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Family: The Heart of the COVID-19 Home, 56 UIC L. Rev. 115 (2022)

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FAMILY: THE HEART OF THE COVID-19 HOME

MACKENZIE PRINCE*

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I. INTRODUCTION

One hundred and eighty thousand deaths in the blink of an eye, or at least it felt like it.¹ Since early 2020, COVID-19 has waged its deadly toll across the globe.² On March 20, 2020, Illinois, like many other states, issued a statewide “Shelter-in-Place” order.³ With orders requiring all but “essential workers” to stay at home, the attempt to stop the spread of the virus left many feeling isolated, depressed, and lonely.⁴ But by December

*J.D, UIC School of Law, 2023; I would like to thank all of my friends and family who have supported me through this process. I would also like to send my sympathy to all those who have been negatively impacted by the Covid-19 pandemic.

1. *Previous U.S. COVID-19 Case Data*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 27, 2020), www.cdc.gov/coronavirus/2019-ncov/covid-data/previouscases.html [perma.cc/HQ2G-6MKL].

2. *Basics of Covid 19*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 24, 2021), www.cdc.gov/coronavirus/2019-ncov/your-health/about-covid-19/basics-covid-19.html [perma.cc/LVM3-RYZU].

3. Ill. Exec. Order No. 2020-10 (March 20, 2020), www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-10.pdf [perma.cc/A37G-N4VM] (stating that “[w]ith exceptions as outlined below, all individuals currently living within the State of Illinois are ordered to stay at home or their place of residence . . . [a]ll businesses and operations in the State, except Essential Businesses and Operations as defined below, are required to cease all activities within the State except Minimum Basic Operations . . .”).

4. Julianne Holt-Lunstad, *The Double Pandemic of Social Isolation and COVID-19: Cross-Sector Policy Must Address Both*, HEALTH AFFS. (June 22, 2020), www.healthaffairs.org/doi/10.1377/hblog20200609.53823 [perma.cc/SKU3-XVFN]. See also *Summary of Guidance for Public Health Strategies to Address High Levels of Community Transmission of SARS CoV-2 and Related Deaths*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 11, 2020), www.cdc.gov/mmwr/volumes/69/wr/mm6949e2.htm [perma.cc/E92B-73JR].

2020, there was a glimmer of hope, as Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases, encouraged the public that if the coming vaccination campaign went well, we could approach herd immunity by summer's end and "normality that is close to where we were before" by the end of 2021.⁵ Finally, with research and testing complete, multiple vaccines are now authorized for public use.⁶

Eager to take the steps necessary to return to normal life, Rebecca Firlit, an Illinois mother, went to her doctor appointment but came out with bad news.⁷ She could not get vaccinated.⁸ Her doctor, concerned with previously-documented "adverse reactions" to past vaccines, advised her not to get this one because it "pose[d] a risk."⁹ Shortly after, Firlit, who had been divorced for over seven years at the time, went to court to work out a child support agreement with her ex-husband.¹⁰ Of his own accord, the judge asked whether Firlit was vaccinated, to which she explained

(explaining that "[e]ssential (critical infrastructure) workers include health care personnel and employees in other essential workplaces (e.g., first responders and grocery store workers).").

5. Braktkton Booker, *Fauci Predicts U.S. Could See Signs of Herd Immunity by Late March or Early April*, NPR (Dec. 15, 2020), www.npr.org/sections/coronavirus-live-updates/2020/12/15/946714505/fauci-predicts-u-s-could-see-signs-of-herd-immunity-by-late-march-or-early-april [perma.cc/GL2L-3KAH]. In reality, that normality was more out of reach than originally anticipated. As of July 2022, "Europe and the United States have entered the endemic stage of the COVID-19 outbreak: the virus is widespread, is significantly less fatal than it was in 2020, and is spurring only limited changes in public behavior." Sara Charumilind et al, *When Will the COVID-19 Pandemic End?*, MCKINSEY & CO. (July 28, 2022), www.mckinsey.com/industries/healthcare-systems-and-services/our-insights/when-will-the-covid-19-pandemic-end [perma.cc/G57Z-KKBK]. Experts predict "[t]he winter of 2022–23 may see a more substantial uptick in the Northern Hemisphere, but this is unlikely to be as severe as the December 2021–February 2022 wave." *Id.*

6. Jessie Yeung et al., *The Latest on the Coronavirus Pandemic and Vaccines: What You Need to Know*, CNN (March 4, 2021, 8:15 PM), www.cnn.com/world/live-news/coronavirus-pandemic-vaccine-updates-03-04-21/index.html [perma.cc/GXU7-KFA4]. See also Kathy Matella, *Comparing the Covid Vaccines: How are They Different*, YALE MED. (Oct. 7, 2021), www.yalemedicine.org/news/covid-19-vaccine-comparison [perma.cc/7F9H-Y6Q2] (explaining the FDA's decision to "end[] a pause on the [Johnson & Johnson] vaccine, [which] it had recommended 'out of an abundance of caution' over an uncommon, but potentially fatal, blood clotting disorder that occurred in a small number of recipients."). However, fully vaccinated people are still testing positive—a phenomenon known as "breakthrough infections." *Fully Vaccinated? Get the Facts*, MAYO CLINIC (July 23, 2022), www.mayoclinic.org/coronavirus-covid-19/fully-vaccinated [perma.cc/JTL2-ASM4]. Fully vaccinated people are "less likely to have serious illness with COVID-19 than those who are unvaccinated. Even when vaccinated people develop symptoms, they tend to be less severe than those experienced by unvaccinated people." *Id.*

7. Bob Chiarito, *Judge Rules Pilsen Mom Can't See Her Son Because She's Not Vaccinated Against COVID-19*, CHI. SUN TIMES (Aug. 29, 2021, 1:25 PM), www.chicago.suntimes.com/2021/8/29/22647262/judge-rules-pilsen-mom-custody-covid-19-vaccination [perma.cc/2V5W-KCWZ].

8. *Id.*

9. *Id.*

10. *Id.*

that she was not—due to her doctor’s advice and previous health issues.¹¹ The judge then “stripped her of all parenting time with her son until she g[ot] vaccinated.”¹² Just like that, any glimmer of hope for Firlit’s return to normalcy faded. Despite her health risk, the judge, exercising his authority, separated this child from his mother.¹³ Many parents’ biggest fear during the divorce process is losing the child(ren).¹⁴ But at no point did anyone expect a deadly global pandemic to be the driving force. While a unique situation, Firlit’s story represents a new reality for families and family law practitioners—Covid-19 has forever shocked the traditional order and processes of the family law practice.

This Comment will discuss Covid-19’s impact on family law. While looking at the effect nationally, this Comment will focus on Illinois-specific issues, as well as two emerging areas of the practice: (1) guardian ad litem/child representative investigations; and (2) vaccination struggles between parents. Part II of this Comment will explain Covid-19’s effect on the legal field, particularly on how the guardian ad litem (“GAL”) and child representative investigative process worked before the pandemic versus how it is working now. It will also address the struggle between parents regarding vaccinations for children. Examining how courts will handle Covid-19 vaccination struggles between divorced parents, Part III compares case law from prior vaccination issues to those currently at issue. Additionally, it will explain how guardians ad litem and child representatives were forced to modernize their investigative process.¹⁵ Part IV will address a need for family law, as a practice area, to modernize the guardian ad litem and child representative’s investigative process to become more efficient and technologically-oriented. Part V will provide a summary and conclusion of this Comment.

II. BACKGROUND

A. Covid-19’s Effect on the Legal Field

Since March 2020, the legal profession and communities worldwide have dealt with the consequences of a deadly pandemic that has brought

11. *Id.*

12. *Id.* See also Meghan Dwyer, *Judge Reverses Ruling to Strip Unvaccinated Illinois Mother of Rights to See Son*, WGN-TV (Aug. 30, 2021), www.wgntv.com/news/coronavirus/judge-reverses-ruling-to-strip-unvaccinated-illinois-mother-of-rights-to-see-son/ [perma.cc/7K96-37UV] (explaining that the judge in Firlit’s case reversed the initial decision to strip parenting time for failure to vaccinate).

13. Chiarito, *supra* note 7.

14. John Anderer, *Loveless Marriage: Nearly Half of Parents Only Stay Together for their Kids*, STUDYFINDS (Nov. 9, 2020), www.studyfinds.org/loveless-marriage-half-parents-stay-together-for-kids/ [perma.cc/QE59-EQE9] (explaining that “[c]lose to half (47%) [of parents] say the only reason they’re married still is for the sake of their kids.”).

