

PARENTAL RESPONSIBILITY OVER CHILD'S HEALTH: DISPENSING WITH COURT PROCEEDINGS IN EMERGENCY SITUATIONS *

Abstract

From time immemorial, the child has been regarded as an incomplete being who depends on the assistance of adults, particularly, his parents or those in loco parentis, to survive and succeed in life. Parental responsibility over the child is considered as an indispensable tool to the full realisation of child rights. Sometimes, however, this responsibility when it relates to the health of the child, is discharged more to the detriment rather than for the benefit of the child. In such a case, government usually intervenes through the courts to pave way for appropriate steps to be taken in the best interest of the child. Considering the rigorous and cumbersome procedures associated with courts of some countries, emergency situations may arise requiring instant measures to be taken. This research understudied the right of the child to health vis-a-vis parental responsibility to protect this right in emergency situations. It adopted a non-doctrinal approach to the study and recommended inter alia that provisions be made in the Child's law for health care givers to take actions in the best interest of the child without recourse to the courts in emergency situation.

KEY WORDS: Parent, Parental Responsibility, Child and Health

1. Introduction

Closely linked to the rights to life, survival and development is the child's right to health. Where the child's health is threatened, his chances of living become slim. Health is wealth and therefore, a vital commodity to the child. A child in a bad health condition cannot really live life to the fullest. Whereas the right to health can be regarded as part of human rights and applicable to all, children are totally dependent upon adults to enjoy and enforce this right in satisfaction of their health needs. Children are easier prone to adverse health events, improper nutrition, sanitation and environment they usually have no control over. Parents as primary care-givers of the child have the first responsibility to ensure the child lives healthy. Where there is a clash of interest between the child's interest and that of his parent, the State intervenes through the instrumentality of the court to resolve such conflict with the best interest of the child remaining paramount. Several decisions of the court in this regard have

emerged. In *Esabunor and Anor v Faweya and Ors¹*, the Apex Court recognized the vulnerability and incapacity of the child to make decisions relating to his health when it held that:

All adults have the inalienable right to make any choice they may decide to make and to assume the consequences. When it involves a child different considerations apply and this is so because a child is incapable of making decisions for himself and the law is duty bound to protect such a person from abuse of his rights as he may grow up and disregard those religious beliefs.

Health providers facing the challenge of performing their professional and legal duties of ensuring that the child enjoys the best medical attention needed and at the same time respecting parental rights over the child have made it a trend to resort to the court for directives on how to balance both interests without the child's health being jeopardized. The court has effectively played its role in this regard. However, where life threatening situations occur that require immediate attention of the health providers, resorting to the court

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before taking appropriate life-saving measures may be futile particularly, in an ailing legal system. The question becomes, are there alternatives to court proceedings in emergency health situation of the child? Must those responsible for health care delivery obtain first court orders before carrying out medical treatment on a child whose parents have withdrawn their consent to medical care? This article seeks to answer these questions and many more.

1.1 Who is a Parent?

Originally, parenthood was associated with a married couple, usually male and female who are biological mother and father of a child. However, the term has been substantially taken over in most jurisdictions by a variety of statutes to include: either the natural father or the natural mother of a child; the adoptive father or the adoptive mother of a child; a child's putative blood parent who has expressly acknowledged paternity, and an individual or agency whose status as guardian has been established by judicial decree. The Convention on the Rights of the Child² which is the springboard for other laws relating to the child did not define the term "parent" but some state parties in domesticating the Convention on the Rights of the Child (CRC) have filled up this gap.

