



## OPINION

## Medical consent for a minor – an alternative proposal

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Under current South African law, in terms of Child Care Act 74 of 1983,<sup>1</sup> consent for elective surgery, HIV testing and therapy can only be given by the biological mother, married father or legal guardian of a minor. Where the consent of a parent or legal guardian cannot be obtained, permission for a medical procedure must be sought from the Minister of Social Development if in the opinion of a medical practitioner the procedure is necessary, i.e. consent by proxy.

While we can accept that the intention of the law is to protect the welfare of the child, we find that this prejudices those patients requiring consent via the social service department. This procedure has in the past often led to delays and/or cancellations of the intended surgery or institution of appropriate therapy. It is a protracted pathway and at times a frustrating endeavour.

The above laborious process is initiated as a consequence of the absence of a biological mother or father through death or uncontactability, the absence of a legal guardian, or when children are brought to hospital by caregivers, family members or neighbours who are not allowed to sign consent in terms of the current Child Care Act.

Despite the goodwill shown by these caregivers, South African law prevents them from providing consent unless they are legal guardians as determined by the court. The emotional insult experienced by these people is often evident in their reaction to this, for surrogate guardians now consider the

children their own, care for the children, bring them for health care and yet are not permitted to give consent.

To compound the problem we are in the midst of an HIV pandemic, so the above problem has increased exponentially as we are left with the legacy of AIDS orphans. Numerous applications to the portfolio committee on social development have been made by AIDS action groups to amend this situation, as the legislation in its current form creates difficulty in treating children with antiretroviral therapy (ART). These groups are currently forced to resort to litigation to obtain consent for ART for many children living with HIV/AIDS. Four of 10 children with HIV/AIDS needing ART at a public clinic in Soweto were orphans, all were below 14 years of age, all lived in informal care settings, and none had been placed in legal custody of their caregivers. It was therefore impossible to obtain consent to treat these children under the common law. Based on the health needs of the children, in June 2003 an urgent application was made in the Johannesburg High Court for the children to receive ART.<sup>2</sup> There have since been several such challenges, with variable success. Are these extreme measures really necessary in attempting to provide children with their basic rights as laid out in the South African Bill of Rights<sup>3</sup> sections 27.1b and 28.1c?

Because of current legal difficulties we therefore find ourselves in a quandary. It is notoriously difficult to get legal consent under these circumstances, which inevitably delays or leads to the cancellation of intended surgery. Many would argue that the system works, but at Red Cross Children's Hospital, where a full-time social work department exists to aid the process, there is usually a minimum of a 2-day delay in obtaining consent. Furthermore, the strain it places on an already understaffed and overworked social work department is significant. There is unanimity among medical, nursing and social work staff, who often face this dilemma, that the current process seen within the South African context is labour intensive and not logical, with consent required from a party with no direct responsibility to the child.

Considering the options, is a department of social services the most appropriate body to be empowered to give consent – more so than, in the absence of the mother, a biological father, family guardian, caregiver, responsible surgeon or medical superintendent? In answering this, due notice must be taken of the fact that the person in the social services department who eventually signs consent does not work at the hospital, has no or little understanding of the medical procedure, its

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*Both authors consider themselves advocates for children's rights and are deeply concerned about current laws pertaining to procedural consent for children, its inappropriateness for the South African setting, and its prejudice of disadvantaged children.*

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benefits, indications or contraindications, and of even greater concern has no knowledge of the child and his/her social circumstances. No one could truly argue that this person, at any level scrutinised, could be the best person to provide consent. We think not.

In section 27.2 the Bill of Rights states that 'The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights'.

Laws are created to protect and assist children. In South Africa we have a heightened sensitivity to aid children and those most disadvantaged by social circumstances. When we identify a law that clearly has no sound basis and that is detrimental to an already disadvantaged group, it needs to be reconsidered.

Dealing daily with such situations we would suggest that a logical, practical and compassionate approach be taken. This may be open to criticism or modification, which we acknowledge. But any person who cares for, clothes and loves a child enough to bring the child continually for medical attention or admission to hospital, would have the child's best interests at heart and should therefore be permitted to give consent.

In accordance with the above and ethical and legal requirements<sup>4</sup> of the 'best interests of the child', the newly proposed Child Bill,<sup>5</sup> which has been under review for several years, now recognises the inadequacies of the current Child Care Act. In section 32 it states that '(1) A person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, including a care-giver who otherwise has no parental responsibilities and rights in respect of a child, must, whilst the child is in that person's care: (a) safeguard the child's health, well-being and development; and (b) protect the child from maltreatment, abuse, neglect, degradation, discrimination,

exploitation, and any other physical, emotional or mental harm or hazards. (2) Subject to section 129, a person referred to in subsection (1) may exercise any parental responsibilities and rights reasonably necessary to comply with subsection (1), including the right to consent to any medical examination or treatment of the child if such consent cannot reasonably be obtained from the parent or guardian of the child.'

The proposed Children's Bill also provides for autonomy of children at a younger age with regard to consent for medical treatment as detailed in section 129.2: '(a) A child may consent, subject to paragraph (b), to medical treatment or a surgical operation, provided the child – (i) is at least 12 years of age; and (ii) is of sufficient maturity and has the mental capacity to understand the benefits, risks and social implications of the treatment or operation. (b) A child may not consent to a surgical operation in terms of paragraph (a) without the assistance of – (i) the parent of the child; or (ii) the primary care-giver of the child.'

We believe however that the Bill should be broadened to exclude subsection 129.2b.

There is growing urgency among surgeons and HIV action groups to have the new sections of the proposed Children's Bill pertaining to consent enacted as soon as possible. Each day many of the most disadvantaged children are being denied immediate access to the best treatment because of an Act that, in the eyes of health care workers, no longer serves a functional purpose. Delaying the enactment of the current bill and treating these children in the current manner is depriving them of their basic rights.

1. South African Parliament. Child Care Act 74 of 1983.
2. Gerntholtz L. South Africa: Safeguarding Children's Rights to Medical Care. Submission on the Children's Bill. Portfolio on social development. National assembly 27 July 2004. Human Rights Watch website [http://hrw.org/english/docs/2004/07/27/safric9150\\_txt.htm](http://hrw.org/english/docs/2004/07/27/safric9150_txt.htm) (last accessed 21 April 2006).
3. Constitution of the Republic of South Africa. Bill of Rights. 1977.
4. Section 28.3 of the South African Bill of Rights. 1977.
5. Children's Bill B70B-03. 2003.