15. For the definitions of GALs and child representatives, see *infra* Section II. B.

life— as we once knew it—to a halt.¹⁶ On March 13, 2020, the White House declared the Novel Coronavirus Disease, known as SARS-CoV-2 (COVID-19), a National Emergency.¹⁷ In addition to creating an economic and humanitarian crisis, the outbreak triggered multiple social, political, and environmental impacts on the global stage.¹⁸ At the pandemic's outset, “[o]nly 8 % of justice systems continue[d] to work normally and 92 % of judicial authorities . . . delay[ed] or suspend[ed] all matters except those deemed ‘urgent.’”¹⁹

To protect themselves from the spread of the virus, families were forced to stay within the confines of their home.²⁰ However, these stay-at-home orders presented unique challenges for divorced families.²¹ For divorced parents, Covid-19 brought new questions, such as whether it was “safe to have children traveling back and forth from” one parent’s residence to the other’s.²² For other families, this meant determining whether a parent who works in the medical field, as an emergency responder, or an essential worker is putting the child at risk during parenting time.²³ The American Academy of Matrimonial Lawyers conducted a survey of family lawyers and found that sixty-three percent of respondents reported “an increase in the number of their cases or clients” as a result of the pandemic.²⁴ Furthermore, among the same lawyers, forty-nine percent said they also experienced “increased litigation over custody issues.”²⁵ These issues included “conflicts over masks, social distancing, and vaccinations for children, and disagreements about in-class virtual learning.”²⁶ For some parents, these issues are not so easily resolved out-of-court and require judicial oversight.

16. *Major Epidemics of the Modern Era*, COUNCIL ON FOREIGN RELS., www.cfr.org/timeline/major-epidemics-modern-era [perma.cc/V38V-EUMV] (last visited Aug. 28, 2022).

17. Raleigh D. Kalbfleisch, *The Impact of the Covid-19 Pandemic on Legal Services*, 33 DCBA BRIEF 14, 14 (2020).

18. *Id.*

19. *Id.* at 16.

20. See Ill. Exec. Order. No. 2020-10, *supra* note 3, at 1-2.

21. Stephanie Zimmerman, *Divorce Lawyers Say Technology Changes May Outlive the COVID-19 Pandemic*, A.B.A. J. (June 11, 2020), www.abajournal.com/web/article/divorce-in-the-time-of-coronavirus-attorneys-say-tech-changes-may-outlive-the-pandemic [perma.cc/64ZF-7CQF].

22. *Id.*

23. See Rafael Olmeda, *No Mask, No Child Custody: Covid is a New Factor in Family Law*, S. FLA. SUN SENTINEL (Oct. 1, 2020), www.sun-sentinel.com/local/broward/fl-ne-covid-family-court-order-20201001-dt65cwe3nrex5ltjwnjkh3ggqu-story.html [perma.cc/SFE5-244E] (explaining for example, an Orlando mother “didn’t want her ex-husband, a firefighter newly engaged to an emergency room nurse, to share custody of their son.”).

24. AM. ACAD. OF MATRIMONIAL LAWYERS, *Covid-19 Pandemic has, as Predicted, Increased the Demand for Divorce*, CISION PR NEWSWIRE (Sept. 21, 2021), www.prnewswire.com/news-releases/covid-19-pandemic-has-as-predicted-increased-the-demand-for-divorce-301380886.html [perma.cc/Q3SD-XC4R].

25. *Id.*

26. *Id.*

B. Court Appointed Representative

In the context of domestic relations, “any proceedings involving the support, custody, violation, allocation of parental responsibilities, education, parentage, property interest, or general welfare of a minor or dependent child, the court may . . . appoint an attorney” as a guardian ad litem or a child representative.²⁷ While these types of statutes vary by state, a guardian ad litem’s duties are relatively similar across jurisdictions.²⁸ In Illinois, a GAL “is a divorce attorney with special training who is appointed by an Illinois Family Court to investigate issues regarding custody or visitation and to look out for the best interests of the children involved.”²⁹ The GAL “shall testify or submit a written report to the court regarding his or her recommendations in accordance with the best interest of the child. The report shall be made available to all parties.”³⁰ Furthermore, “[t]he guardian ad litem may be called as a witness for purposes of cross-examination regarding the guardian ad litem’s report or recommendations.”³¹ A critical task of the GAL is “investigat[ing] the facts of the case and interview[ing] the child and the parties.”³² In divorce, custody, and visitation cases, “where they are often torn between two warring parents,” children need the assurance of client confidentiality.³³ Legislatures created the child representative’s role because “children need special representation—someone to work in their best interests who can do more than merely advocate for them but also observe and investigate[.]”³⁴

C. The Investigative Process

“Determining the child’s best interest requires the [appointed individual] to identify the child’s legal interest in the case and the possible

27. 750 ILL. COMP. STAT. 5/506 (2016).

28. *What is a Guardian Ad Litem or Court Appointed Special Advocate*, IND. LEGAL SERVS., INC., www.indianalegalservices.org/sites/indianalegalservices.org/files/Guardians%20Ad%20Litem%20-%20-%20PDF%20Brochure_0.pdf [perma.cc/K957-UJN6] (last visited Aug. 29, 2022) (“In Indiana, when children are involved in court cases, the judge may choose someone to look out for the child’s welfare. These people are called Guardian Ad Litem/Court Appointed Special Advocates. . . . The GAL/CASA volunteer gathers information about the child’s situation by talking to the child and people who know him or her and by collecting any reports or written records. The volunteer may interview parents, family members, friends, teachers, doctors and others who know the child.”).

29. *What is a Guardian Ad Litem in Illinois?*, THE L. OFF. DEANNA J. BOWEN (Jan. 1, 2019), www.deannabowen.com/guardian-ad-litem-illinois/ [perma.cc/Ry78-5CTX].

30. 750 ILL. COMP. STAT. 5/506(a)(2).

31. *Id.*

32. *Id.*

33. Rebecca J. Whitcombe, *The Child’s Representative Law After in Re Marriage of Bates*, 93 ILL. B.J. 26, 27 (2005).

34. *Id.*

results of litigation.”³⁵ Through the investigation process, the court-appointed representative obtains “medical records, psychological and psychiatric records, school records and report cards, reports from social workers, and letters written on behalf of the parents from friends or relatives.”³⁶ GALs “will evaluate all professional reports for errors and weaknesses[,] . . . the impartiality or neutrality of the expert, the competence of the expert,” the evaluation’s comprehensiveness, “the adequacy of the procedures used, and the scope of any recommendations.”³⁷ The attorney must understand the child’s capacity for self-expression, comfort level and willingness to participate in the process.³⁸ An investigation’s success may be predominantly influenced by the child’s culture, race, ethnicity, and socioeconomic class.³⁹ External factors also influence the success of investigations, including: the interview setting, the tone that the attorney establishes at the beginning of the interview, and the attorney’s line of questioning.⁴⁰

At the initial meeting, the attorney should explain their role, the purpose for the interview, and encourage the child to ask questions if the child does not understand what is taking place or what is expected of the child.⁴¹ The GAL’s investigation identifies mental health issues, developmental needs, “quality of attachment to each parent, and that parent’s social [and parental] environment” through interviewing parents and children jointly and individually.⁴² In this way, the interview setting itself determines the child’s comfort level and ability to “participate effectively in an interview.”⁴³

Some mental health professionals suggest that children under the age of 10 should be interviewed in their own homes.⁴⁴ “By doing so, the attorney will have an opportunity to observe the child in an environment where the child’s behavior and communications better reflect the child’s personality.”⁴⁵ The “security of the home” allows children to interact freely with the attorney more so than in the formal setting of an attorney’s

35. Helene M. Snyder & Susan A. McDaniels, *Effectively Representing Children*, 14 CBA REC. 34, 34-35 (Sept. 2000) (noting that “lay persons often fulfill the traditional investigative guardian ad litem role as a substitute for or in addition to mental health professionals, court services officers, or social work professionals.”).

36. Linda D. Elrod, CHILD CUSTODY PRAC. & PROC., § 12:7 at 1253-57 (2020 rev. ed).

37. *Id.*

38. Snyder & McDaniels, *supra* note 35, at 34.

39. *Id.* at 36.

40. *Id.*

41. See Helen W. Gunnarson, *ABCs for GALs*, 98 ILL. STATE BAR ASS’N, 572, 574 (Nov. 2010) (“If the GAL or child rep is not clear on what the children can expect and doesn’t call them back, the children will feel very betrayed. It only adds to the problems in the family when the children feel betrayed and abandoned not only by their family members but also by the legal system.”).

42. Marcia M. Boumil et. al., *Legal and Ethical Issues Confronting Guardian Ad Litem Practice*, 13 J. L. & FAM. STUD. 43, 47 (2011).

43. Snyder & McDaniels, *supra* note 35, at 35-36.

44. *Id.* at 36.

45. *Id.*

office.⁴⁶ Additionally, visiting the child's home “provide[s] the attorney with additional information about the family, such as how the child and parent interact, and the child's social environment.”⁴⁷

With Covid-19 restrictions in place, GALs and child representatives faced a new issue – they could no longer visit homes and were forced to investigate by videoconference.⁴⁸ The investigative process is meant to get to the bottom of any issues for the court.⁴⁹ But virtual conferences completely altered the investigative process.⁵⁰ With lawyers working from home, new privacy issues arose. For example, roommates or family sheltering in place jeopardized the confidentiality of conversations or documents.⁵¹ Child representatives and GALs could no longer enter the homes and see these interactions firsthand. This switch required many child representatives “to educate themselves on the new legal issues that have arisen through Covid-19 via remote continuing legal education to stay up to date on recent developments and best practices.”⁵²

D. The Vaccination Struggle

As family law practitioners navigated the pandemic, the government launched mass vaccination efforts in an attempt to bring society back to normal.⁵³ However, as vaccines rolled out, many people questioned its overall safety and success.⁵⁴ As of September 2021, more than 3.64 billion

46. *Id.*

47. *Id.*

48. Ellen Rosen, *The Zoom Boom: How Videoconferencing Tools are Changing the Legal Profession*, A.B.A. J. (June 3, 2020, 8:00 AM), www.abajournal.com/web/article/ethics-videoconferencing-tools-are-changing-the-legal-profession [perma.cc/P2VZ-MG4G] (discussing the use of video-conferencing and its effect on the legal system in wake of the pandemic).