One of the simplest but all-encompassing definition of a "parent" is contained in *Section 2* of the Children's Act of Kenya³. The Act defines "parent" to mean "the mother or father of a child and includes any person who is liable by law to maintain a child or is entitled to his custody". The term denotes more than responsibility for conception and birth.⁴ Thus, a parent is the lawful father or mother of someone. The United Kingdom (UK) Children's Act⁵ did not define a parent but in mentioning persons with parental responsibility, it includes mother and father of a child born within wedlock, civil partners at the time of a child's birth, and persons recognised as legal parents of a child born after sperm donation or artificial insemination or other fertility treatment.⁶ Like the UK Act, the Child's Right Act⁷ (CRA) does not define a parent and no other law in Nigeria is found to have done so. But a definition can be inferred from *Section (2)* of the CRA to include the father, step-father, mother or step-mother of the child; a person who is cohabiting with the mother or step-mother of the child, whether or not he is the putative father of the child; or the person in whose care and custody the child has been during the two years immediately preceding the date of the order or committal.⁸

1.2 Concept of Parental Responsibility

Parental responsibility can be broadly defined as a legal term that specifies rights and duties of parents towards their children. This is reflected in the parents' authority to take all necessary decisions in regard to the child's welfare. The concept of parental responsibility, though not defined by the CRC can be found in most countries but the exact terminology varies from one country to another, as well as over time.⁹ Although the holders of parental responsibility are legally clearly defined, the content and its meaning for everyday family life as well as social work is less clear. In order to understand the concept of parental responsibility fully it is necessary to establish a country-specific meaning through legislation and policy documents.¹⁰

² Herein referred to as CRC

³ 2001(Cap 141, Rev. 2012)

⁴ "Parental Responsibility and Child Maintenance in Kenya: The Role of the Children's Court", <https://www.academia.edu/31644993/Parental_Responsibility_and_Child_Maintenance_in_Kenya_The_Role_of_the_Childrens_Court> accessed on 19/03/2020

⁵ 1989

⁶ Parental Responsibility and Child Maintenance in Kenya: The Role of the Children's Court", *op. cit.*

⁷ 2003 herein referred to as CRA

⁸ See section

⁹ K Bain, "Parental Responsibility", (2009) *Social Work and Society International Online Journal*, Vol.1, No.1, <<https://www.socwork.net/sws/article/view/54/356>> accessed on 28/2/2020

¹⁰ *Ibid*

Section 277(a) of the CRA and *section 3* of the UK Children's Act define parental responsibility to mean all the rights duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property. This is similar with the definition of the term in the Kenyan's Children's Act except that in Kenya, parental responsibility must be consistent with the evolving capacities of the child.¹¹ Basically, parental responsibility is exercisable over the person and property of the child. The responsibility can be natural (biological parents of the child) or acquired by agreement or order of the court (e.g. adoptive parents).

The responsibility of parents in rearing and raising their children is not only a moral duty but a legal one too. In the past, children were best seen as dependants of their parents or persons in *loco parentis* whose welfare are protected based on the discretion of their parents. The welfare-based approach of child protection began to change with the emergence of the legal systems established globally and domestically. With the laws now, the child is better referred to as a right-bearer with duty imposed on all and sundry to ensure inviolability of these rights. These rights although, recognised from conception, become enforceable at birth with the help of parents as the primary contacts of the child. The law recognises the position and authority of the parents as care-givers to take decisions for and on behalf of the child without interference subject to legally established limits which amongst others include where such decisions or actions are adverse to the best interest of the child. The best interest of the child must always be served first and as such where such interest is threatened by failure, refusal or neglect by parents to carry out their responsibilities over the child, the law steps in to provide alternative measures to do.

Parental responsibility is a concept that has gained universal recognition as is evident in most national and international child's rights laws. By *Articles 3(2) and 5* of the United Nations Convention on the Rights of the Child, States Parties undertook to take into account and respect the responsibilities, rights and duties of a child's parents, legal guardians, or other individuals legally responsible for him or her, including members of the extended family or community as provided for by local custom, where applicable, and to take all appropriate legislative and administrative measures to this end. For the purpose of guaranteeing and promoting the rights of the child, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their duties towards the child and shall ensure the development of institutions, facilities and services for the care of children.¹² The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.¹³

