

# Ethics and the Children's Act: What the Dental Practitioner needs to know.



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When it comes to providing a health service to children, health professionals are faced with many challenges, the most important of these being issues of consent and guardianship and how these impact on the treatment that can be provided. According to the Constitution, a child is defined as a person under the age of 18 years.<sup>1,2</sup> Excluding cases of mental impairments, it is accepted that individuals at 18 years of age are able to make their own decisions and are therefore able to consent to issues involving their health and any treatment they may require.<sup>3</sup> For healthcare professionals in particular, the patients that pose the biggest challenges where ethics are concerned are those that fall below this age of majority.

The Children's Act is administered by the Department of Social Development and provides a framework and guide for all individuals dealing with children. When it comes to the provision of healthcare, the main objectives of the Children's Act are as follows:<sup>2,4</sup>

- Children should be protected from maltreatment, neglect and abuse.
- The child's best interests are always the primary concern.
- The general health and well-being of every child should be promoted.
- The special needs of children with disabilities (including learning disabilities) should be recognized. The child should be provided with appropriate care and the caregiver must be provided with the necessary support. These special needs children should not be subjected to any practices (medical, social, cultural or religious) that would negatively impact on their health, well-being or dignity.
- Children should have access to health care services. Accessibility means that services should be provided without discrimination and services should be affordable and physically and 'environmentally' accessible i.e. it should be within easy reach.
- In cases where these services are not affordable, the government has to step in.<sup>1</sup> Children will be provided with the basic health care services in cases where their parents or caregivers cannot afford treatment.

The Constitutional rights<sup>1</sup> of the child also include:

- The right to be treated equally
- The right to privacy
- The right to confidentiality regarding their health status (except where maintaining such confidentiality is not in the best interest of the child). Children also have the right to keep the health status of their parent or caregiver confidential so as to avoid discrimination against them e.g. children may be stigmatized if their parent's HIV status becomes known.<sup>5</sup>

The Committee on the Rights of the Child is particularly concerned about the issue of HIV and children's rights as well as the health rights of adolescents who have reached puberty.<sup>2</sup> Regarding health care needs, the Act states that children are entitled to be informed about their health status. Information should be provided in such a manner that the child is able to understand and comprehend the situation. "Child-friendly" language should be used.<sup>5</sup> Children have to be informed about any decisions that are made regarding their health care needs and they have the right to participate in these decisions.<sup>6</sup> Their wishes should always be considered before any decisions are made regarding their well-being.<sup>4</sup>

## ISSUES OF CONSENT

Consent is the agreement to medical treatment where a person can indicate his or her will.<sup>5</sup> Informed consent is when a person agrees to treatment after being fully informed about the risks, benefits and possible negative consequences of a particular procedure as well as what might happen if consent is not given and treatment not delivered.<sup>5</sup>

If consent is not obtained, and treatment intervention nevertheless proceeds, the health care worker's actions could be considered "assault" as any actions that are administered without consent would be considered "unlawful" actions.<sup>5</sup>

Consent for medical treatment should be sought from the child's biological or adoptive parents or other caregivers. A caregiver is someone other than the parent who is taking care of the child and can be any of the following:<sup>5</sup>

- A foster parent.<sup>7</sup> Foster parents can be appointed by a court or the Department of Social Development.
- A person who cares for a child with the blessing or consent of the biological parent.
- A person who cares for a child in temporary safe care.
- Head of a child youth centre in which the child has been placed.
- Head of a shelter.
- Superintendent of a hospital.
- A child or youth care worker who cares for a child who does not have family in the community.
- A child at the head of a child-headed household. A child can be considered to be the head of a household only when they are old enough to qualify for a South African identity document i.e. 16 years.<sup>6</sup>

Biological parents are considered the natural guardians. Even if a child has been conceived through artificial insemination using the gametes of another person, this child born to a married couple is considered to be the couple's biological child.<sup>2</sup> The donor of the gamete cannot claim paternity or guardianship.<sup>2</sup> A child who is adopted may be regarded as the natural child of the adoptive

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parents. Biological and adoptive parents are considered legal guardians and have full parental rights. A legal guardian can also be someone who is appointed to be a guardian either in a will or by a court and has the proper documentation. The High Court is the supreme guardian of all children and only that body can grant permission to someone to become a guardian or limit or stop parental responsibilities.<sup>2</sup>

Even if caregivers do not have parental responsibilities over the child, they should still protect the child and safeguard the child's health, well-being and development. It should however be noted that there are limitations for the types of procedures to which these caregivers can consent on behalf of a child.

### CONSENT FOR MEDICAL TREATMENT

Medical treatment has not been defined by the courts but it includes medical or pharmaceutical remedies but not surgical procedures.<sup>5</sup> Counseling can also be considered a form of treatment.

