

## Parents refusing blood transfusions for their children solely on religious grounds: Who must apply for the court order?

**To the Editor:** I read with interest the article by McQuoid-Mason.<sup>[1]</sup> While I appreciate the author's intention, I have a number of concerns.

First, the learned author took the improbable premise that refusal of blood transfusions will invariably be 'solely on religious grounds.' Assuming that he is only addressing situations involving infants (mature minors having the legal capacity to make treatment decisions), in our experience the best interests of the child are foremost in the minds of parents who seek medically acceptable alternatives. He also makes the unsubstantiated claim that in 'nearly all cases' and 'some provinces', health providers are being advised to seek court orders. This broad generalisation ignores the reality that most medical matters are resolved consensually between ethical healthcare providers and the infant's parents. Relying on 'hard cases' with unique medical circumstances to extrapolate a broad rule makes for poor ethics if not poor medicine.

McQuoid-Mason asserts that it is the parent who bears the onus to approach the courts to prove that appropriate alternative treatments are available and that medical practitioners can override a parent's refusal to consent to a particular treatment. However, the Children's Act 38 of 2005 (Children's Act)<sup>[2]</sup> only permits certain actors to give consent in lieu of the parents (i.e. the hospital superintendent and the Minister), and then only in specific extreme circumstances (subsections 129(6) - (8)). Furthermore, section 6(1) of the National Health Act 61 of 2003<sup>[3]</sup> imposes a duty on the healthcare provider to inform the user about the range of treatment options generally available and the benefits, risks, costs and consequences associated with each option. This is the medical ethical duty that arises from the legal best interests test.

To suggest that administering a blood transfusion without parental consent upholds the law contradicts section 129(1) of the Children's Act,<sup>[2]</sup> which reads '... a child may be subjected to medical treatment or a surgical operation only if consent for such treatment or operation has been given in terms of either subsection (2), (3), (4), (5), (6) or (7)'. The parent, not the doctor, has the legal authority to consent to treatment. To assume otherwise makes the parental role superfluous. Should a parent disagree with a healthcare provider on a medical recommendation, the parent is entitled to seek a second opinion and, in the meantime, withhold consent for a specific procedure. Then, according to section 129(10), a parent should be in a position to show the healthcare provider that there is a medically acceptable option available for the child's treatment. The healthcare provider does not get to overrule the informed decision of a competent parent and must see to it that the chosen option is applied. If the healthcare provider feels that the option presented by the parent is potentially harmful to the child or if the parent cannot transfer the child to a medically acceptable alternative facility, the burden of proof is on the healthcare provider to challenge the parent in court in terms of section 129(9), in which case the parent should still be in a position to show to the court that their option is a medically acceptable alternative, and it would be up to the court to decide.<sup>[4]</sup> Any other course of action sidesteps the rule of law, while this approach follows international jurisprudence, which indicates that procedural rights are an important aspect of making the limitation of the parent's rights and responsibilities reasonable and justifiable.<sup>[5]</sup> Moreover, the current international standard of care avoids transfusions wherever possible and facilitates informed parental decision-making and consent for medical treatments.<sup>[6]</sup>

**Bongani Hopewell Malokane**

*Bongithemba Solutions Pty Ltd, Emalahleni, South Africa  
bhmalkane@yahoo.com*

1. McQuoid-Mason DJ. Parents refusing blood transfusions for their children solely on religious grounds: Who must apply for the court order? *S Afr Med J* 2020;110(2):100-101. <https://doi.org/10.7196/SAMJ.2020.v110i2.14486>
2. South Africa. Children's Act No. 38 of 2005. <https://www.justice.gov.za/legislation/acts/2005-038%20childrensact.pdf> (accessed 8 June 2022).
3. South Africa. National Health Act 61 of 2003. <https://www.gov.za/documents/national-health-act> (accessed 8 June 2022).
4. See in this regard the views expressed in the unreported judgment *Stuurman and Another v Dr George Mukhari Academic Hospital and Another (The Centre for Child Law Intervening)* (North West Division of the High Court Civ/App/MG6/2016) (7 May 2020) at paras 19-21.
5. See, for example, *B. (R.) v Children's Aid Society of Metropolitan Toronto* [1995] 1 SCR 315 (SCC) and *M. (J.) v Alberta (Director of Child Welfare)* (2004) ABQB 512.
6. Crighton GL, New HV, Liley HG, Stanworth SJ. Patient blood management, what does this actually mean for neonates and infants? *Transfus Med* 2018;28(2):117-131. <https://doi.org/10.1111/tme.12525>