49. Snyder & McDaniels, *supra* note 35, at 35.

50. *See, e.g.*, Stephanie A. Sharf & Roberta D. Liebenberg, *Practicing Law in the Pandemic and Moving Forward: Results and Best Practices from a Nationwide Survey of the Legal Profession*, A.B.A. (2021), www.americanbar.org/content/dam/aba/administrative/digital-engagement/practice-forward/practice-forward-survey.pdf [perma.cc/85DQ-MU4J] (comparing attorneys' experiences on how “they worked with each other, provided client services, handled their workload, developed business, and managed the people and processes that take place in every organization” at the beginning of the pandemic and how these changes will fare in the future).

51. Rosen, *supra* note 48.

52. Colleen M. Hurley, *Child Representation in the Time of COVID* (Aug. 10, 2020), www.lavellelaw.com/child-representation-in-the-time-of-covid [perma.cc/7RD9-22S7].

53. Booker, *supra* note 5.

54. *See, e.g.*, Alec Tyson et al., *U.S. Public Now Divided Over Whether to Get Covid-19 Vaccine*, PEW RSCH. CTR. (Sept. 17, 2020), www.pewresearch.org/science/2020/09/17/u-s-public-now-divided-over-whether-to-get-covid-19-vaccine/ [perma.cc/R94N-9YWG] (illustrating that about half of U.S. adults (51%) that responded said “they would definitely or probably get a vaccine to prevent COVID-19 if it were available today”; nearly as many (49%) said “they definitely or probably *would not* get vaccinated at this time.”). In a later poll conducted from August 23 to August 29 2021, 73% of those ages 18 and older said “they’ve received at least one dose of a vaccine for COVID-19”, with the vast majority of this group saying they

people worldwide received a Covid-19 vaccine.⁵⁵ For some divorced couples, the dispute is over whether their children should be vaccinated. While three vaccines are currently available for adults, only two have been approved for children ages 6 months and older.⁵⁶ As of June 17, 2022, the FDA approved the Pfizer and Moderna vaccines for children as young as six months old.⁵⁷ With clinical trials completed for those six-months to five-years old, parents were, and many still are, unsure whether the vaccine is safe and effective.⁵⁸ As the switch back to in-person learning and sports involvement has increased, many parents have weighed the pros and cons of vaccinating their kids, endeavoring to return to a sense of normalcy.⁵⁹ The issue is not so cut and dry for divorced parents, though.

For divorced parents, a court order typically determines decision making powers.⁶⁰ For example, under the Illinois Marriage and Dissolution Act, the trial court has the authority to grant decision-making powers to either one or both parents but must do so while considering several factors.⁶¹ In determining the child's best interests for decision-

had "received all the shots they need to be fully vaccinated" and about a quarter of adults (26%) said "they had not received a vaccine." Alec Tyson et al., *Majority in U.S. Says Public Health Benefits of COVID-19 Restrictions Worth the Costs, Even as Large Shares Also See Downsides*, PEW RSCH. CTR. (Sept. 15, 2021), www.pewresearch.org/science/2021/09/15/majority-in-u-s-says-public-health-benefits-of-covid-19-restrictions-worth-the-costs-even-as-large-shares-also-see-downsides/ [perma.cc/HXN5-5VNP].

55. Josh Holder, *Tracking Coronavirus Vaccinations Around the World*, N.Y. TIMES (Aug. 15, 2022), www.nytimes.com/interactive/2021/world/covid-vaccinations-tracker.html [perma.cc/H5PG-LBU7]. As of August 2022, over 262.6 million people in the United States were vaccinated with the first booster and over 223 million people were vaccinated with the second booster. *Covid Data Tracker Weekly Review*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 26, 2022), www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html [perma.cc/3UNX-QNJK]. As the Covid-19 pandemic continues, these trackers are continuously updated. The links reflect the most recent data at the time of publishing.

56. Press Release, U.S. FOOD AND DRUG ADMIN., Coronavirus (Covid-19) Update: FDA Authorizes Moderna and Pfizer-BioNTech Covid-19 Vaccines for Children Down to 6 months of Age (June 17, 2022).

57. *Id.*

58. The U.S Food and Drug Administration evaluated the effectiveness and safety for pediatric populations in "two ongoing, randomized, blinded, placebo-controlled clinical trials in the United States and Canada which enrolled infants, children and adolescents. "Immune primary series of the Moderna COVID-19 Vaccine at 25 micrograms (mcg) of messenger RNA (mRNA) per dose were compared to immune responses among 290 adults 18 through 25 years who received two higher doses of the vaccine in a previous study which determined the vaccine to be effective in preventing COVID-19. In these FDA analyses, the immune response to the vaccine, of both age groups of children, was comparable to the immune response of the adults." *Id.*

59. Jennifer McDermott & Lauran Neergaard, *Pfizer's Request to OK Shots for Kids a Relief for Parents*, AP NEWS (Oct. 7, 2021), apnews.com/article/coronavirus-pandemic-science-business-coronavirus-vaccine-healthb9a0e105be709a4d7a1c7d604e8d05f2 [perma.cc/K5BE-T8W3].

60. 750 ILL. COMP. STAT. 5/602.5 (2016).

61. *Id.*

making responsibilities, the court will consider:

the wishes of the child, taking into account the child's maturity and ability to express reasoned and independent preferences as to decision-making; the child's adjustment to his or her home, school, and community; the mental and physical health of all individuals involved; the ability of the parents to cooperate to make decisions, or the level of conflict between the parties that may affect their ability to share decision-making; the level of each parent's participation in past significant decision-making with respect to the child; any prior agreement or course of conduct between the parents relating to decision-making with respect to the child; the wishes of the parents; the child's needs; the distance between the parents' residences, the cost and difficulty of transporting the child, each parent's and the child's daily schedules, and the ability of the parents to cooperate in the arrangement.⁶²

If one parent has medical decision-making power, then the choice is theirs to make. But in most cases, parents have shared decision-making powers with their child's best interest in mind.⁶³ Most judges encourage and often require the marriage settlement agreement to contain a mediation provision to attempt to resolve disputes over decisions before the courts get involved.⁶⁴

Decision-making authority frequently boils down to choices regarding health, academics, and extra-curriculars, but vaccination choices have further divided divorced parents. In one California case, a divorced physician, Caroline, sought to vaccinate her twelve-year-old son.⁶⁵ After months of debate, "[i]t became very clear that [her ex] wanted to wait to some future undetermined time" to vaccinate their child.⁶⁶ Although her ex had previously agreed to "all other childhood vaccines[,] . . . he told her that the coronavirus vaccines were experimental and dangerous, and that there were safer, more effective treatments."⁶⁷

However, infectious disease experts have urged that "the best protection against Covid-19" is vaccination and to "not wait for the illness

62. *Id.*

63. See *In re Marriage of Duffy*, 718 N.E.2d 286, 288 (2d Dist. 1999) (encouraging the parents to "make the language of this agreement a reality that will be a wonderful thing for your child. I think with one exception the joint parenting agreement you've negotiated is clearly in your child's best interests, and therefore, you are hereby awarded joint legal custody of [the child], with [petitioner] having the situs of the child's primary residence.").

64. *Id.* at 290. (explaining that many jurisdictions recognized "the utility of mandatory mediation and have approved its use by trial courts in custody and visitation disputes."). See *In re Marriage of Goldberg*, 691 S.W.2d 312, 316 (Mo. Ct. App. 1985) (finding that mediation reduces the friction inherent in most custody arrangements and is necessary for successful "shared parenting" in joint custody situations).

65. Christine Nguyen, *Divorced Parents are Going to Court over Vaccinating Their Kids Against the Coronavirus*, WASH. POST (Oct. 7, 2021 9:00 AM), www.washingtonpost.com/lifestyle/2021/10/07/divorced-parents-covid-vaccine-court/ [perma.cc/4WR5-XNF7].