Parental responsibility to the child is duly recognised under the Nigerian Child Protection Laws. By *section 2* of the CRA, the protection and care necessary for the well-being of the child is guaranteed, taking into account firstly, of the rights and duties of his parents.¹⁴ All persons, bodies, institutions and authorities, whether public or private, are under a mandatory duty to respect the rights and duties of parents and legal guardians over the child.¹⁵ Parental responsibility presupposes right of the child to the discharge of that responsibility. The corollary of right is duty. As rightly observed by Oputa, every right involves a person invested with the right and persons on whom that right imposes a correlative duty or obligation. For Raz, a right exists when an aspect of a person's well-being is sufficient reason for holding some other person or persons to be under a duty.¹⁶ Thus, the child by virtue of *section 14(1)* of the CRA is granted a right to parental care, protection and maintenance and except for the purpose of his education, welfare or in the exercise of a judicial determination shall not be separated from his parents against his wish. Although, the fulfilment of this responsibility depends on the financial capacity and material resources at the disposal

¹¹ See *section 23(1)* of the Children's Act of Kenya

¹² *Article 18*

¹³ *Article 27(2)*

¹⁴ then legal guardians or other individuals, institutions, services, agencies, organisations or bodies legally responsible for the child.

¹⁵ See for instance *section 7(3)* of the CRA

¹⁶ J. Raz, *the Morality of Freedom*, (Oxford, 1986), p. 116

of the child's parents,¹⁷ the child reserves the legal right, in appropriate circumstances, to enforce this right in the Family Court.

Similarly, *section 6* of the Kenyan Act guarantees the child, right to parental care. A child shall have a right to live with and to be cared for by his parents except where the court or the Director determines in accordance with the law that it is in the best interests of the child to separate him from his parent, in which case the best alternative care available shall be provided for the child. Section 22 of the Act gives the child right to enforce this right in case of violation.

2 The Child's Right to Health

In legal parlance, the meaning of a child is determined by the age of the person under consideration. Laws both international and domestic have laid down different minimum age of adulthood below which a person is referred to as a child. The definition of a child is, therefore, 'dependent on each respective legal system in order to accommodate the different economic, social, political, cultural and legal systems of the respective state'.¹⁸ Generally, under international law, there appears to be a consensus that a child is a person under the age of eighteen years¹⁹ which has been adopted by many national laws.²⁰ Health refers to the condition of the body and the degree to which it is free from illness, or the state of being well.²¹ The meaning of the term has been expanded to include "physical, mental or emotional health"²². It concerns the complete well-being of a person. For the purpose of this research we would limit ourselves to the physical or medical health of the child.

Every human being (including the child) has a right to live healthy. This right contains both freedoms and entitlements. The freedoms include the right to control one's health and body, and the right to be free from interference, such as the right to be free from non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.²³ The right to health entitles people to a system of health protection, including the prevention, treatment and control of diseases and access to functioning public health care facilities, goods and services. States must do everything they can, within their available resources, to provide all these things. The right to health is not a right to be healthy – that would be impossible for a state to achieve, as it cannot control its citizens' biological make-up or socio-economic conditions (although it can influence these).²⁴

The human right of the child to health is recognized in numerous international instruments. *Article 25(1)* of the Universal Declaration of Human Rights affirms: "everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services". In the same vein, *Article 12* of the International Covenant on Economic, Social and Cultural Rights recognizes "the right of everyone to the enjoyment of the highest attainable standard

¹⁷ *Section 14(2)*

¹⁸ L A Oti-Onyema, "Right to Life and Defence of Property in Nigeria: The Child's Right Act in Focus", (2019) Vol. 3, No. 2, *African Journal of Law and Human Rights*, p.49

¹⁹ *Article 1* of the Convention on the Rights of the Child, (CRC); African Charter on the Rights and Welfare of the Child, 1990 and *Article 3(d)* of the "Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime, 2000

²⁰ See section 277 of the CRA

²¹ "Health", <<https://dictionary.cambridge.org/dictionary/english/health>> accessed on 22/03/20

²² *Section 277 of the CRA*

²³ CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), <<https://www.refworld.org/pdfid/4538838d0.pdf>> accessed on 20/3/2020

²⁴ K Jukes, "There Is A Human Right To Health, And This Is How It Works", <<https://eachother.org.uk/is-there-a-right-to-health/>> accessed on 21/3/2020

of physical and mental health". Apart from the general laws providing the child a right to health, the CRC as an instrument specifically negotiated for the protection of the child, establishes the child's right to health.