The minimum age for independent consent is 12 years. The Children's Act<sup>4</sup> allows a child of 12 years or older to give consent to medical treatment or procedures provided that the child is "sufficiently mature" and has the mental capacity to comprehend the benefits, risks and other implications of the procedure in question. If sufficient maturity is displayed, the child's consent is adequate and additional parental consent is not required.<sup>6</sup> The nature of the treatment varies according to the level of invasiveness of the procedure and the degree of complication. The type of procedure therefore also has to be taken into consideration.<sup>5</sup>

Children mature at different rates.<sup>5</sup> It is therefore imperative that the health care worker first determines the child's level of maturity by asking appropriate questions which test the child's level of comprehension. The stage of schooling and age-appropriate language skills could be used as a means of gauging the child's level of maturity. The child should understand the relevant information, the consequences of the treatment and be able to reason around issues concerning the treatment required.<sup>8</sup> Further, the child should be able to articulate that he or she is aware of the risks and consequences if consent is given or not. Care needs to be exercised when assessing whether the child can provide independent consent.

Caregivers may consent to medical treatment even though he/she may not be the child's legal guardian. By allowing a person caring for a child to provide consent to medical treatment, the administrative processes for health care providers are simplified. In the absence of a legal guardian, the Children's Act<sup>4</sup> makes provision for these caregivers to provide consent in cases where emergency pain relief is required. If a caregiver refuses to consent to treatment and there are no other resources available, the Minister of Social Development, court or superintendent of the facility may be approached for consent.<sup>4</sup>

The HIV status of a minor may not be disclosed without the consent of his or her legal guardian. If the child is old enough to decide on whether or not to disclose his or her status, the child's freedom of choice must be respected.

Testing a child for HIV can only be done if it is in the best interest of the child or if it is necessary to establish whether a health care worker or any other person may be at risk of contracting HIV. Consent for HIV testing must be obtained from either the child if he or she is old enough to understand the situation (including the risks and benefits) or the parent if the child is not of sufficient maturity. The provincial head of social development, a designated child protection organization, superintendent of the hospital or children's court may be contacted in the absence of the parent. A court order may also be sought if necessary in cases of refusal on the part of the parent or child.<sup>5</sup>

### CONSENT FOR SURGICAL TREATMENT

Knowing which caregivers are able to grant consent is essential when planning for surgical procedures like treatment under general anaesthesia or sedation. Only the following caregivers can consent to surgical treatment:<sup>2</sup>

- Married biological mother and father.
- Divorced mother and/or father (depending on the court's decision).
- Adoptive parents.
- Unmarried biological mother.

Unless the courts grant the father full parental rights, unmarried biological fathers are only expected to provide maintenance and are allowed to have contact with the child. Guardianship and care are usually the responsibility of the unmarried mother.<sup>2</sup>

The Children's Act<sup>4</sup> does however now make provision for unmarried fathers to claim parental responsibility<sup>5,9</sup> if they:

- were living with the child's mother in a serious long-term relationship at the time of the child's birth.
- want to claim paternity of the child even if he and the child's mother do not have a relationship.
- contribute to the child's upbringing.
- contribute or try to contribute to the maintenance of the child.

The unmarried father can also claim parental rights (by applying to the High Court) if the mother is an unfit parent, has passed away or if it is in the best interests of the child.<sup>3</sup> Paternity cannot be claimed if the child has been conceived due to rape or incest or the person is biologically related to the child because of artificial insemination.<sup>2</sup>

The mother of an unmarried parent may also be considered the guardian of her grandchildren<sup>3</sup> but unless stipulated by the court, she would not be considered a legal guardian. Caregivers who are not the child's legal guardian may not consent to surgical treatment.<sup>5</sup> Even though foster parents have rights similar to parents, they cannot consent to surgical procedures including treatment under general anaesthesia and sedation. In such cases, or in cases where consent cannot be obtained from the biological parents or legal guardian for whatever reason, consent from the Minister of Social Development must be sought.<sup>5</sup> If the medical condition is of such an urgent nature that consent from the Minister needs to be granted as soon as possible, it is perhaps better to request consent from the High Court or local children's court.<sup>5</sup> There is a children's court in every magisterial district.<sup>6</sup> In emergency situations where there is no time to approach the minister or the court, the superintendent of a facility can grant consent for surgical procedures.<sup>4</sup> The superintendent cannot however delegate his or her powers of consent to anyone else unless that person is acting as a "person in charge of the hospital".<sup>5</sup>

Children of 12 years of age can give consent to a surgical operation provided he or she is "duly assisted (in writing) by a parent or guardian".<sup>4</sup> The meaning of the words "duly assisted" has not been clarified by the courts but involves certification by the parent that the child understands the nature of the operation and is sufficiently mature to comprehend the risks and benefits of the procedure.<sup>5</sup> A contradiction is also noted in the Children's Act which states that children between the ages of 12 and 18 can consent to surgery without the permission of their parents.<sup>6</sup> Discretion on the part of the health care worker is therefore important.