66. *Id.*

67. *Id.*

to create natural immunity.”⁶⁸ Although the human immune system is “an extraordinary mechanism,” the virus itself is “unpredictable and serious.”⁶⁹ Additionally, the American Academy of Pediatrics recommends a Covid-19 vaccination for “children and adolescents 6 months of age and older who do not have contraindications” as soon as possible.”⁷⁰

Therefore, Caroline’s decision is supported by medical evidence, but she ultimately had to postpone her son’s appointment for months because Caroline’s ex did not trust the vaccine and they had mutual decision-making powers.⁷¹ Although many divorced parents share mutual decision-making authority, many states give each parent “the independent right to consent to noninvasive medical decisions.”⁷² But there is no consensus on whether the vaccination is actually “noninvasive.”⁷³ Therefore, the issue must go to court. In these cases, vaccination orders have typically been upheld over one parent’s objections.⁷⁴ In Illinois, it is well-settled that “the trial court alone is in the best position to evaluate the credibility of the witnesses and the best interests of the child.”⁷⁵

According to Illinois practitioners, the “trend of the court” for parents with joint decision-making responsibilities seems to be “leaning toward science.”⁷⁶ As of October 26, 2021, a federal vaccine panel said

68. Katie Pearce, *Vaccine Beat Natural Immunity in Fight Against Covid-19*, JOHNS HOPKINS U. (Sept. 10, 2021), hub.jhu.edu/2021/09/10/infection-from-covid-vs-vaccines/ [perma.cc/W56M-QW6C].

69. *Id.*

70. AM. ACAD. OF PEDIATRICS, *Covid-19 Vaccine Frequently Asked Questions*, www.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/covid-19-vaccine-for-children/about-the-covid-19-vaccine-frequently-asked-questions [perma.cc/T7MF-BNFF] (last visited Sep. 19, 2022). *See also* *Contraindication*, MEDLINE PLUS MEDICAL ENCYCLOPEDIA (2021) (explaining that “[a] contraindication is a specific situation in which a drug, procedure, or surgery should not be used because it may be harmful to the person.”).

71. Nguyen, *supra* note 65.

72. *Id.*

73. *Id.*

74. *In re P.C.*, 171 N.E.3d 808, 834. *See also In re S.P.*, 53 Cal. App. 5th 13, 17 (Cal Ct. App. 2020) (finding that a juvenile court has the authority to order vaccinations for dependent children under its jurisdiction); *In Interest of A.W.*, 187 A.3d 247, 248 (Pa. Super. Ct. 2018) (juvenile court could order vaccinations over parents’ objections); *In re K.Y.B.*, 215 A.3d 471, 482 (Md. Ct. Spec. App. 2019) (juvenile court did not abuse its discretion in concluding that the State’s compelling interest in protecting the health of the child outweighs mother’s belief that vaccination contravenes her faith); *In re Deng*, 887 N.W.2d 445, 447 (Mich. Ct. App. 2016) (holding that “[b]ecause the trial court has the authority to make medical decisions over a respondent’s objections to vaccination for children under its jurisdiction and the court did not clearly err by determining that vaccination was appropriate for the welfare of respondent’s children and society, we affirm.”); *New Jersey Div. of Child Protection & Permanency v. J.B.*, 212 A.3d 444, 453 (N.J. Super. Ct. App. Div. 2019); *In re C.R.*, 570 S.E.2d 609, 611 (Ga. Ct. App. 2002) (“order permitting C.R. to be immunized should be affirmed.”).

75. *In re Marriage of Melton*, 681 N.E.2d 1046, 1048 (1997); *Hahin*, 266 Ill. App. 3d at 173.

76. Bob Chiarito, *Divorce Attorneys Brace for Exes Battling Over Kids Getting Covid-*

“the benefits of the Pfizer-BioNTech Covid-19 vaccine for children ages 5-11 years outweigh the potential risks,” although some expressed hesitation in recommending it to this age group.⁷⁷ Despite half of parents expressing fear of infection for their children, “few parents intend to vaccinate their children against covid.”⁷⁸ This hesitancy stems from “little information about how well the vaccine will prevent infection in young children or how long immunity will last,” a perceived lower risk of infection, and an overall fear of future complications.⁷⁹

III. ANALYSIS

Since Covid-19’s outbreak and shelter-at-home orders were issued, the family law practice area had to adapt in order to meet their clients’ exacerbated needs.⁸⁰ To protect public safety, court proceedings moved entirely online to ensure public access to the justice system despite the pandemic.⁸¹ Part A of this section will examine how judges handled Covid-19 vaccination struggles between divorced parents as compared to previous vaccination cases. Part B will discuss how GALs and child representatives were forced to take their investigations online to determine the best interests of children involved in family law proceedings.

A. Trial Court Judges Exercise their Discretion to Make Final Vaccination Decisions

The World Health Organization (“WHO”) defines “vaccine hesitancy” as a “delay in acceptance or refusal of vaccines despite availability of vaccination services.”⁸² Vaccine hesitancy is “complex and context

19 Vaccine, CHI. SUN TIMES (Aug. 29, 2021, 8:47 AM), www.chicago.suntimes.com/news/2021/8/29/22643296/chicago-coronavirus-vaccine-vaccinating-children-students-divorced-parents-disagree-attorneys-covid [perma.cc/ZJ8V-SK5M] (explaining that courts may see an “influx of cases asking for decision on child vaccination”, but the “majority” of cases will be whittled down to disputes with “special circumstances.”).

77. Melissa Jenko, *FDA Panel: Benefits of Covid-19 Vaccine for Ages 5-11 Outweigh Risks*, AM. ACAD. OF PEDIATRICS (Oct. 26, 2021), publications.aap.org/aapnews/news/17751 [perma.cc/SD3Q-ZR9K].

78. Jennifer Reiche, *Why Some Parents are Skeptical About Covid Vaccines for Young Children*, WASH. POST (June 17, 2022), www.washingtonpost.com/outlook/2022/06/17/covid-vaccine-under-five-parents-hesitation/ [perma.cc/32GV-T35P].

79. *Id.* (explaining that “2.7 children out of every 100,000 under the age of 5 years were hospitalized with covid” compared to the “estimated 1-2 percent risk of hospitalizations adults face. . .”).

80. *See, e.g.*, AM. ACAD. OF MATRIMONIAL LAWYERS, *supra* note 24.

81. Janna Adelstein, *Courts Continue to Adapt to Covid-19*, BRENNAN CTR. FOR JUST. (Sept. 10, 2020), www.brennancenter.org/our-work/analysis-opinion/courts-continue-adapt-covid-19 [perma.cc/G8E7-9YVL].

82. WORLD HEALTH ORG., *Report of the Sage Working Group on Vaccine Hesitancy* (2014), www.who.int/immunization/sage/meetings/2014/october/

specific," which means it varies across time and place and is specific to each vaccine.⁸³ It is influenced by factors such as "misinformation, complacency, convenience, and confidence."⁸⁴ In certain instances though, an individual's genuine and sincere religious beliefs contrary to inoculation creates an exemption from vaccination requirements.⁸⁵ Regardless of the reasoning, the struggle in deciding to vaccinate children is not a novel issue for parents or family law courts.

1. *Vaccination Struggles of the Past*

Courts have determined whether children should be vaccinated against the will of their parents for years. In 1992, the Kings County Family Court in New York found that while a father articulated religious beliefs contrary to vaccination, he "failed to demonstrate that his opposition to inoculation stemmed from a sincerely held religious conviction" and was unable to obtain a religious exemption.⁸⁶ There, the father opposed the measles vaccination despite the fact that his three other children had been vaccinated with his consent.⁸⁷ Determining whether a religious belief is "truly" or "sincerely held" is a question of fact.⁸⁸ "Therefore, in determining whether a belief is 'truly' or 'sincerely' held, the trial court must rely heavily upon its unique ability to observe the demeanor of witnesses and to weigh their credibility."⁸⁹ While the court ultimately found that the father's desire was rooted in medical and scientific concerns rather than a religious conviction, it still declined to order the inoculation because there was no measles outbreak or epidemic at the time.⁹⁰ However, the court noted that a "parent's knowing failure to have a child immunized against measles in the midst of a measles epidemic or outbreak clearly places that child's physical condition in imminent danger of becoming impaired."⁹¹

Just two years later, in *Prince v. Massachusetts*, the Supreme Court made clear that "a family itself is not beyond regulation in the public interest as against a claim of religious liberty."⁹² Therefore, the state acting as *parens patriae*, "may restrict the parent's control by requiring school attendance, regulating child labor and in many other ways."⁹³

SAGE_working_group_revised_report_vaccine_hesitancy.pdf [perma.cc/PTU8-6KB3].

83. *Id.*

84. *Id.*

85. Megan Cerullo, *What Constitutes a "Sincerely Held" Religious Exemption to a Vaccine Mandate*, CBS NEWS (Sept. 16, 2021 11:55 AM), www.cbsnews.com/news/religious-exemption-covid-vaccine-mandate/ [perma.cc/54U4-H434] (discussing vaccine mandates generally and how individuals can be considered exempt from getting inoculated).

86. *Matter of Christine M.*, 595 N.Y.S.2d 606, 619 (Fam. Ct. 1992).

87. *Id.* at 607.

88. *United States v Seeger*, 380 US 163, 185 (1965).

89. *Christine M.*, 595 N.Y.S.2d at 615.

90. *Id.* at 618.

91. *Id.* at 613.

92. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

93. *Id.* "Parens patriae" is Latin for "parent of the country or homeland." Under

Thus, a parent “cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds.”⁹⁴ Ultimately, “the right to practice freedom of religion does not include liberty to expose the community or the child to communicable disease, ill health or death.”⁹⁵

In 2018, the Court of Appeals of Tennessee heard *King v. Daily*, which stemmed from a divorce action involving two minor children in which the father wanted to have the kids vaccinated but the mother opposed vaccinations on “religious grounds.”⁹⁶ The parties finally agreed to vaccinate their children pursuant to school requirements but the mother ultimately failed to comply.⁹⁷ The judge then granted the father sole decision-making power for “non-emergency” medical decisions, including those regarding vaccination.⁹⁸ The court noted that

[T]he freedom of choice in matters of family life is a fundamental liberty interest, “meaning the vast majority of parenting decisions should be left to the parents of the child; but when courts are called upon to intervene, the best interests of the children are paramount which require[s] some limitations on the rights and interests of either or both of the parents.”⁹⁹

Ultimately, because decisions regarding parenting agreements are “factually driven and require consideration of numerous factors,” trial judges who have the opportunity to observe the witnesses and make credibility determinations are in the best position to evaluate the facts of each case.¹⁰⁰

2. Current Vaccination Struggle

Today, while courts have judicial authority to ultimately decide whether or not a child must be vaccinated, the combination of case law and the regulatory scheme behind the vaccine makes the issue more complex. While many government agencies recommend the vaccine, few

parens patriae, a state or court has a paternal and protective role over its citizens or others subject to its jurisdiction. LEGAL INFORMATION INSTITUTE, “Parens Patriae” CORNELL LAW SCHOOL, www.law.cornell.edu/wex/parens_patriae [perma.cc/G7AW-55Y7] (last updated May 2022).

94. *Id.*

95. *People v. Pierson*, 176 N.Y. 201, 246-47 (N.Y. 1903) (“[T]he law of nature, as well as the common law, devolves upon the parents the duty of caring for their young in sickness and in health, and of doing whatever may be necessary for their care, maintenance, and preservation, including medical attendance, if necessary; and an omission to do this is a public wrong, which the state, under its police powers, may prevent.”).

96. *King v. Daily*, No. M2017-01743-COA-R3-CV, 2018 WL 6266363, at *1 (Tenn. Ct. App. Nov. 30, 2018).

97. After conducting hearings on the competing motions, the Special Master recommended Mother be found in civil contempt for violating the August 2016 Agreed Order. *Id.*

98. *Id.*

99. *Id.* See also *Neely v. Neely*, 737 S.W.2d 539, 543 (Tenn. Ct. App. 1987); *Fisher v. Fisher*, 324 N.W.2d 582, 584 (Mich. Ct. App. 1982); and *Felton v. Felton*, 418 N.E.2d 606, 607 (Mass. 1981).

100. *King*, 2018 WL 6266363 at *5.

to none have generally mandated it.¹⁰¹ Many of those against vaccinations (so-called anti-vaxxers) argue that it is an invasion of privacy for either legislators or judges to determine whether children must be vaccinated and point to statistics showing the vaccines ineffectiveness to support this decision.¹⁰²

For example, one divorced father who was okay with vaccinating children for common illnesses “doesn't agree that the children should be getting it without years of research proving that it works and that it's not going to kill [the] children.”¹⁰³ Despite data and recommendations from medical and infectious disease experts, “a constant stream of misinformation, the proliferation of conspiracy theories, and inconsistent safety guidelines are adding to the difficulties.”¹⁰⁴ But *Jacobson v. Massachusetts* makes clear that

[I]f a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.¹⁰⁵

Therefore, “the possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases.”¹⁰⁶

While this is a pandemic situation unlike in *King*, there is still no clear mandate from the government. Where schools require certain vaccinations for students to attend, the court has greater authority to

101. *National COVID-19 Preparedness Plan*, WHITE HOUSE, www.whitehouse.gov/covidplan/ [perma.cc/3HLW-TNXL] (last visited Aug. 28, 2022) (explaining “the President announced vaccination requirements for the federal government in July and called on the private sector to do more to encourage vaccination as well. Since then, employers, schools, nursing homes, restaurants, hospitals, and cities in all 50 states have announced vaccination requirements.”).

102. Danielle Campomar, *Divorced Parents are Going to Court Over COVID-19 Vaccines for Their Children*, TODAY (Nov. 19, 2021), www.today.com/parents/covid-19-vaccine-kids-issue-co-parents-t237998 [perma.cc/2569-MMDV].

103. *Id.*

104. *Id.*

105. *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905); See *Railroad Co. v. Husen*, 95 U.S. 465, 470-71 (1877); *Mugler v. Kansas*, 123 U.S. 623, 661 (1887); *Lawton v. Steele*, 152 U.S. 133, 136 (1894); *Atkin v. Kansas*, 191 U.S. 207, 223 (1903).

106. *Jacobson*, 197 U.S. , at 30-35 (explaining “it is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain. It could not properly abdicate its function to guard the public health and safety. The state legislature proceeded upon the theory which recognized vaccination as at least an effective, if not the best-known, way in which to meet and suppress the evils of a smallpox epidemic that imperiled an entire population... in a free country, where the government is by the people, through their chosen representatives, practical legislation admits of no other standard of action; for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not.”).

decide for parents.¹⁰⁷ However, with vaccinations only recently approved for children, school mandates will likely be rare.¹⁰⁸ An advisory panel for the U.S. Food and Drug Administration voted to recommend authorizing it for school-aged children on October 25, 2021.¹⁰⁹ The ultimate authorization for use in children occurs under an Emergency Use Authorization (“EUA”), which is the same authority that allowed twelve to fifteen year old children access to the vaccine.¹¹⁰ But in states like Georgia, the commissioner of the Georgia Department of Public Health explained that she “would not implement mandates for vaccines that are still under EUA.”¹¹¹ On the other hand, California Governor Gavin Newsom announced that the state will require all schoolchildren to get vaccinated once the Food and Drug Administration grants full approval.¹¹² This will make California the first state to enact a vaccination requirement for children.¹¹³

On December 3, 2021, a New York court ordered an 11-year-old child’s vaccination over the father’s objection because the mother wanted the child vaccinated and the child’s pediatrician endorsed the shot.¹¹⁴ After initial back and forth about whether he would permit the vaccine, the father argued that he would not permit the child’s vaccination until “reliable” trials for long-term side-effects were conducted, a mandate for children was enforced, and there was no longer a risk of heart-related complications.¹¹⁵ The court ordered a conference call with the

107. *Zucht v. King*, 260 U.S. 174, 175 (1922) (asserting “it is within the police power of a state to provide for compulsory vaccination, and therefore no right under the Federal Constitution is infringed by excluding unvaccinated children from public and private schools.”).

108. McKenzie Beard, *Just a Few School Districts are Imposing Coronavirus Mandates*, WASH. POST (Aug. 25, 2022), www.washingtonpost.com/politics/2022/08/25/just-few-school-districts-are-imposing-coronavirus-vaccine-mandates/ [perma.cc/V2HW-9N59] (explaining “D.C. Public Schools is mandating middle school and high school students be vaccinated against the coronavirus to return to the classroom next week... the District’s back-to-school plans set it at odds with most of the rest of the country.”).

109. Sara G. Miller, *FDA Advisory Panel OKs Pfizer Vaccine for Children 5-11*, NBC NEWS (Oct. 26, 2021, 3:18 PM), www.nbcnews.com/health/health-news/fda-advisory-panel-oks-pfizer-vaccine-kids-5-11-rcna3726 [perma.cc/C6EE-ZL6A].

110. Ty Tagami, *A Covid Vaccine for Younger Children is Coming, but Won’t be Required in Georgia Schools for Now*, ATLANTA J. CONST. (Oct. 26, 2021), www.ajc.com/education/a-covid-vaccine-for-younger-children-is-coming-but-wont-be-required-in-georgia-schools-for-now/4UFJ3G3B65HOTGZHUVOIT5WO4Y/ [perma.cc/4N27-BXD].

111. *Id.*

112. Robert Barnes et al, *Supreme Court Declines to Block New York Schools Vaccine Mandate*, WASH. POST (Oct. 1, 2021, 8:21 PM), www.washingtonpost.com/nation/2021/10/01/covid-delta-variant-live-updates/ [perma.cc/R4Y9-LF8N].

113. *Id.* See also CALIFORNIA DEP’T OF PUBLIC HEALTH, *Shots for School*, CA. GOV (June 1, 2022), www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/School/shotsforschool.aspx [perma.cc/QWJ3-KWSW] (explaining “COVID-19 Vaccine Requirements for students are postponed until at least the 2023-2024 school year.”).

114. *J.F. v. D.F.*, 74 Misc.3d 175, 176 (N.Y. Sup. Ct. 2021).