Article 24(1) of the Convention mandates state parties to ensure that the child enjoys the highest attainable standard of health; to provide facilities for the treatment of illness and rehabilitation of health; and to ensure that no child is deprived of his or her right of access to such health care services. *Article 24(2)* enumerates, by way of illustration, a number of steps to be taken by the States parties to achieve the full realization of this right. Appropriate measures shall be put in place to:

- (a) to diminish infant and child mortality;
- (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
- (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;
- (d) To ensure appropriate pre-natal and post-natal health care for mothers;
- (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;
- (f) To develop preventive health care, guidance for parents and family planning education and services.

In many countries, the child's right to health is recognised in their constitution²⁵ as well as the state's obligations under international treaties. *Section 28(1)(c)* of the South African Constitution establishes the right of the child to basic health care services within available resources of the State. *Section 17(3)(d) & (f)* of the Nigerian Constitution enjoins the State to direct its policy towards ensuring that there are adequate medical and health facilities for all persons and that children, young persons and the age are protected against any exploitation whatsoever, and against moral and material neglect.²⁶ *Section 53(1)(c) and (d)* of the Kenyan constitution²⁷ guarantees every child the right health care and to be protected from neglect.

By ratification of the CRC, many signatories to the Convention have adopted the obligation to recognise and protect the right of the child to health. *Section 13* of the CRA recognise the child's right to health and medical care and contains similar provisions with the CRC on what government should do in this regard.²⁸ The realization of the right to health implies that government at all levels should put in place health services that are available in any circumstance, accessible to everyone, of good quality and satisfactory.

The right to health also involves prevention and awareness campaigns. Prevention plays an essential role in maintaining public health, particularly children's health. Health education, environmental sanitation and vaccinations prevent the spread of infectious disease.

2 The Best Interest Rule of Child Protection

In both domestic and international law, a common legal standard for cases involving children is the "best interest of the child" standard.²⁹ The "best interests of the child" approach has a long history in domestic

²⁵ See *sections 12(c), 24, 27, 28 and 35* of the Constitution of the Republic of South Africa, 1996

²⁶ This section of the Constitution which falls under Chapter II of the Constitution has been declared non-justiciable by virtue of section 6(6)(c)

²⁷ Constitution of Kenya, 2010

²⁸ See also *Section 9* of the Kenyan Children's Act

²⁹ D Marriane Blair & Merle Hope Weiner, "Resolving Parental Custody Disputes - A Comparative Exploration", (2005) 39 *FAMILY LQ.* p.247.

law. The principle of the best interests of the child has featured in diverse areas of law but more pivotally in family law, particularly in custody disputes.³⁰ Despite its origin in family law and by extension its incidental welfare inclination, the content and significance of the principle of the best interests of the child has transited over the years out of the family law domain. At present, the principle, having become entrenched in several international and regional human rights instruments and laws, is prevalent in several areas of law but is particularly more dominant in the area of human rights generally and child justice in particular. The principle is used in the sphere of child protection and child rights to influence decisions relating to children.³¹ Despite such universal recognition of the principle, defining the concept is still a problem. "Just as values and social norms are not the same everywhere, so are the understanding of this notion."³² Though superfluously recognised in national and international instruments, the principle of the best interest of the child has no binding content attached to it. As a result, determining the exact content of this standard and hence what is best for the child has to be assessed on a case by case basis depending on the particular realities of a given state.³³