**McQuoid-Mason responds:** I wish to reply to the following statements in the above correspondence:

1. *[The] learned author took the improbable premise that refusal of blood transfusions will invariably be 'solely on religious grounds'.*

It is not clear how the correspondent came to this conclusion. Nowhere in the article was this suggested. The article deals specifically with the provision in the Children's Act<sup>[1]</sup> that states how such matters should be dealt with when parents refuse 'by reason only of religious or other beliefs' (section 129(10)) – after being informed that no alternative remedies are available in the health service concerned.

2. *[In] our experience the best interests of the child are foremost in the minds of parents who seek medically acceptable alternatives.*

That may be, but the drafters of the Children's Act were well aware of the problem where religion is the sole grounds for refusal. Similar problems have been reported in the courts of the USA, Canada, the UK and Australia, all of which have ruled in favour of the child's right to life in the best interests of the child.<sup>[2]</sup>

3. *He also makes the unsubstantiated claim that in 'nearly all cases' and 'some provinces', health providers are being advised to seek court orders.*

The sentence criticised actually reads 'nearly all cases where parents refuse blood transfusions for their children solely on religious grounds'. The reference to 'some provinces' arose because the ethics committee at a large public hospital was experiencing an increasing number of cases where parents were refusing consent for lifesaving treatment, solely on religious grounds, after being informed that no alternative treatment options were available at the institution concerned. The committee mentioned that practitioners at that particular institution, and at other state hospitals, were being advised by the state legal advisers to apply for court orders, and wanted some clarity on the matter.

4. *This broad generalisation ignores the reality that most medical matters are resolved consensually between ethical healthcare providers and the infant's parents.*

The article does not make a 'broad generalisation' – it deals specifically with cases where religion is the sole ground for refusing to consent to medical treatment for a child after the parents have been informed that no medical alternatives are available, and no consensus could be reached on the way forward (see my earlier response in point 3 above). There was no attempt 'to extrapolate a broad rule' regarding all refusals by parents on religious grounds. It is medically, ethically and legally justifiable to act in the 'best interests of the child', against the religious beliefs of parents that undermine the child's right to life, where no alternative therapies are available.<sup>[3]</sup>

5. *[The Children's Act] ... only permits certain actors to give consent in lieu of the parents (i.e. the hospital superintendent and the Minister), and then only in specific extreme circumstances (subsections 129(6) - (8)).*

The article also refers to these sections. I concede, however, that the article should have made clear that reference was being made to emergency life-threatening situations where the hospital superintendent and the Minister are not available or contactable at the time, and the doctor is entitled to proceed to save the patient's life without consent. The Health Professions Council of South Africa's Guidelines for Good Practice in the Health Care Professions<sup>[4]</sup> point out that 'In an emergency, where consent cannot be obtained, health care practitioners may provide medical treatment to anyone who needs it, provided the treatment is limited to what is immediately necessary to save life or avoid significant deterioration in the patient's health' (para 7.1). This is consistent with the Constitution,<sup>[5]</sup> which states that nobody may be refused emergency medical treatment (section 27(3)), and international best practice.<sup>[6]</sup>

6. *[The National Health Act] ... imposes a duty on the healthcare provider to inform the user about the range of treatment options generally available and the benefits, risks, costs and consequences associated with each option.*

The article assumes that this would have been done in the information provided to the parents by the healthcare team when trying to obtain informed consent. The information provided would have to have included whether a medically acceptable alternative was available during the discussion on the benefits, risks and costs of each option. It is conceded that the article could have spelled this out in more detail.