115. *Id.*

pediatrician who concluded that the child was best protected by the vaccine rather than running the risk of getting the illness even if there were potential side effects.¹¹⁶ The judge opined

waiting — to be ‘sure,’ as the father asks — is simply untenable, when the specter of a killing or incapacitating disease is swirling in the environment surrounding this young girl. The wait, requested by the father, could extend beyond the term of the virus, as scientists may never catch up to this ever evolving and elusive virus and variants.¹¹⁷

Therefore, in considering the best interests and safety of the child, the court ordered the vaccination.¹¹⁸

Just weeks later, a New York mother filed a motion to modify a previously stipulated joint parenting agreement with her husband.¹¹⁹ The parties had previously entered into a joint agreement in which they agreed to comply with all federal, state, and city social distancing protocols regarding Covid-19.¹²⁰ The mother argued that because her ex-husband refused to “take precautionary steps such as masking, social distancing, and regular preemptive testing to ensure the health and safety of their children while they are in his care” (including refusing the vaccination for himself and consenting to their vaccination), she should be given full medical decision-making powers.¹²¹ The court held that an evidentiary hearing would be necessary to determine

whether the level of animosity on the issue of Covid-19 has become such that either party has demonstrated an unwillingness or inability to communicate without animosity regarding the best interests of the children on the medical decision making as to Covid-19 issues; and whether the father has cooperated and complied with the April 2020 so-

116. *Id.*

117. *Id.*

118. *Id.*

119. *B. S. v. A. S.*, 74 Misc.3d 473, 475-76 (N.Y. Sup. Ct. 2021) (seeking a modification “(a) suspending the Plaintiff’s in-person parenting time and restraining the Plaintiff from in-person access with the Children until either the Plaintiff agrees to allow the Children to be vaccinated against COVID-19 or: (b) The Plaintiff agrees to be PCR tested for COVID-19 weekly, undergoes COVID-19 antigen testing 24 hours prior to any in-person parenting time, and tests negative as set forth in lab-issued results delivered directly to the Defendant via HIPPA authorization by the Plaintiff in favor of the Defendant; and (c) The Plaintiff agrees to abide by all Centers for Disease Control (CDC) and New York State recommended COVID-19 safety guidelines for unvaccinated individuals at all times for so long as he remains unvaccinated; and (d) The Plaintiff agrees that he will ensure that he and the Children abide by all CDC and New York State recommended COVID-19 safety guidelines for unvaccinated children at all times the Children are with him including that they remain masked when in the presence of unvaccinated and unmasked individuals; and (e) The Plaintiff not take the Children to visit or stay overnight in any location where those present are unvaccinated or unmasked. (f) restraining either party from traveling with the Children internationally including, but not limited to, Sint Maarten, until such time as the Children may be vaccinated against COVID-19.”).

120. *Id.*

121. *Id.*

ordered agreement to follow NYC and NYS guidelines.¹²²

While it is not up to judges to “inject their preference” into a custody battle, the best interests of the child must be kept in the forefront of all judicial decision-making.¹²³ This will ultimately come down to examining the facts of each case to consider whether the child is immunocompromised, involved in sports, attending in-person school, or has siblings in extra-curricular activities, etc.¹²⁴

B. Child Reps and GALs Turn to Technology

1. Benefits of a Covid-19-Centric World

While many businesses saw their work grind to a halt when the pandemic began, family law practitioners faced an increasing caseload. Rather than shutting down, the family law practice area used technology to bridge the gap between the national emergency and the newly accumulating issues amongst their clients.¹²⁵ Under Illinois Supreme Court Rule 907, GALs and child representatives “shall have the right to interview his or her clients without any limitation or impediment” and “shall take whatever *reasonable* steps are necessary” to determine what services the family needs to address the custody and allocation of parental responsibility, and to make appropriate recommendations.¹²⁶ For child representatives and GALs, Covid-19 meant conducting child investigations in a completely new fashion.¹²⁷ In-home visits were no longer practicable nor safe for the children or the attorneys conducting investigations due to the virus’ contagiousness.¹²⁸ For instance, the Supreme Court of Ohio released “Considerations for Implementing Technological Alternatives,” which stated that “older” staff and those with health concerns were “excused from any in person obligations” and in-person visits were reserved for only limited occasions.¹²⁹ Those who *did*

122. *Id.* at 494.

123. Mark Ashton, *Vaccination Wars Go to Custody Court*, JD SUPRA (Sept. 1, 2021), www.jdsupra.com/legalnews/vaccination-wars-go-to-custody-court-5510519/ [perma.cc/4UHX-66HV].

124. *See, e.g.*, Chiarito, *supra* note 76.

125. Erika Richard & Qudsiya Naqui, *Response to Covid Pushes State Court Modernization Forward*, PEW CHARITABLE TRS. (July 21, 2020), www.pewtrusts.org/en/research-and-analysis/articles/2020/07/21/response-to-pandemic-pushes-state-court-modernization-forward [perma.cc/5L2S-NPEP].

126. Ill. Sup. Ct. R. 907(b), (d).

127. *See, e.g.*, Rosen, *supra* note 48.

128. *Coronavirus Disease (Covid-19): How is it Transmitted?*, WORLD HEALTH ORG. (Dec. 30, 2020), www.who.int/news-room/questions-and-answers/item/coronavirus-disease-covid-19-how-is-it-transmitted [perma.cc/J2FG-ZCJG] (listing settings where transmission of the Covid-19 virus spreads more easily: “crowded places, close-contact settings, especially where people have conversations very near each other, crowded and enclosed spaces with poor ventilation.”).

129. THE SUPREME COURT OF OHIO, *CONSIDERATIONS FOR IMPLEMENTING TECHNOLOGICAL ALTERNATIVES* 1, 2 (2020), www.supremecourt.ohio.gov/coronavirus/resources/juvenileTechConsiderations032720.pdf [perma.cc/RLQ6-KED4].

have to conduct in-person interviews were instructed to bring only items necessary for the visits, carry a sanitary tool kit, avoid all physical contact with persons and doorknobs, and to wash hands upon arrival, at departure, and any time contact was made.¹³⁰ Therefore, GALs were to keep in-person visits at a minimum and instead use technology to maintain these investigations.¹³¹

In turn, time spent in court hearings reporting their findings was also reduced because GALs were able to quickly log into remote hearings without having to travel to the physical courthouse.¹³² Less time in court allowed GALs to carry heavier workloads at a time when the need for their services was at its peak.¹³³ Vaccination battles between parents were not the only thing keeping GALs busy. With shelter-at-home orders in place, physical isolation increased loneliness and depression and aggravated family dynamics.¹³⁴ These increased mental health issues, caused “family law courts [to] [see] significant increases in domestic violence, substance and alcohol overuse and abuse, suicides and hospitalizations of adults and children” throughout the beginning of the pandemic.¹³⁵ This further pressured courts to hear emergency matters to appoint mental health professionals and guardians ad litem to assist families in need, to adjust parenting plans, and address custodial environments in immediate need.”¹³⁶

2. Drawbacks of a Covid-19-Centric World

“The pandemic created enormous pressure for the services of legal aid organizations that provide free or low-cost legal representation.”¹³⁷ In fact, the number of inquiries from people seeking legal aid has more than tripled since 2020.¹³⁸ In Chicago, the Cook County Public Guardian’s Domestic Relations Division (“Division”) focuses on representing children in highly contested custody cases.¹³⁹ Currently, the Division is staffed by a supervising attorney, seven lawyers, and a social worker.¹⁴⁰

130. *Id.* at 4.

131. *Id.* at 2.

132. *Id.*

133. *Roundtable on Family Law Update*, CRAIN’S CHI. BUS. (July 21, 2021, 12:00 AM CDT), www.chicagobusiness.com/craains-content-studio/roundtable-family-law-update [perma.cc/AM2W-L392].

134. WORLD HEALTH ORG., *The Impact of Covid-19 on Mental Health Cannot be Made Light of* (June 16, 2022), www.who.int/news-room/feature-stories/detail/the-impact-of-covid-19-on-mental-health-cannot-be-made-light-of [perma.cc/54P8-W5QD].

135. *Id.*

136. *Id.*

137. Elaine McArdle, *Practicing Law in the Wake of a Pandemic*, HARV. L. BULL. (July 15, 2022), hls.harvard.edu/today/practicing-law-in-the-wake-of-a-pandemic/ [perma.cc/E5AV-4K7N].

138. *Id.*

139. *Welcome*, COOK CNTY. PUB. GUARDIAN, www.publicguardian.org/ [perma.cc/4K5Q-DKP4] (last visited Oct. 29, 2021).

140. *Domestic Relations Division*, COOK CNTY. PUB. GUARDIAN,

All of the Division's cases are by court appointment with a retainer ordered by the court at the time of the appointment.¹⁴¹ As a government entity, its fees are requested on a sliding scale basis and are generally apportioned between both parents upon court approval.¹⁴² Due to the sheer volume of cases requiring a GAL during Covid-19, legal aid providers like the Office of the Public Guardian were spread thin. . . As a result, lower income litigants who would typically receive the Public Guardians' services must pay for private attorney's services, an added financial strain in an already challenging time.¹⁴³ Moreover, online investigations rather than in-home visits, while time efficient, presented their own issues.¹⁴⁴ Even in a normal in-home investigation, GALs must be cognizant of any behavior or responses.¹⁴⁵ Like "coaching" for example, is "any behavior that inspires a child in the context of a custody case to reveal bad things about the opposing party or say good things about oneself . . . (a classic textbook example is buying a sixteen-year-old a sports car in the middle of a custody case)."¹⁴⁶

Video calls make it difficult to determine whether a child is alone in the room or being observed by a party who might be influencing the child's opinions and statements.¹⁴⁷ Additionally, some worry that remote

www.publicguardian.org/domestic-relations-division/ [perma.cc/4VLW-GN6Y] (last visited Oct. 29, 2021).