The overall theme of the principle is that due focus and priority should be given to the political, economic and social interests of the child whenever policies, laws and decisions are made which directly or indirectly affect children.³⁴ In international law, one of the clearest statements regarding the "best interests of the child" standard can be found in the United Nations Convention on the Rights of the Child (CRC). The CRC, however, did not originate the concept in international law; thirty years prior to the CRC, the United Nations Declaration on the Rights of the Child introduced the idea that "the best interests of the child shall be the paramount consideration." The ideals of the Declaration on the Rights of the Child were formalized into obligations when the CRC was adopted in November 1989. The rule is set forth in *Article 3* of the CRC, which states as follows:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. "

The "best interests of the child" standard in the international context has been called an "umbrella provision" and is invoked often as a guiding principle of interpretation for other articles and rights in the CRC. At the regional level, *Article 4(1)* of the 1990 Charter in the Rights and Welfare of the African Child provides:

in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

The CRA has a similar provision in *Article 1* as the one quoted above:

in every action concerning a child, whether undertaken by an individual, public or private body, institutions or service, court of law, or administrative or legislative authority, the best interest of the child shall be the primary consideration.

As recognized by both domestic and international law, the "best interests of the child" approach is essential in protecting children, particularly, his health. However, there are no hard and fast rules on the indices that determine the best interest of the child.

³⁰ D Archard, *Children: Rights and Childhood*, 2nd ed., (Routledge 1993)

³¹ M Couzens, 'The Best Interests of the Child and its Collective Connotations in the South African Law' (2010) 73 *Journal of Contemporary Roman-Dutch Law*, p. 266

³² P Alston, "The best interest principle: towards a reconciliation of culture and Human Rights, reconciling culture and Human Rights," (1994) *International Journal of Law, Policy and the Family*, Vol. 8, Issue 1, p. 10

³³ A Degol & S Dinku, *op. cit.*, pp. 324 & 325

³⁴ *Ibid*

4 Legal Regime for Parental Responsibility Over A Child's Health

Parental responsibility is required in virtually all aspects of the child's life but its place is more particularly complicated in matters relating to the child's health. Although parental responsibility is not mentioned in *Article 24* of the CRC, as shown above, parents are to ensure conditions of living necessary for the child's development are provided and well utilised.

In addition to the CRC, national laws recognise parental responsibility in protecting their child's right to health. As one of the three major components of parental responsibility, *Section 23* of the Kenyan Children's Act, imposes a duty on the parents to maintain the child, and in particular to provide him with adequate medical care including immunisation³⁵

The child's right to health in Nigeria is provided in *section 13(1)* of the CRA. It imposes on parents and all other public and private persons or public to ensure the child has the best attainable state of health.³⁶By the provisions of *section 13(3) of the CRA*, the duty of the government in this regard include to:

- (a) endeavor to reduce infant and child mortality rate;
- (b) ensure the provision of necessary medical assistance and health care services to all children with emphasis on the development of primary health care;
- (c) ensure the provision of adequate nutrition and safe drinking water;
- (d) ensure the provision of good hygiene and environmental sanitation;
- (e) combat disease and malnutrition within the framework of primary health care through the application of appropriate technology;
- (f) ensure appropriate health care for expectant and nursing mothers; and
- (g) support, through technical and financial means, the mobilisation of national and local community resources in the development of primary health care for children.

Parents are under a mandatory duty under the law to ensure their children take advantage of health services provided by government. Every parent guardian or person having the care and custody of a child under the age of two years shall ensure that the child is provided with full immunisation. Failure to do so is a crime.³⁷

5 Limits of Parental Responsibility In Child Health Matters

Generally, parents are user representatives of their children until their children can fully represent themselves. As the main guiding principle, parents are responsible of giving consent to health and medical examinations and treatments on behalf of their child until they reach the age of majority. In addition, parents have a legal right to participate in decision-making to customize their child's health care. This implies that parents have the opportunity to be involved in and influence the decision-making concerning individual modifications to their child's care, examinations and treatments. This is in line with family-centred care approaches, which expect parents to participate in partnership with health providers in the coproduction of children's health care.³⁸ Parents have valuable knowledge about their child and are important helpers in implementing their children's health care³⁹. Increased parental involvement in decision-making about children's health care is expected to increase the individual customization of children's health care and thereby improve the quality of care and safety.⁴⁰ Although parental involvement in decisions about their

