowed, and ultimately, on the fourth day of the trial, the parties came to an agreement in relation to all matters.

4. Accordingly, on 3 December 2020, the Court made orders by consent of the parties together with certain procedural orders for the mother and the father to have equal shared parental responsibility, for the child to live with the mother, orders for spend time arrangements, orders for immunisation/vaccination, orders for school attendance, religion observance and certain other matters. These orders are set out in paragraph [7] of the Court's reasons of 11 December 2020.

5. Subsequent to the making of these orders the mother sought to withdraw her consent solely in relation to the orders which had been made for vaccination/immunisation.

6. This application by the mother was the subject of the hearing on 11 December 2020. On that day the mother's application was opposed by both the father and the ICL. The submissions made that day were addressed in paragraphs [17]-[22] of the Court's reasons of 11 December 2020. In paragraph [23] of those reasons it was explained by reference to authority, that the orders made by consent on 3 December 2020 had already been made, and that it was not open to proceed on the basis that they had not been made.

7. On 11 December 2020, pursuant to liberty to apply, certain orders sought by the father to facilitate the child's vaccination were also made. The mother now also seeks a stay of these orders.

8. At paragraphs [25]-[27] of the 11 December 2020 reasons the following observations in relation to the need for these further orders were made:

[25] Very regrettably, it is plain that the mother does not support the child being vaccinated. Indeed, I consider that her opposition to the child being vaccinated, as the child's principal carer, will likely complicate the process and make it much more difficult for the child. In these circumstances it would be counter-productive for the mother to accompany the father and the child to any medical appointments concerned with the vaccinations. I accept that the mother's opposition to the

vaccinations would be likely to cause distress to the child.

[26] The mother's position in this regard is to be lamented. It flies in the face of the evidence of Associate Professor D, a consultant paediatrician and infectious diseases physician at the B Hospital who had prepared a report dated 1 December 2019 which was in evidence at the trial. The mother's position concerning vaccination is not child-focused, and it is not in the best interests of the child. It is not based on evidence, and on the evidence of Associate Professor D it may expose the child to harm.

[27] There will accordingly be orders in the terms set out at the commencement of these reasons. If the mother is able to contain her own fears in relation to the child being vaccinated and support the orders that have been made, it may be expected that the father will involve her in the process as he has said he will do. That would unquestionably be in the child's best interests, but it will require the mother to set her apprehensions to one side. It is to be hoped that she will be able to do so.

9. The mother, who appears on her own behalf this morning, submits that she did not give valid consent to the orders which were made on 3 December 2020. She says, although she was at that time legally represented, that she was not heard on the question of the orders, that she was told she was at risk of losing her role as primary carer, and that she was not made privy to a draft of the proposed consent orders. The mother also made various other submissions in relation to difficulties with mainstream schooling and the C Church. It appears that the mother now seeks to withdraw her consent to all of the orders made on 3 December 2020.

10. As well as these matters, the mother submits that no one will be harmed if there is a stay of the orders, and that it may be that if the orders are not stayed and the father proceeds to vaccinate the child, the child may run away and this would be antithetical to her best interests.

11. Counsel for the father submits that, consistently, with settled authority, the onus is on the mother to show that there is merit in her appeal. It is submitted on behalf of the father that being in receipt of final orders he should be able to act, forthwith, on the basis of those orders. It is contended that to permit the mother to have a stay of these orders would be to undermine the Court's process. The father relies on *Aldridge & Keaton (Stay Appeal)* [2009] FamCAFC 106, and the well-known principles in relation to the granting of stays essayed at paragraph [18]. These include the following:



1. the onus to establish a proper basis for the stay is on the applicant for the stay. However it is not necessary for the applicant to demonstrate any "special" or "exceptional" circumstances;
2. a person who has obtained a judgment is entitled to the benefit of that judgment;

100. a person who has obtained a judgment is entitled to presume the judgment is correct;

4. the mere filing of an appeal is insufficient to grant a stay;
5. the bone fides of the applicant;
6. a stay may be granted on terms that are fair to all parties - this may involve a court weighing the balance of convenience and the competing rights of the parties;

7. a weighing of the risk that an appeal may be rendered nugatory if a stay is not granted - this will be a substantial factor in determining whether it will be appropriate to grant a stay;
8. some preliminary assessment of the strength of the proposed appeal - whether the appellant has an arguable case;
9. the desirability of limiting the frequency of any change in a child's living arrangements;
10. the period of time in which the appeal can be heard and whether existing satisfactory arrangements may support the granting of the stay for a short period of time;

And I observe significantly in this case:

11. the best interests in the child, the subject of the proceedings are a significant consideration.
12. Counsel for the father submits that the bona fides of the mother are presently in question. She points to the mother's continuing change of position, the fact that the mother was cross examined at trial and gave sworn evidence and that that evidence is inconsistent with the position she now adopts, and that despite all this she has, perhaps, allowed herself to come under the influence of an "outside source". I take this to be a reference to the activities of Mr P, who has purported to file documents on behalf of the mother.
13. Counsel for the father points also to the mother's application in the Supreme Court of Victoria, on 25 December 2020, Christmas Day, dismissed with costs, seeking to enjoin the child's vaccination, and the mother's active involvement of the child in resisting a vaccination referral from a general practitioner. These matters are the subject of the father's affidavit of 26 January 2021.
14. I pause to observe that it is plain that the mother has been inappropriately involving the child, aged 10, in the matters which are the subject of this litigation. I will return to this aspect of the matter in due course.
15. Counsel for the father concedes that there would be a risk that, absent a stay, the mother's appeal at least in relation to vaccinations, might be rendered nugatory. However she says that, balanced against this, is that vaccination is manifestly in the child's best interests, and that this was confirmed by the medical evidence at the trial.
16. As to the mother's prospects on the appeal, Counsel for the father contends that they are weak. Insofar as the asserted point arising under s 51(xxiiiA) of the Constitution is concerned, the father submits that vaccinations are not a medical procedure in the nature of "civil conscription" as that term is employed in s 51(xxiiiA) of the Australian Constitution. Whether or not a child is vaccinated is a question simply of parental responsibility, and the father relies in this respect on *Mains & Redden* [2011] FamCAFC 184, [95] ff. The father says that this is a "faux" constitutional point. Vaccinations are not compulsory and to this extent s 51(xxiiiA) does not provide an implied right of freedom from vaccination as asserted by the mother. The father also submits, with some force, that in any event this point was not raised during the mother's case prior to her agreement to the orders made on 3 December 2020.
17. Insofar as the mother's complaint about the representation she received is concerned, the father says that this also is without merit. Counsel for the father points to Ms  Covington 's evidence in the witness box that she was not necessarily unsupportive of vaccinations. The father questions whether the ongoing applications made by the mother are, in fact, an attempt to bleed the father of funds and thereby achieve, collaterally, the result which she seeks.



18. Pursuant to the liberty to apply granted on 3 December 2020 the father also seeks the following orders:

1. The Application in a Case filed by the Mother on 14 January 2021 be dismissed.
2. The Mother pay the Father's costs of this proceeding in accordance with Schedule 3 of the [Family Law Rules 2004](#) fixed in the sum of \$2,893.85 within 28 days of the date of these Orders.

#### Primary School

3. In order to give effect to Orders 29 to 30 of the Final Orders dated 3 December 2020:

(a) Z attend F School with such attendance to be as agreed by the Mother and Father, and failing agreement each Tuesday, Wednesday, Thursday and Friday in term one of the 2021 school year from the commencement of school until 11.30am on each day;

(b) Z's attendance at F School progress to full-time attendance at the commencement of Term Two in the 2021 school year, unless otherwise agreed by the Mother and Father in writing; and

(c) Z commence her attendance at F School on 28 January 2021.

#### Vaccinations

4. The Mother be restrained by injunction from contacting any medical practitioner, or their servants and agents, attended by Z for the purpose of giving effect to Orders 22 to 27 of the Final Orders.

#### Passport

5. In the event the Mother refuses to sign all necessary documents to obtain an Australian Passport for Z born in 2010 within seven days, pursuant to [s 11](#) of the [Australian Passports Act](#) (Cth), the Father be hereby authorised to execute all documents necessary to obtain an Australian Passport and travel documents for and on behalf of Z without the Mother's consent AND IT IS REQUESTED THAT the Department of Foreign Affairs and Trade forthwith issue an Australian Passport for Z.

6. The passport be held by the Father and provided to the Mother no less than twenty-eight (28) days prior to any proposed travel in accordance with Order 16 of the Final Orders.

#### Orders

7. The Mother and Father be at liberty provide a copy of these Orders to:

(a) any school attended or to be attended by Z;

(b) any General Practitioner or Doctor attended by Z for the purpose of obtaining

vaccinations or a referral for same; and

(c) the Magistrates' Court of Victoria in relation to Intervention Order matters.

19. The father proposes also that the Court notes:

1. In the event the Mother does not facilitate compliance with the Final Orders or these Orders, then the Father and the Independent Children's Lawyer have liberty to apply to the Chambers of Justice McEvoy for an urgent hearing of the matter.

20. It is said that absent the making of these orders, nothing will happen. The mother is simply refusing to comply with the orders made by consent on 3 December 2020.