141. *Id.*

142. *Id.*

143. See Adiel Kaplam, *More People Than Ever Need Legal Aid Services. But the Pandemic has Hit Legal Aid Funding Hard*, NBC NEWS (Apr. 25, 2021, 5:00 AM), www.nbcnews.com/business/personal-finance/more-people-ever-need-legal-aid-services-pandemic-has-hit-n1264989 [perma.cc/6XBZ-MSNP] ("The several hundred legal aid organizations around the country help the poorest Americans deal with challenges from eviction and unemployment to domestic violence and medical debt. Even before the pandemic, there was not enough funding for these groups to meet the needs of the 57 million Americans who qualified for their services, recent studies show. With demand now rising as court proceedings begin to resume, legal aid groups say they should be adding attorneys, but instead are scrambling to fill budget gaps and trying to dodge staff cuts.").

144. Carlos Maycotte, *What Happens to GAL Investigations During the Coronavirus Pandemic*, FITCH LLP (Apr. 17, 2020), www.fitchlp.com/blog/2020/04/what-happens-to-gal-investigations-during-the-coronavirus-pandemic/ [perma.cc/G4W7-G655] (arguing that "while telephone calls do make up a large portion of a GAL's work – namely in interviews of collaterals and professionals involved with the family, like doctors, teachers, and counselors – a large portion of the GAL's work is done in person. Particularly, meetings with the parents, visits to each parent's household, meetings with the child, are all instrumental to the GAL fact-finding process.").

145. Gregory Forman, *(Unwittingly) Coaching the Children*, GREGORY S. FORMAN, P.C. ATT'Y L. (April 17, 2020), www.gregoryforman.com/blog/2016/11/unwittingly-coaching-the-children/ [perma.cc/9EQW-J4NW].

146. *Id.* (explaining generally the pressures that children of divorce experience during custody investigations).

147. See Elizabeth G. Thornburg, *Observing Online Courts: Lessons from the Pandemic*, 54 FAM. L.Q. 181, 216 (2020) (explaining that a "source of concern comes from the inability to know whether the witness is alone and answering questions without relying on notes... some witnesses are not completely alone, although when that is apparent, judges have asked the witness to relocate to a private setting.").

investigations are not as “thorough” and even create chances for “failure to comply with the provisions of the standing order governing evaluations [and] could also create many challenges or suboptimal results.”¹⁴⁸ The ability to “visit a person’s home and see first-hand the home’s conditions, people’s body language, the physical space and its set-up, and other such matters, would be severely curtailed by the restriction on in-home visits.”¹⁴⁹

IV. PROPOSAL

While Covid-19 turned the family law practice area upside-down in terms of norms and procedures, the technological and investigative changes in the family law field should be viewed as a jumping-off point to modernize the practice area. This comment proposes a preventative risk mitigation technique and argues that family law attorneys must put more consideration into religious beliefs and medical decision-making portions of couples’ marriage settlement agreements. Additionally, GALs and child representatives should continue to incorporate technology in remote investigations to enhance efficiency in the practice area.¹⁵⁰

A. Improving Marriage Settlement Agreements to Prevent Vaccination Disputes

In many jurisdictions, judges encourage couples to incorporate remediation provisions into their marriage settlement agreements.¹⁵¹ These provisions typically require couples to attempt to resolve disputes in mediation before seeking judicial resolution.¹⁵² While mediation “reduces the friction inherent in most custody arrangements and is necessary for successful ‘shared parenting’ in joint custody situations,”¹⁵³ more preventive measures can be taken to avoid the need for third parties. Although the decision to vaccinate young children for common illnesses like measles, influenza, and rubella is not new, these vaccinations were only a minor concern in the overall framework of medical decision-making powers.¹⁵⁴ With the severity of the virus and the

148. Maycotte, *supra* note 144.

149. *Id.*

150. *See, e.g., Roundtable on Family Law Update, supra* note 133.

151. *See* 750 ILL. COMP. STAT. 5/602.1 (b) (West 2016) (repealed 2016), law.justia.com/codes/illinois/2014/chapter-750/act-750-ilcs-5/part-vi/ [perma.cc/NE9E-Z57W] (providing that “a joint parenting agreement ‘shall specify a procedure by which proposed changes, disputes and alleged breaches may be mediated or otherwise resolved.’”). The now-repealed Section 602.1(b) further provided that, “in the event the parents fail to produce a Joint Parenting Agreement, the court may enter an appropriate Joint Parenting Order.” *Id.* Section 602.1(c)(1) identified the factors a trial court should consider before entering a joint parenting order, including “the ability of the parents to cooperate.” 5/602.1(c) (West 2016) (repealed 2016).

152. *Id.*

153. *See, e.g., In re Marriage of Goldberg*, 691 S.W.2d 312, 316 (Mo. Ct. App. 1985).

154. *See Christine M.*, 595 N.Y.S.2d at 615. The court also considers sincerely held

sheer speed at which it spread, the Covid-19 vaccination has created a much more hotly contested debate between divorced parents than past vaccinations.¹⁵⁵ As a result, trial courts are flooded with cases.¹⁵⁶

The pandemic caught the globe off-guard and shocked nearly every industry's operations, but we can all adjust our practices to be more resilient in any potential change moving forward.¹⁵⁷ To better prevent future vaccination battles, attorneys should encourage their clients to incorporate their agreements on vaccinations into the marriage settlement agreement.

Where parents share joint medical decision-making powers, attorneys can get ahead of the problem by having each parent state their preferences and/or any religious beliefs regarding vaccinations within the marriage settlement agreement. In spelling out their beliefs and concerns before the vaccination dispute arises, parties can approach it from a more neutral and less emotional perspective. In many instances, the vaccination debate comes down to what medical experts are advising versus any "sincerely held" religious belief that either or both parents may hold.¹⁵⁸ Where this decision turns on a judge's factual evaluation, including one's beliefs and preferences within the marriage settlement agreement thus enhances his or her credibility if the issue goes to the court.¹⁵⁹ For example, if a mother claims to have a religious opposition to the Covid-19 vaccination but nowhere in mediation for the marriage settlement agreement did she discuss any prior religion-based vaccination hesitancy, the courts will have further indication that the belief is likely not sincerely held. In this way, litigation is, at the least, less lengthy—saving both parties time and the expense of a long legal battle. When preferences are stated from the beginning or when a plan provides

religious beliefs and public policy in determining whether vaccinations are required.

155. *Supra*, discussion, Section II.

156. Cassandra Lybrink & Carolyn Muyskens, *Parents Prepare for Legal Battles Following Vaccine Approval for Young Children*, THE HOLLAND SENTINEL (Nov. 12, 2021), www.hollandsentinel.com/story/news/coronavirus/2021/11/10/parents-prepare-legal-battles-after-vaccine-approval-young-children/6356911001 [perma.cc/V96L-ZYJS]. (explaining that "for many parents, the emergency-use approval of COVID-19 vaccines for children ages 5-11 in early November brought a direct sense of relief. But for others, especially divorced parents, it was the beginning of a potentially long and expensive legal battle. . ."). See also *Retired Judges Will Hear Divorce Cases to Clear Backlog*, AP NEWS (Mar. 29, 2022), www.apnews.com/article/covid-health-maine-df811651c36bd1cfd722ef12aa9aae6f [perma.cc/UW7A-VPKY] (reporting that Maine's court system is "assign[ing] retired judges to divorce proceedings to clear a growing backlog of more than 6,000 cases that have been delayed since the start of the coronavirus pandemic" to avoid overburdening existing personnel).

157. Jason McCann, *Five Business Lessons Learned During the Pandemic on Resiliency and Strength*, FORBES (June 29, 2021), www.forbes.com/sites/forbesbusinesscouncil/2021/06/29/five-business-lessons-learned-during-the-pandemic-on-resiliency-and-strength/ [perma.cc/V9JM-WJCF] (advising businesses to "be prepared for the unexpected" with a contingency plan for a global health crisis moving forward to "help avoid business interruptions and confusion for employees during a crisis.").

158. See, e.g., *Seeger*, 380 U.S. at 185.

159. See *Christine M.*, 595 N.Y.S.2d at 615.

remedial measures if the parties cannot agree, then all a judge must do is point to this provision for enforcement.

B. *Virtual Reality is the New Reality*

Technology, now more than ever, is a staple of daily life. The widespread use of technology and digital media has become so profound that many teens and young children do not know a life without it.¹⁶⁰ While many fear a world in which we rely heavily on technology,¹⁶¹ Covid-19 has only proven that these digital tools can and should transform the family law practice for the better.¹⁶² While GALs and child representatives conducted best-interest investigations through Zoom, they can continue to build on this technological switch by incorporating virtual reality technologies that many mental health professionals resorted to during the pandemic's peak.¹⁶³

In many ways, GALs and child reps evaluate the mental health, behavioral relationships, and overall general welfare of not only the children involved in divorce but also the parents. They receive training and participate in Continuing Learning Education programs to expand on their abilities to critically observe, evaluate, investigate, and make

160. COUNCIL ON COMMUNICATIONS AND MEDIA, *Children, Adolescents, and the Media* 132 PEDIATRICS 958, 958 (2013) (explaining that, “[a]ccording to a recent study, the average 8- to 10-year-old spends nearly 8 hours a day with a variety of different media, and older children and teenagers spend >11 hours per day. Presence of a television (TV) set in a child’s bedroom increases these figures even more, and 71% of children and teenagers report having a TV in their bedroom. Young people now spend more time with media than they do in school—it is the leading activity for children and teenagers other than sleeping.”).