³⁵ See *section 23(2)* of the Kenyan Act

³⁶ See *section 13(2)* of the CRA

³⁷ See *section 13(4)(5)(6)*

³⁸ J Smith., V Swallow, and I Coyne, "Involving parents in managing their child's long-term condition – A concept synthesis of family-centred care and partnership-in-care", (2015). *Journal of Pediatric Nursing*, 30, 143–159

³⁹ T M Harrison. Family-Centered Pediatric Nursing Care: State of the Science , (2010), *Journal of Pediatric Nursing*, 25, pp.335–343

⁴⁰ A Aarthun, K A. Øymar, and K Akerjordet Parental Involvement in Decision-Making about Their Child's Health Care at the Hospital", < <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6279730/>> accessed on 20/03/2020

child's health care is widely acknowledged, parents do not participate as much as they would like to⁴¹. arising mainly from the complexities associated with parental responsibility over the health of their children.

Basically, it is the government and not the parents of the child that has the primary responsibility of providing health care services for the child and also ensuring that the child stays healthy. Article 24 of the CRC enjoins the State to provide the highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health. States Parties are also duty-bound to ensure that no child is deprived of his or her right of access to such health care services. The only responsibility of the child's parents in this regard is restricted to ensuring that the child takes advantage of the services so provided.

While both government and parents agree that health facilities should be provided by government, there has been a seeming power tussle between government and parents as to who has the authority to decide the type of medical care to be given to the child and the extent of the care. The extent of the parents' responsibility towards the child in this regard remains obscure. Does the responsibility stop at taking the child to hospital and picking him back after medical treatment has been administered? Does it extend to being informed about the diagnosis of the child, the exact treatment best for the child and the choice of submitting to the elected treatment? Most litigations in this area tend towards agitation by parents to parents right to information and control of decisions concerning the health of their children. This was the case in *Esabunor & Anor v Faweya and Ors*⁴² where the parents of one month old baby sought to control the medical treatment of their child who was gravely ill by rejecting blood transfusion on the child based on religious belief amongst other reasons.

In many Western countries, parents have a legal right to participate in decision-making about their child's health care to ensure that health care is provided in accordance with the children's and the families' needs and preferences. From a health promotion perspective, this provides parents the opportunity to improve their personal control over their child's health care and their own life circumstances. This is in line with the World Health Organization's (WHO) health promotion strategy, which recommends supportive environments and implementation of salutogenesis in societies.

Whatever be the responsibility of parents in respect of health issues affecting their children, parental authority is not absolute. When the choice is contrary to the best interests of the child, the state can intervene, acting in accordance with the *parens patriae* doctrine (which in Latin means father of the country). In law, this refers to the power of the state to use surveillance and intervene against an abusive or neglectful father and to act as the "father" of any child or person in need of protection. According to the US Supreme Court, in the case of *Prince vs. Massachusetts*⁴³, *neither the rights of religion nor parenthood are beyond this limitation*. Brazilian law is explicit in this respect, in *Article 227* of the country's Constitution 34⁴⁴ and *Article 13* of the *Statute of the Child and Adolescent (SCA)*⁴⁵.

