

# Children's Rights and Oral Health



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## ABSTRACT

Despite clear legal promulgations by section 27 of the Constitution and Children's Act 38 of 2005, the best interests of children are generally undermined or ignored. The lack of respect for the rights of children is difficult to quantify; the extent to which "children are seen and heard" is under-reported. Culture, religion, patriarchy and socio-economic condition are among the factors that exacerbate blatant disregard conditions for children's rights. Health care professionals are not adequately informed about the rights of the child and how to ensure that their interest are protected during oral health care. Consequently, children may suffer neglect and harm during dental care. Practitioners must familiarize themselves regarding their responsibilities and roles when treating children. Additionally, teaching institutions and regulatory bodies must provide continuous professional development on legislation that regulates the protection of children within health care service. This case study seeks to provide a legal framework for oral health practitioners when dealing with consent for minors during dental care.

## BACKGROUND

It is not uncommon for clinicians to be drawn into custody battles, when dealing with minor children. In most instances, the clinician will refer such matters to the CEO or delegated hospital manager to supersede and authorise dental treatment. This article seeks to answer the following questions: How are such conflicts managed in solo practices or in settings without delegated, independent and accountable senior manager? When are clinicians obligated to respect parental or guardian's rights upon the child? Clinicians

should have sufficient understanding of the constitutional provisions as well as laws that provide for protection of children.<sup>1,2</sup> Irrefutably, all legal provisions regard the interests of children as paramount.<sup>3</sup> Hence the appointment of the High Court, as an absolute guardian to always act to protect the child's rights in cases of conflict. The law takes centre stage as an unbiased arbiter to assure that decisions taken are always in the best interest of the child. Naturally, parents or guardians might hold particular biases about what is the "best" interest of the child; and in case of conflicts, these opposing interests might potentially harm the child if not managed decisively and timeously. Clinical situations may drastically deteriorate, when a minor requiring urgent medical care, experience undue delays. Furthermore, clinical indecision and legal deferment could seriously compromise the prognosis, clinical outcomes and quality of life.

## Case scenario

An 11 year-old girl, was referred from a local clinic to maxillofacial hospital for further management following a fall from a bicycle. The clinical examination revealed that she had suffered a horizontal maxillary Fort I fracture resulting in separation of her hard palate from the upper maxilla.

The attending clinician recommended immediate reduction of the fracture under general anaesthesia. The accompanying adult, her biological father seemed hesitant to give consent for the surgery, despite having clearly understood the risks and benefits associated with the procedure, as well as the urgency and the consequences of no treatment. On further questioning he said that a few weeks earlier he had been deemed ineligible to consent for his daughter's treatment because they do not share the same surname. At this time the child's mother had to be called to give consent. It emerged that the mother had been married to her current spouse for 8 years and the child lived with her biological mother and stepfather. At the time of the accident, the child had been visiting her biological father, who was recently been released from prison after serving a 10-year jail sentence. Given the urgency of the operation, and the unavailability of the mother, the stepfather was summoned to give consent for the surgery, however, the biological father opposed the authority and delegation of the stepfather. Finally, the hospital superintendent authorised the surgery. The child was successfully operated, discharged and recovered very well

## DISCUSSION

In the case of the 11 year old girl, surgery proceeded without any complications. Legal and ethical questions arise given what transpired during this encounter:

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- (i) Which of the parents have the right to consent for child.
- (ii) How should the conflict between parents be resolved?
- (iii) How would a clinician ensure the best interest of child under their care?

#### (i) Critical Notes on the Children's Act 38 of 2005

The standard of "the best interests of the child" is the measure entrenched in the Children's Act and the Constitution.<sup>4,5</sup> This comprehensive law has gone through two iterations, and has repealed over six acts relating to children.<sup>6</sup> This act was reformed in order to regulate consent for treatment of children.<sup>7</sup> Notably, the repealed *Child Care Act* of 1983, made provision for children above the age of 14 and 18 to consent to medical and surgical operations respectively.<sup>8</sup> These laws were viewed as limiting the children's rights to participate in decisions about their health.<sup>7,9,10</sup> Hence, the current *Children's Act* 38 of 2005 prescribes the responsibilities and rights of the parents, caregivers and the court of law over the child, and the decisional capacity of the child. The *Children's Act* provides for guardians to consent for medical intervention for children.<sup>6,8</sup> However, parental responsibility and rights are not absolute, and can be limited if found to be unreasonable.<sup>10</sup> The question is who has delegation of authority to consent for this child?