161. See, e.g., Tracey Burns & Francesca Gottschalk, *What Do We Know About Children and Technology?*, CTR. FOR EDUC. RSCH & INNOVATION (2019), www.oecd.org/education/cei/Booklet-21st-century-children.pdf [perma.cc/S277-ASGR] (summarizing “shock headlines such as “Have Smartphones Destroyed a Generation” and claims that technology is “re-wiring” children’s brains are dramatic . . . we live in an age where digital tools have fundamentally transformed the world, and the reality of children’s lives.”).

162. Stephanie Zimmerman, *Divorce Lawyers Say Technology May Outlive the Covid-19 Pandemic*, AM. BAR ASSOC. (June 11, 2020), www.americanbar.org/groups/journal/articles/2020/divorce-lawyers-say-technology-changes-may-outlive-the-covid-19/ [perma.cc/883P-NRHH] (explaining that “many family lawyers say they’re successfully adapting during the crisis. They are trading face-to-face mediation sessions for platforms like Zoom, where a mediator can create virtual rooms with virtual doorbells for each opposing side and a third room for the attorneys and mediator to talk together Some attorneys believe the shift will have positive effects that last well into the future—as long as courts find ways to include people who don’t have the latest technology.”). Susan Myres, a Houston family law attorney, says that “[w]e’re limited only by our imaginations[.]” *Id.*

163. Mariana Sampaio et al., *Therapists Make the Switch to Telepsychology to Safely Continue Treating Their Patients During the COVID-19 Pandemic. Virtual Reality Telepsychology May Be Next*, FRONTIERS VIRTUAL REAL. (Jan. 15, 2021), www.frontiersin.org/articles/10.3389/frvir.2020.576421/full [perma.cc/A3XK-GYKV].

recommendations.¹⁶⁴ In certain instances, video-conference interviews are likely enough. For example, if the GAL is appointed to determine whether the living conditions at the father's home are up to par, the GAL can simply have the parent show the space via video conferencing or record a video to submit to the court. While virtual conferences are suitable in many instances, the technology does have its shortcomings. A father could simply show the investigator what he wants them to see—*i.e.*, the father could hide or remove things from the home on the date of the scheduled home inspection. In a face-to-face situation, however, the investigator could open doors and dig around or pick up on the parent's body language. Over the video camera, this is not as feasible. The investigator can still instruct the parent to open doors, move the camera to a certain area and so on, but a certain investigatory component is still lost. In other instances, the investigation might involve one parent who is currently living in another state, but the matter is still within the jurisdiction of the original court. Rather than sending the GAL on a flight to another state, practitioners can continue to use virtual tools as needed and even incorporate virtual reality technology into the investigation. This would allow investigators to mimic in-person interviews with the child.

During the pandemic, “nearly all therapists used a wide range of telecommunication technologies to communicate with their quarantined patients, including texting, telephones, video conferences, and even virtual reality.”¹⁶⁵ Virtual reality allow individuals in different locations to “meet” in a “shared computer-generated” setting to conduct interviews, meetings, and therapy sessions.¹⁶⁶ For example, virtual reality is “being used to achieve therapeutic outcomes” for those struggling with alcohol addiction, claustrophobia, teenage depression, and eating disorders.¹⁶⁷ For patients with anxiety disorders, VR exposes them to a “anxiety-inducing stimuli in a safe, controlled environment,” so that they “eventually learn[] that the “threats” they’re worried about are not actually very dangerous.”¹⁶⁸

Utilizing this technology, GALs and child representatives could recreate their office setting or in-home setting to conduct one-on-one

164. U.S. LEGAL, Continuing Legal Education Law and Definition, definitions.uslegal.com/c/continuing-legal-education/ [perma.cc/W8ZQ-S5J2] (last visited Oct. 1, 2022) (defining continuing legal education “Continuing legal education or CLE is a system or process of professional education of lawyers that takes place after their initial admission to the bar. The CLE helps lawyers in extending their learning beyond the law school studies. While doing the CLE, lawyers attend seminars designed to sharpen lawyering skills or that provide updates on legal developments within particular practice areas.”).

165. Sampaio, *supra* note 163.

166. *Id.*

167. Sam Martin, *Virtual Reality Might be the Next Big Thing for Mental Health*, *SCI. AM.*, (June 24, 2019), blogs.scientificamerican.com/observations/virtual-reality-might-be-the-next-big-thing-for-mental-health/ [perma.cc/6B9S-5REA].

168. *Id.* This is not to say that the situations are not “dangerous” but rather puts this response on display in a way that is controlled.

interviews. The setting is one in which the child feels comfortable, willing to self-express and participate in the virtual process in a fashion similar to the normal process, but saving all parties the time spent traveling and making travel arrangements.

Virtual reality would also allow GALs and child representatives to create the scenarios in which they can evaluate the child's behavior. In many cases, GALs ask children about their interests, memories with parents, what works well for them during the school week, what routines they have, and so on. Utilizing virtual reality, the GAL could provide a virtual atmosphere similar to the child's home with a virtual parent exhibiting similar scenarios and to the situation at hand. This would create a more realistic reaction from the child than a simple question such "how does it make you feel when your mother says XYZ" or "how do you react when your mother comes home late at night." In the investigative role, the GAL seeks to get to the center of the child's mind and emotions to determine what is best for them. Utilizing virtual reality allows the GAL to see first-hand how the child is affected by the very scenarios being described.

While placing children in emotionally upsetting and stress-inducing scenarios could be traumatic, it is only for a brief period of time to gauge their emotional responses. In this virtual setting, the GAL can quickly end the simulation and sit down to talk about what happened. This brief moment of emotion can be stopped rather than the actual situation parents may subject the child to in the first place. The individuals conducting the simulation might not be trained therapists, but they are trained extensively to deal with trauma response and can fully evaluate the situation to advocate for the child's best interests in the long run.

Parents training their children's responses for interviews is a big concern in virtual hearings, but virtual reality technology allows the parent to be physically present in the room but outside the realm of the GAL's created scenario. The setting ensures that the GAL can analyze the bigger picture. Coercing responses is an issue even during in-person court interviews¹⁶⁹; therefore, it is never an issue that will be entirely eradicated from family law. Children are innately concerned with their parents' well-being and how the divorce will impact the familial relationship.¹⁷⁰ Virtual reality better prevents the parent from coercing the child's response in a certain way than a simple video call because it is simply the child responding to the virtually live scenario, ultimately resolving credibility issues.

In a survey conducted among those treating mental health patients

169. Forman, *supra* note 145.

170. AM. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY, *Children and Divorce*, (Jan. 2017), www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Children-and-Divorce-001.aspx [perma.cc/2HQZ-HSZW] (explaining "[v]ulnerability to both physical and mental illnesses can originate in the traumatic loss of one or both parents through divorce. With care and attention, however, a family's strengths can be mobilized during a divorce, and children can be helped to deal constructively with the resolution of parental conflict.").

during the pandemic, therapists remarked having “a number of concerns about compliance, legality, lack of training and inability to handle emergency situations online” but a follow up survey shows “large changes in therapists behavior” during the pandemic.¹⁷¹ Virtual reality is “proving valuable for assessing, preventing and treating psychological problems including stress-related psychological problems, depression, [and] anxiety disorders.”¹⁷² Thus, attorneys can utilize this technology to determine areas of concern within the family realm to determine what is in the child’s best interest overall.

V. CONCLUSION

Since the pandemic began, the world as we know it has changed forever. Shelter-in-place orders and safety concerns ignited the initial influx of cases for family law courts. When it seemed like life would simply return to normal with the vaccination, it only brought more strife, concern, and confusion for divorced parents. Ultimately, coming down to a battle between medical experts and sincerely held religious beliefs, the family law practice can alter marriage settlement agreements to prevent issues with vaccinations from arising in the future. Additionally, to maintain the efficiency of remote GAL investigations, the practice can incorporate virtual reality software to ensure comfort and credibility throughout the process. While Covid-19 shocked the norms and procedures of the family law practice area, it has ultimately created a change for the better.

171. *Id.*

172. *Id.* See also Page L. Anderson et al, *Cognitive Behavioral Therapy for Public-Speaking Anxiety Using Virtual Reality for Exposure*, 22 DEPRESSION & ANXIETY 156, 156–158. (Oct 17, 2005) (exploring “cognitive-behavioral treatment” in a study that “provided preliminary evidence that a cognitive-behavioral treatment using virtual reality for exposure to public speaking may reduce public-speaking anxiety . . .”).