By *section 13(2)* of *CRA* of Nigeria, the duty to provide health best attainable care for the child is imposed collectively on government, parent, guardian, institution, service, agency, organisation or body responsible for the care of the child.⁴⁶ Where therefore, the right of the child to health is likely to be breached by failure of his parents to carry out their responsibility on the child, the government or institution or individual responsible for providing the child such health care can in the best interest of the child intervene and ensure that the child's health is protected. Parental responsibility over health care to be administered to his child has become a tool to protect the interest of the parents rather than the child's which has in recent cases subjected the child to critical health condition resulting sometimes to unavoidable death. For this reason, health givers in order to forestall child mortality rate and long term health challenges of the child have severally engaged in conflicts with parents of their underage patients in health delivery. Bearing in

⁴¹ A Aarthun, & K Akerjordet, "Parent Participation in Decision-Making in Health-Care Services for Children: An Integrative Review" (2014), *Journal of Nursing Management*, 22, pp. 177–191

⁴² (2019) LPELR 46961 (SC)

⁴³ 321 US 158

⁴⁴ Constitution of the Federal Republic of Brazil, 1988

⁴⁵ 1990 of Brazil

⁴⁶See *section 13(2)* of the *CRA*

mind the legal duty imposed on them to respect parental responsibility, some of these health providers mandate the parents to sign against medical advice while the more enlightened ones seek state intervention through the court to save the child's life. This may occur where doctors refuse to instigate or continue futile treatments or where treatment is not felt to be in the best interests of the patient.

Cases may also be referred to the courts where doctors feel treatment options do exist but those with parental responsibility refuse to consent. Disagreement may also occur between parents. The best interests of the child are paramount and their welfare should always be the primary consideration. However, the court's opinion will be increasingly sought as parents' expectations increase and doctors fear litigation if they act against the parents' wishes.⁴⁷ To resolve conflicts between parents and health providers, the court must weigh the rights of a parent against the interests of the child. One important factor in this process is the expected outcome of the illness or disease: if the proposed medical treatment has a good chance of success and the predicted outcome without treatment is death, courts are more likely to intervene and overrule parental decisions; if the proposed medical treatment does not have a high likelihood of success or the predicted outcome is not death, courts frequently uphold the decision of parents. Generally, it is only when the child's life is at risk that the weighing of interests favors the child and the government authority that is asserting the child's rights.⁴⁸ Simply obtaining a court order, without giving due weight to the position of the parents and without exhausting all dialogical options, can cause excessive harm to the family unit and the children.

Kopelman and Deville⁴⁹ argue that the coercive interference of the State in the prerogatives of parents, for the good of society and children, is justified when there is convincing evidence that the actions or decisions of parents represent serious risk to children. Moreover, Sher⁵⁰ points out that negligence, the basis of the State's action in many health care cases, has been defined as *the failure to provide a minimum quality of care that the community can tolerate*. The Supreme Court of Delaware in *Newmark v. Williams*⁵¹ decided in favour of the parents. The child in *Newmark* was diagnosed with Burkitt's lymphoma and was given a 40 percent chance of survival if he obtained chemotherapy treatments. His parents decided that, rather than allowing an uncertain and painful medical treatment, they would seek treatment through their church. The State objected and filed for temporary custody of the child. The court determined that the parents were within their rights to forgo the treatment. According to the court, the spiritual treatment exemptions reflect, in part, "the policy of this State with respect to the quality of life" a desperately ill child might have in the caring and loving atmosphere of his or her family, versus the sterile hospital environment demanded by physicians seeking to prescribe excruciating, and life-threatening, treatments of doubtful efficacy.

This case differs from *Esabunor and Anor V. Faweya and Ors*⁵², where the 2nd appellant who is the mother of the 1st appellant gave birth to him on April 19, 1997 at the Chevron clinic, Lekki Peninsula in Lagos. Within a month of his birth, he fell gravely ill. He was taken back to the clinic by his mother for urgent treatment. The 1st respondent treated the 1st appellant, and discovered that the 1st appellant needed urged blood transfusion as the only medical solution to his health challenge. The mother of the child and her husband made it abundantly clear on no account should their child be given a blood transfusion. Their reason being that there were several hazards that follow blood transfusion such as contracting Aids,

⁴⁷K Leask, "The Role of the Courts in Clinical Decision Making" <<https://adc.bmj.com/content/90/12/1256.full>> accessed on 22/03/2020