21. For his part the ICL notes with alarm the extent to which the mother's position has changed since 3 December 2020. He submits that there should be no stay of the 3 December 2020 and 11 December 2020 orders, and that the further orders now sought by the father should be made, save for order 3. The ICL says that the best interests of the child are that she be vaccinated, but he doubts that there is a need to make order 3 as sought by the father. The ICL also submits, and this is supported by the father, that there should be an order in the following terms:

The Mother be and is hereby restrained by injunction from doing any of the following:





(a) discussing the issues in the legal proceedings both substantive and appeal, with Z;

(b) requesting or requiring Z to produce written opinions or views on the issues involved in the Court Orders;

(c) in any event further filing or relying upon any documents purporting to have been written by Z in these proceedings;

(d) having any discussions regarding these proceedings, in particular involving any official or unofficial advisors or her McKenzie friend with Z present or within hearing.

22. The mother opposes an order in these terms, as she opposes the further orders sought by the father pursuant to liberty to apply.

23. In all the circumstances I do not consider that there is a proper basis for a stay of the orders of 3 December 2020 or 11 December 2020. In my assessment the mother's appeal is most unlikely to succeed. Her so-called constitutional point appears to me to be wholly misconceived, and her claim that she did not consent to the orders made flies in the face of the evidence she gave to the Court during the trial. In my assessment and consistently with the medical evidence at trial, the best interests of the child Z demand that she be vaccinated. I also consider that her best interests demand that she commence a graduated program of mainstream schooling. Mr  Covington  is entitled to the benefit of the orders that he has obtained, by consent, and in the best interests of his daughter. Ms  Covington s conduct

since 3 December 2020 has been, to put matters neutrally, unhelpful. It is not child focused and it must cease. To be clear, in all the circumstances I do not regard the risk that refusing to stay the orders which have been made might render the appeal nugatory as significant given the terms in which the appeal is couched and the very great problems that seem to me to bedevil it.

24. Further, I accept that it is necessary, having regard to the mother's behaviour since 3 December 2020, that the further orders sought by the father pursuant to liberty to apply be made. I will make those orders as follows:

1. The Application in a Case filed by the mother on 14 January 2021 be dismissed.
2. In order to give effect to Orders 29 to 30 of the final orders dated 3 December 2020 ("the Final Orders"):

(a) Z attend F School with such attendance to be as agreed by the mother and father, and failing agreement each Tuesday, Wednesday, Thursday and Friday in term one of the 2021 school year from the commencement of school until 11.30 am on each day;

(b) Z's attendance at F School progress to full time attendance at the commencement of term two in the 2021 school year, unless otherwise agreed by the mother and father in writing; and

(c) Z commence her attendance at F School on 28 January 2021.

3. The mother be restrained by injunction from contacting any medical practitioner, or their servants and agents, attended by Z for the purpose of giving effect to Orders 22 to 27 of the Final Orders.

4. In the event the mother refuses to sign all necessary documents to obtain an Australian Passport for Z born in 2010 within seven days, pursuant to s 11 of the *Australian Passports Act* (Cth), the father be hereby authorised to execute all documents necessary to obtain an Australian Passport and travel documents for and on behalf of Z without the mother's consent AND IT IS REQUESTED THAT the Department of Foreign Affairs and Trade forthwith issue an Australian Passport for Z.

5. The passport be held by the father and provided to the mother no less than twenty-eight (28) days prior to any proposed travel in accordance with Order 16 of the Final Orders.

6. The mother and father be at liberty provide a copy of these Orders to:

(a) any school attended or to be attended by Z;

(b) any General Practitioner or Doctor attended by Z for the purpose of obtaining vaccinations or a referral for same; and

(c) the Magistrates' Court of Victoria in relation to Intervention Order matters.

25. I also accept that, having regard to the mother's involvement of the child in the litigation, it is necessary to make the further restraining order sought by the ICL and the father, and I will make that order in the following terms:

26. The mother be and is hereby restrained by injunction from doing any of the following:

(a) discussing the issues in the legal proceedings both substantive and appeal, with Z;

(b) requesting or requiring Z to produce written opinions or views on the issues involved in the Court Orders;

(c) in any event further filing or relying upon any documents purporting to have been written by Z in these proceedings; and

(d) having any discussions regarding these proceedings, in particular involving any official or unofficial advisors or her McKenzie friend with Z present or within hearing.

26. As to the father's application for the costs of today, which he now seeks be reserved, I will, on this occasion, make no order for costs. I would, however, indicate to the mother that if the father is put to the trouble of responding to further applications, or required to approach the Court again pursuant to liberty to apply, the Court may not be so accommodating of the mother's position in relation to costs.

**I certify that the preceding twenty-six (26) paragraphs are a true copy of the reasons for judgment of the Honourable Justice McEvoy delivered on 27 January 2021.**

Associate:

Date: 1 March 2021