

MEDICINE AND THE LAW

What to do when a parent or guardian tries to override a legally competent child's consent to a surgical operation

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Guidelines are provided for doctors where a parent or guardian tries to override an otherwise legally competent child's consent to a surgical operation by refusing to provide the assistance required by the Children's Act. Consideration is given to whether an otherwise legally competent child is competent to consent to a surgical operation when this can be overridden by their parent or guardian, and the legal position regarding informed consent by a child to the surgical termination of her pregnancy.

S Afr Med J 2018;108(12):1030-1031. DOI:10.7196/SAMJ.2018.v108i12.13492

The author recently received a query from Dr N F Moran, Clinical Department: Obstetrics and Gynaecology, KwaZulu-Natal Department of Health, Durban, South Africa, regarding whether a parent or guardian can override an otherwise legally competent child's consent to a surgical operation, which can be answered by considering the following:

Can an otherwise legally competent child alone ever consent to a surgical operation?

The Children's Act^[1] provides that a 12-year-old child, who is 'of sufficient maturity and has the mental capacity to understand the benefits, risks and social and other implications of the surgical operation', may consent to a surgical operation if assisted by their parent or guardian (section 129(3)). The Act specifically excludes the provisions of the Choice on Termination of Pregnancy Act (section 129(1)),^[2] which allows a child of any age to consent to a surgical termination of pregnancy without the consent of a parent or guardian (section 5(3)). However, such child must be competent to give informed consent. Although the Children's Act^[1] does not declare that parents must consent to the surgery, and states that the child must be 'assisted' by a parent or guardian, such assistance effectively means that a parent or guardian must also consent to the operation.

The Children's Act^[1] provides that the superintendent, or the person in charge of the hospital, in the absence of the superintendent, may consent to surgery on an otherwise legally competent child, subject to the following: the treatment or operation is necessary to preserve the life of or save the child from serious or lasting physical injury or disability (section 129(6)(a)); or the need for the treatment or operation is so urgent that it cannot be deferred to obtain the consent that would otherwise have been required (section 129(6)(b)). However, such a child alone may consent to surgical procedures in medical emergencies when there is no time to contact a parent or guardian or superintendent of a hospital, or in his/her absence the person in charge of the hospital.^[3]

A child may consent to a surgical procedure to terminate a pregnancy in terms of the Choice on Termination of Pregnancy Act,^[2] provided he/she can give informed consent. Informed consent means that the patient has knowledge of the procedure and understands and

appreciates all its consequences.^[4] The National Health Act^[5] provides that, for informed consent, the patient must be given information on the diagnostic procedures and treatment options available and the benefits, risks, costs and consequences generally associated with each option (section 6(1)(b) and (c)). This must be provided in a language that the child understands and in a manner that takes into account their level of literacy (section 6(2)). Therefore, for informed consent the child should be able to understand the benefits, risks and social and other implications of the termination of pregnancy.

Can a parent or guardian refuse to assist an otherwise legally competent child to consent to a surgical operation?

In terms of the Constitution^[6] (section 28(2)) and the Children's Act^[1] (section 7), anyone assisting an otherwise legally competent child by consenting to a surgical operation must consider the best interests of the child. When applying the best interests of the child, the persons concerned must consider the child's physical and emotional security (section 7(1)(h)). Therefore, a parent or guardian can refuse to assist an otherwise legally competent child to consent to a surgical operation only if they can show that they are acting in the best interests of the child.

The Children's Act^[1] provides that no parent or guardian of a child may refuse to assist an otherwise legally competent child only because of religious or other beliefs – unless they can show that there is a medically accepted alternative to the proposed surgery (section 129(10)). For example, a parent may not for religious or other beliefs refuse to allow a pregnant child to have a caesarean section for a baby who is in distress and will be harmed if not delivered urgently.^[3]

The Children's Act^[1] states that the minister of Social Development may consent to surgery if the child's parent or guardian unreasonably refuses to assist the child in giving consent (section 129(7)(a)). A high court or a children's court may consent to surgery on a child where another eligible person is unable or refuses to give such consent (section 129(9)). This would apply, for instance, where the minister refuses to give consent or it is impractical to contact the minister for consent. There is no requirement that doctors must contact or attempt to contact the minister before approaching the courts.