⁴⁸ L Black, "Limiting Parents' Rights in Medical Decision Making" <<https://journalofethics.ama-assn.org/article/limiting-parents-rights-medical-decision-making/2006-10>> accessed on 20/03/2020

⁴⁹ K A DeVille and L M Kopelman, "Fetal Protection in Wisconsin's Revised Child Abuse Law: Right Goal, Wrong Remedy", (1999) *J Law Med Ethics*, 27(4), pp.332-42

⁵⁰ J Elizabeth and E J Sher, "Choosing for Children: Adjudicating Medical Care Disputes between Parents and the State", (1983) *NYU Law Rev*, 58, pp.176-177

⁵¹ 588 A2d 1108 (Del 1990)

⁵²(2019) LPELR 46961 (SC)

Hepatic etc. and as members of the Jehovah Witness sect; blood transfusion was forbidden by their religion. Dr. Tunde Faweya (the 1st respondent) remained unyielding and through the assistance of the Commissioner of Police, Lagos State obtained a court order to perform the transfusion”.

The Supreme Court held that “an adult who is conscious and in full control of his mental capacity and of sound mind has the right to either accept or refuse blood. The hospital has no choice but to respect their patient’s choice. When it involves a child the court stated that a child is incapable of making decisions for himself and the law is duty bound to protect such a person from abuse of his rights as he may grow up and disregard those religious beliefs. It makes no difference if the decision to deny him blood transfusion is made by his parents.” The Court held further that when a competent parent or one in *loco parentis* refuses blood transfusion on religious ground, the court should step in, consider the baby’s welfare i.e saving the life and the best interest of the child, before a decision is taken. These considerations according to the court outweigh religious beliefs of the Jehovah Witness sect. The decision should be to allow blood transfusion especially in life threatening situations.

6 Dispensing with Court Proceedings in Emergency Health Situations

The courts have in no small measure reduced abuse of parental authority over decisions relating to the health of their children by its interventionist approach to issues concerning the child. Though seeking approval from the court is commendable to avoid arbitrary actions to be taken on the child against parental rights., applying to and waiting for the court to make an order before certain decisions are taken by health providers in treating a sick child may be a futile effort where the child’s situation is extremely bad and cannot survive an iota of delay in the medical process.

The courts, particularly, in developing countries like Nigeria are fraught with so many problems ranging from, lack of infrastructural facilities to shortage of manpower to expedite proceedings. The rigorous steps taken by Dr. Tunde in *Esabunor’s* case just to be authorized to carry out the blood transfusion could have averted. The law has already given powers to such health providers by virtue of Article 3 of the CRC and *section 1* of the CRA to act in the best interest of the child. Once the person responsible for providing health to the child is satisfied that the treatment to be administered to the child is in his best interest, there may not be need to first go to court before saving the life of the child particularly, in life threatening emergency situations.

7 Conclusion

A child is said to be “gillick competent” when they are deemed to have sufficient understanding and intelligence to enable them to understand fully their proposed management. Before this level of competence is reached, decisions regarding their physical and emotional wellbeing have to be made on their behalf, including decisions regarding their medical treatment. Parents are said to be best placed to make these decisions as they above all others should have their child’s welfare at heart. However, as the case law reveals, there are occasions when decisions made by parents are not thought to be in the best interests of their child, and at this point the courts may be asked to intervene. The procedural bottlenecks experienced in the court exposes a child in emergency health situations to the risk of death and as such this research recommends that:

- a. where delay in securing a court order would result in permanent harm or death of the child, the health officer or any one responsible for the health care of the child must in the best interest of the child offer the required treatment without recourse to the court.
- b. A provision should be added in the applicable law that any treatment prescribed by the health officer be approved by his superior in office or where there is no superior by a government approved medical officer who shall be appointed for the sole purpose of certifying such treatment.
- c. Where a health officer acts in the best interest of the child within a reasonable level of competence and in compliance with ethics of his profession, provision shall be made under the law to shield him from unwarranted litigation.

- d. There is need to clearly determine and streamline the degree of parental involvement and influence on health services to be offered their children.