#### (ii) Responsibilities and Rights of Parents<sup>11,12</sup>

Both parents have full parental rights and responsibilities and may consent individually to child's medical treatment or surgery. It is incumbent on consenting parent to consider views and expressions of the other, especially where a decision could significantly have an adverse effect on the child's health. A biological mother automatically assumes full parental right and responsibilities irrespective of her marital status. Similarly, the act confers equal parental rights and responsibilities to an unmarried father, as long as they are committed to the upbringing and caring of the child. Categories of parents excluded by the act, include: (i) biological parent of a child conceived through rape or incest; (ii) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation; and (iii) a parent whose parental responsibilities and rights in respect of the child have been terminated. In respect of common law, an adoptive parent in a marriage assume parental rights and responsibilities by virtue of marriage.

#### (iii) Responsibilities and rights of caregivers

Caregiver is any person who cares for the child, including grannies, aunts and other relatives who take responsibility over the child. The consent to care for the child may be given by the child's parents, a foster parent, or any person authorised to do so. Caregivers are authorized to give consent for the child only if the child is under the age of 12 or lacks the capacity and mental maturity to consent.

#### (iv) Roles of the court

In the event that, the parent or guardian are unavailable or untraceable, then the Minister of Social Development or the Court of Law can be approached to give consent. This process can take time. There is legal precedence on the court acted as the upper guardian in the protection of the best interests of the child. *In S v Makwanyane; Christian Education South Africa v Minister of Education* 2000 (4) SA

77757 and in *ex parte Thulisile Sibisi*, the courts upheld decisions in favour of the child.

#### (v) General principles and children's rights

The guiding principles on matters related to the child are to protect the well-being and the best interest of the child, respect child agency by involving them in decision-making. To determine what is "in the best interest of the child", the following factors must be considered: - *Section 7(a)(i)* nature of the personal relationship between child and parent or guardian; *S7(g)(i)* age, maturity and stage of development; and *S7(h)(1)* the child's physical and emotional security and his or her intellectual, emotional, social and cultural development.

According to *Section 10* "Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration". Therefore, the right of a child to participate in decision-making should be respected even if the child is not of legal consenting age.

*Section 129(b)(c)* provides that a child may consent if he/she is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment and for a surgical operation, the child is duly assisted by his/her parents or guardian" and minor children aged 12, and 14 years can consent for medical and surgical procedures respectively.

In this scenario, which parent has the primary right to consent for her treatment, the biological father or the stepfather? According to the Act, any parent, biological or adoptive may hold parental rights and responsibilities. *Section 21* of the act confers parental rights to unmarried father, provided the following conditions are met; (i) he consents to be identified as a father, either by paying damages (customary law), by applying to the court. (ii) he has contributed or attempted to contribute to the upkeep and maintenance of the child in good faith and for a reasonable period.

The biological father served a 10-year prison term, and he did not support his child in any way during this period. Damages were paid and rituals concluded for the child on her 2nd birthday, whilst still in jail, he failed on four components of parental responsibilities and rights, that is (i) care of a child, (ii) contact with a child, (iii) acting as a guardian of a child and (iv) contributing to the maintenance of a child. It is evident that the biological father would not enjoy the legal parental rights, without commensurate responsibilities. It is possible for the courts to restrict, terminate or suspend parental rights in such cases.<sup>10</sup> The practitioners who previously questioned the legality of the biological father's authority to consent for the child were therefore justified. It is incumbent of health professionals to question relationships of children and guardian, as suspicion can avert cases of child abuse and harm.