How can doctors overcome refusal by a parent or guardian to assist an otherwise legally competent child to consent to a surgical procedure?

The steps to overcome refusal by a parent or guardian to assist an otherwise legally competent child to consent to a surgical procedure depend on the circumstances, but doctors must always be guided by the best interests of the child:

- (i) **Where there is a medical emergency, the operation cannot be delayed, an otherwise legally competent child has given informed consent and a parent or guardian refuses consent.** The doctor should first counsel the parent or guardian regarding the need for the operation and explain the consequences if it is not done. If consent is refused, the doctor should inform them that it is in the child's best interests that surgery is undertaken with the child's consent, and that consent will be obtained from the superintendent or a delegated person in charge of the hospital.^[1] After obtaining such consent the doctor should proceed with the operation.
- (ii) **Where there is a medical emergency, an otherwise legally competent child has given informed consent, the operation cannot be delayed, the parent or guardian refuses consent and there is no time to contact the superintendent or a delegated person in charge of the hospital for consent.** The doctor should counsel the parent or guardian, as mentioned in (i), except to state that there is no time to contact the superintendent or a delegated person in charge of the hospital for consent. The doctor should inform the parent or guardian that the operation must be immediately undertaken with the child's consent and in the best interests to save the child's life or protect him/her from serious lasting injury or disability, and then proceed with the operation.
- (iii) **Where there is a medical emergency, the operation can be delayed, an otherwise legally competent child has given informed consent, but a parent or guardian refuses consent.** The doctor should counsel the parent or guardian, as mentioned in (i). As the operation can be postponed, the parent or guardian should apply for an urgent court order if they wish to prevent the procedure by proving that it is not in the child's best interests or that the child does not have the capacity to give informed consent. However, the doctor should provide a deadline regarding the time by which the court order must be obtained, failing which the operation will proceed in the best interests of the child.

- (iv) **Where it is not a medical emergency and the parent or guardian, because of religious or other beliefs, refuses to assist the otherwise legally competent child who has given informed consent.** The doctor should counsel the parent or guardian that they cannot legally refuse to assist on grounds of religion or belief.^[1] The need for the procedure and the consequences if it is not done should be explained. If the parent or guardian still refuses consent, they should be advised that the minister of Social Development or the courts will have to be approached to override their refusal^[1] and that they will be liable for the costs involved.
- (v) **Where an otherwise legally competent child gives informed consent to surgical termination of pregnancy and a parent or guardian seeks to override it.** The doctor should inform the parent or guardian that their assistance or consent is not legally required.^[2] They should be informed that the doctor is allowed by law to engage in the surgical termination of the child's pregnancy without their consent, provided the doctor has received informed consent from the child. If they wish to prevent the operation, they should apply for a court order. They will have to prove to the court that it is not in the child's best interests to have the operation to terminate the pregnancy or that the child does not have the capacity to give informed consent for the termination. The parent or guardian should be given a deadline by which to obtain such an order, because the doctor is legally bound to act in the best interests of the child^[6] to prevent the suffering of physical or emotional harm caused by undue delays in terminating the pregnancy.^[1]

Declaration. None.

Acknowledgements. National Research Foundation.

Author contributions. Sole author.

Funding. National Research Foundation.

Conflicts of interest. None.

1. South Africa. Children's Act No. 38 of 2005.
2. South Africa. Choice on Termination of Pregnancy Act No. 92 of 1996.
3. McQuoid-Mason D. Can the consent provisions in the Choice on Termination of Pregnancy Act, which do not require children to be assisted by a parent or guardian, be used for live births by caesarian section in emergency situations? *S Afr J Bioethics Law* 2018;11(1):43-45. <https://doi.org/10.7196/SAJBL.2018.v11i1.644>
4. *Castell v De Greef* 1994 (4) SA 408 (C).
5. South Africa. National Health Act No. 61 of 2003.
6. Constitution of the Republic of South Africa, 1996.

Accepted 6 July 2018.