7. *To suggest that administering a blood transfusion without parental consent upholds the law contradicts section 129(1) of the Children's Act ... The parent, not the doctor, has the legal authority to consent to treatment.*

It is true that the parents have the legal authority to consent to treatment, but as mentioned in both the article and the response letter, in terms of the Children's Act such authority can be replaced by consent from a hospital superintendent, the Minister of Social Development, a high court or a children's court if consent is unreasonably withheld against the best interests of the child (section 129(6) - (10)). In emergencies when such persons are not available, and time is of the essence to save the patient's life, the practitioners concerned may proceed without such consent. As previously mentioned, this is consistent with the Constitution and international best practice (see my response in point 5 above). For, instance in Canada, which has a Charter of Rights and Freedoms<sup>[6]</sup> that is similar to the South African Bill of Rights, the Canadian Medical Protective Association advises practitioners that 'In cases of medical emergency when the patient (or substitute decision maker) is unable to consent, a physician has the duty to do what is immediately necessary without consent.'<sup>[7]</sup> This is almost identical to the wording of the HPCSA Guidelines mentioned above (see my response in point 5 above).

8. *[If] a medically acceptable option [is] available for the child's treatment ... the healthcare provider does not get to overrule the informed decision of a competent parent and must see to it that the chosen option is applied.*

This is accepted, and nowhere in the article is it suggested otherwise. The article deals with situations where there is no medically acceptable option.

9. *If the healthcare provider feels that the option presented by the parent is potentially harmful to the child or if the parent cannot transfer the child to a medically acceptable alternative facility, the burden of proof is on the healthcare provider to challenge the parent in court in terms of section 129.*

Agreed, because in such a case the parents are not relying solely on religious grounds, but on the medically acceptable option mentioned by them.

10. *If the healthcare provider feels that the [medically acceptable] option presented by the parent is potentially harmful to the child or if the parent cannot transfer the child to a medically acceptable alternative facility, the burden of proof is on the healthcare provider to challenge the parent in court in terms of section 129(9), in which case the parent should still be in a position to show to the court that their option is a medically acceptable alternative, and it would be up to the court to decide.*

Agreed, because in such a case the parents are not relying solely on religious grounds, but on the medically acceptable option mentioned by them, and a court must decide which option is 'in the best interests' of the child.

#### D J McQuoid-Mason

Centre for Socio-Legal Studies, University of KwaZulu-Natal, Durban, South Africa  
mcquoidm@ukzn.ac.za

1. South Africa. Children's Act No. 38 of 2005. <https://www.justice.gov.za/legislation/acts/2005-038%20childrensact.pdf> (accessed 12 May 2022).
2. Woolley S. Children of Jehovah's Witnesses and adolescent Jehovah's Witnesses: What are their rights? Arch Dis Child 2005;90(7):715-719. <https://doi.org/10.1136/adc.2004.067843>
3. Cf. B. (R.) v. Children's Aid Society of Metropolitan Toronto [1995] 1 SCR 315 (SCC). <https://scc.lexum.com/scc-csc/scc-csc/en/item/1220/index.do> (accessed 11 May 2022).
4. Health Professions Council of South Africa. Guidelines for Good Practice in the Health Care Professions. Seeking patients' informed consent: The ethical considerations. Booklet 4. 2008. [https://www.hpcsa.co.za/Uploads/Professional\\_Practice/Conduct%20%26%20Ethics/Booklet%204%20Informed%20Consent%20September%20202016.pdf](https://www.hpcsa.co.za/Uploads/Professional_Practice/Conduct%20%26%20Ethics/Booklet%204%20Informed%20Consent%20September%20202016.pdf) (accessed 9 May 2022).
5. Constitution of the Republic of South Africa No. 108 of 1996. <https://www.gov.za/sites/default/files/images/a108-96.pdf> (accessed 12 May 2022).
6. Constitution Act, 1982. Part 1: Canadian Charter of Rights and Freedoms. <https://caid.ca/ConstAct10208.pdf> (accessed 12 May 2022).
7. Cf. C.M.P.A. (Canadian Medical Protective Association). Consent: A guide for Canadian physicians. Fourth edition: May 2006 / Updated: April 2021. <https://www.cmpa-acpm.ca/en/advice-publications/handbooks/consent-a-guide-for-canadian-physicians#Emergency%20treatment> (accessed 11 May 2022).

S Afr Med J 2022;112(8):509-510. <https://doi.org/10.7196/SAMJ.2022.112i8.16603>