In cases where the child refuses treatment, surgical procedures can be carried out against the child's will provided that it is in the best interests of the child.<sup>5</sup> The parent or Minister of Social Development will then have to grant consent on behalf of the child.

## YOUNG PARENTS UNDER 18 YEARS: CONSENT FOR TREATMENT FOR THEIR CHILDREN

Individuals who are younger than 18 years but who have children of their own, can consent to medical and/ or surgical treatment for their children provided they are of sufficient maturity and can understand the implications of the procedure. If these teenage parents are not mature enough to comprehend the situation, this responsibility rests upon the shoulders of their parents. These grandparents then have to “duly assist” their children and provide consent in writing.<sup>5</sup>

## WITH HOLDING OF CONSENT

Both parents have equal guardianship over children that have been born within a marriage. In cases where one parent refuses, the other parent may grant consent if the procedure is in the best interests of the child. Parents should consult each other and their views should be given due consideration. However, legally, one parent’s consent is sufficient. If a parent wants to overturn consent granted by the other parent, a court order will need to be sought.<sup>5</sup>

If parents are no longer together, the holder of parental responsibility should consult with the other parent regarding decisions which affect the child’s health. Even though parents have a duty to consult each other, it is not the place of the health service provider to check that this has been done.<sup>5</sup>

According to the Children’s Act,<sup>4</sup> no parent can withhold consent for religious or other similar reasons. If they refuse the recommended treatment, they will be required to provide proof that a medically acceptable alternative exists. If they are unable to show that such an alternative exists, the parent can be overruled by the Minister of Social Development.<sup>5</sup> This ensures that strongly held religious beliefs will not stand in the way of a child receiving lifesaving treatment.

## SUSPICION OF CASES OF ABUSE

A healthcare worker is required by law to report cases of suspected abuse or neglect.<sup>5</sup> The Children’s Act<sup>4</sup> states that “failure to report a reasonable conclusion that a child has been abused or deliberately neglected would make the health professional liable to be found guilty of an offence and liable upon conviction”. This will be dealt with in more detail in another article.

## CONCLUSION

As health professionals, the basic tenets of the Children’s Act should always inform our treatment practices and the best interests of the child should always be considered. All healthcare professionals should therefore be familiar with the laws that govern the health issues of children.

### References

1. Constitution of the Republic of South Africa. (1996). Available from: [file:///C:/Users/Dell%20User/Downloads/Constitution%20of%20the%20Republic%20of%20South%20Africa%20\(2\).pdf](file:///C:/Users/Dell%20User/Downloads/Constitution%20of%20the%20Republic%20of%20South%20Africa%20(2).pdf) [Accessed 4 Feb 2018].
2. Department of Social Development. The Children’s Act explained (a). Booklet 1: Children and parents—rights and responsibilities. Available from: [https://www.unicef.org/southafrica/SAF\\_resources\\_childdactx1.pdf](https://www.unicef.org/southafrica/SAF_resources_childdactx1.pdf) [Accessed 4 Feb 2018].
3. Consent to Medical Treatment in South Africa: An MPS guide. (2012). Available from: <https://www.medicalprotection.org/docs/default-source/pdfs/Booklet-PDFs/sa-booklets/consent-to-medical-treatment-in-south-africa---an-mps-guide.pdf?sfvrsn=4> [Accessed 3 Feb 2018].
4. The Children’s Act, 38. (2005). Available from: <http://www.justice.gov.za/legislation/acts/2005-038%20childrensact.pdf> [Accessed 5 Feb 2018].
5. Sloth-Nielsen, J. (2010). The Children’s Act and the health care

worker. Faculty of Law; University of the Western Cape.

6. Department of Social Development. The Children’s Act explained (c). Booklet 3: The courts and the protection of children. Available from: [http://www.dsd.gov.za/index2.php?option=com\\_docman&task=doc\\_view&gid=111&ttemid=3](http://www.dsd.gov.za/index2.php?option=com_docman&task=doc_view&gid=111&ttemid=3) [Accessed 4 February 2018].
7. Department of Social Development. The Children’s Act explained (b). Booklet 2: Prevention, intervention and care. Available from: [https://www.unicef.org/southafrica/SAF\\_resources\\_childdactx2.pdf](https://www.unicef.org/southafrica/SAF_resources_childdactx2.pdf) [Accessed 4 Feb 2018].
8. National Health Act, 61. (2003). Available from: [http://www.chr.up.ac.za/undp/domestic/docs/legislation\\_55.pdf](http://www.chr.up.ac.za/undp/domestic/docs/legislation_55.pdf) [Accessed 4 Feb 2018].
9. September, R. A new Children’s Act for South Africa: Making it work for children and families. *Social Work/ Maatskaplike Werk* 2008, 44 (2): 143- 58.