The stepfather should enjoy full parental rights over the child, he is married to her mother and has taken responsibility for her upkeep, care, contact and maintenance for over 8

years. This case highlights that sharing a surname is legally and inherently immaterial to confer parental rights over a child. Clinicians cannot take it at face value that parents who share or do not share surnames have absolute right to consent for the minor's treatment. Dental professionals need to be sceptical and suspicious about relationships between children and guardians. Deeper interrogation is necessary in cases where the child may seem uneasy around a guardian. Such interventions could avert cases of child abuse; neglect and trafficking.

Disputes between consenting parents can be a challenge for all involved in the child's care. It is important for health professionals to focus only on the welfare of the child and to avoid irrelevant matters such as marital differences.<sup>13</sup> If the dispute is over an elective procedure, the medical team must not continue with the procedure without the order from the court. In case of medical emergency, the Superintendent, or a person in charge of the medical facility, can consent on behalf of the child, only if:

- (a) The treatment or surgery is needed to save the child's life or to prevent serious injuries or disability, (b) It is urgent that there is no time to seek consent from the people authorized to give consent. Both requirements must be met in compliance with the Act.

#### Implications for practitioners

Clinicians like other sectors of society are duty bound to protect the health care rights of the vulnerable, especially children. Specific to oral health, the following rights should be guarded by those providing this essential service.

- i) Clinicians must maintain objectivity to ensure that children's rights to oral health are not subverted by third party interest, i.e parents, guardians or caregivers. In so doing, the practitioner must ensure that competent children are involved in decision making about their oral health care needs. Where possible and appropriate, children must be given an opportunity to make inputs about the treatment they will receive.
- ii) Ensure that children enjoy access to preventive; promotive and curative services. It is incumbent on clinician to provide and advocate for increased access to these services.
- iii) Law is not stagnant, therefore it is critical for clinicians to familiarize themselves with the current legislation that promotes the rights of children and inculcate them in their daily practice.

#### CONCLUSION

Familiarity of health professionals with the Children's Act is critical in ensuring that "best interest of children" is realised during oral health care services.

#### References

1. Mahery P, Proudlock P, Jamieson L. A guide to the Children's Act for health professionals. A guide to the Children's Act for health professionals. 2010.
2. Kling S. Ethical issues in treating children: ethics. *Current Allergy & Clinical Immunology*. 2011;24(4):218-220.
3. Pashkov V, Olefir A. Protection of children's rights in the health care: problems and legal issues. *Wiadomosci Lekarskie (Warsaw, Poland)*. 2017;70(6 pt 1):1122-1132.
4. Burman S. Allocating parental rights and responsibilities in South Africa. *Family Law Quarterly*. 2005;39(2):429-439.

5. Dawes A. The South African children's act. In: Taylor & Francis; 2009.
6. Songca R. Evaluation of children's rights in South African law: the dawn of an emerging approach to children's rights? *Comparative and International Law Journal of Southern Africa*. 2011;44(3):340-359.
7. Bonthuys E. Parental rights and responsibilities in the Children's Bill 70D of 2003. *Stellenbosch Law Review*. 2006;17(3):482-493.
8. September R, Dinbabo M. Gearing up for implementation: A new Children's Act for South Africa. *Practice*. 2008;20(2):113-122.
9. Proudlock P, Jamieson L. The Children's Act: providing a strong legislative foundation for a developmental approach to child care and protection. 2009.
10. Matthias CR. Parental responsibilities and rights of unmarried fathers: court decisions and implications for social workers. *Social Work*. 2017;53(1):96-108.
11. Page E. Parental rights. *Journal of Applied Philosophy*. 1984;1(2):187-203.
12. Heaton J. Parental responsibilities and rights. CJ Davel and AM Skelton (eds). 2007;3:1-3.
13. Smith LA, Tumilty E, Page LF, Thomson WM, Gibson B. Children's rights in their oral health care: How responsive are oral health professionals to children's rights. *The International Journal of Children's Rights*. 2018;26(2):354-378.