



LegalWatch

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The Children's Act 38 of 2005 (as amended).

Member hospitals please note and distribute as you deem necessary.

Several outstanding provisions of the Children's Act [Act 38 of 2005] have become operational. Government Gazette No. of , has made the date upon which the law became operational as being 1 April 2010. Several of these provisions impact on the provision of health care to minors. Several LegalWatch publications will be forthcoming in this regard.

Members are advised of the following provisions in relation to the rights of a child to consent:

The Age of Consent (Medical and Surgical Treatment)

The age at which a minor can consent to his or her own medical and surgical treatment has been **changed**. In terms of the new law, minors may consent to their own medical and surgical treatment (without parental consent attached) at the age of 12 years, provided that he/she complies with the provisions of section 129(1)(2) and (3) of the Act.

More specifically section 129(1) of the Act states that a child:

129(1) Subject to section 5(2) of the Choice Termination of Pregnancy Act, 1996 [Act 92 of 1996] 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 subsections (2), (3), (4), (5), (6) or (7) of the Children's Act.

The subsections that deal specifically with the child's right to make a decision pertaining to his or her own medical and/or surgical treatment are subsections (2) and (3) which state that:

With reference to a medical procedure:

129 (2) A child may consent to his or her her own medical treatment or to the medical treatment of his or her own child if –

- (a) The child is over the age of 12 years, and
- (b) The child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment.

With reference to a surgical procedure:

129(3) A child may consent to the performance of a surgical procedure on him or her or his or her child if –

- (a) The child is over the age of 12 years, and
- (b) The child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the surgical operation, and
- (c) **The child is duly assisted by his or her parent or guardian.**

Members must therefore, take note of the following legal qualifications:

1. The law still makes a distinction between a medical and surgical procedure.
2. The child must be over the age of 12 years (this includes the 12th year itself), in order to make any decision pertaining to his or her medical and/or surgical treatment, **and [Emphasis important]**
3. That child must also have the mental capacity and maturity to understand what is meant by informed consent.
4. When it comes to a surgical procedure that child must also be **assisted** by his or her parent or guardian. [This assistance is not needed for the provision of any medical procedure, and is therefore limited to only surgical procedures].
5. Regulation 48 discussed below, requires the health practitioner performing that surgical procedure, or a representative of the health establishment in which such is being performed, to complete a prescribed Form and secure the child's consent in writing.

As stated in addition to the above stated law, the Department of Health has also published Regulations pertaining to these sections. There are certain forms that need to be filled out by the child at the time of his or her consent. More specifically, Regulation 48 states that:

Regulation 48 (Consent by child to performance of a surgical

operation).

48(1) Consent by a child to the performance of a surgical operation must be completed in writing by the person performing such an operation or by a representative of the institution at which the operation is going to be performed, and signed by the child and must be furnished in a form identical to Form 34.

48(2) A parent or guardian who duly assists a child to consent to the performance of a surgical operation on such child must assent to this in writing on the same form contemplated in sub-regulation (1).

In addition to the above, the Children's Act must also be read with the relevant sections of the National Health Act, 2003 which deals with informed consent and the requirements for valid consent prior to the rendering of any medical or surgical treatment.

The difference being that the Children's Act requires that consent (only in so far as it pertains to a surgical procedure) to be in writing, and on a prescribed form.

What is the law in regards to a child under the age of 12?

In terms of section 129(4) and (5) a parent or guardian may provide consent for any medical treatment of or surgical operation on any child, which is under the age of 12 or who lacks sufficient maturity or mental capacity to understand the benefits, risks, social and other implications of such treatment.

See the paragraph below on when a child refuses or lacks understanding for greater detail in this regard.

Child Parents:

There will be circumstances where a child (a person under the age of 18 years) will also be a parent him or herself, and that his or her child may need medical or surgical treatment. In the case of a child parent consenting on behalf of his or her child, please note the following:

1. When it comes to a medical procedure the child parent may consent to a medical procedure for his or her child, if he or she is 12 years of age, and has the maturity and mental capacity to understand the benefits, risks, social and other implications of the medical procedure. He or she does not need the assistance of his or her parent in this regard.

2. When it comes to a surgical procedure the child parent may consent to a surgical procedure for his or her child if he or she is 12 years of age, and has the maturity and mental capacity to understand the benefits, risks, social and other implications of the surgical procedure, *and is assisted by his or her parent. In other words, the child parent (under the age of 18 years) must be assisted by his or her parent or guardian.*

Furthermore, regulation 49 requires that parent or guardian of the child parent to co-sign the relevant form. More specifically, regulation 49 states that:

Regulation 49. The parent or guardian of a child parent who duly assists such a child parent to the performance of a surgical operation on the child concerned, must assent to this in writing in a form identical to Form 35.

What to do when a parent or guardian refuses to assist or assent?

The law stipulates clearly that no parent or guardian may refuse to assist a child in terms of the Act on any grounds, including his or her religious beliefs, unless that parent or guardian can demonstrate that there is a medically accepted alternative to the procedure.

129(10) No parent, guardian or care giver of a child may refuse to assist a child in terms of sub-section (3) or withhold consent in terms of subsection (4) or (5) by reason only of religious or other beliefs, unless that parent or guardian can show that there is a medically accepted alternative choice to the medical or surgical operation concerned.

However, notwithstanding the law there may be situations where a parent or guardian still refuses to assist or consent to a child's medical or surgical procedure, and under these circumstances you are informed that the following may apply:

The role of the superintendent or hospital manager:

The law allows the superintendent of a health establishment or in the case of a private health establishment a hospital manger to make certain interventions on behalf of a child. More specifically section 129 (6) states that:

129(6) The superintendent of a hospital or the person in charge of a hospital in the absence of the superintendent may consent to the medical treatment of or the surgical operation on a child if-

- (a) The treatment or operation is necessary to preserve the life of the child or to save the child from serious or lasting physical injury or disability, and
- (b) The need for the treatment or operation is so urgent that it cannot be deferred for the purposes of obtaining consent that would

otherwise be required.

In other words, the superintendent may intervene (or the hospital manager) only when the treatment (medical or surgical) is required to save the life of that child, or to prevent serious injury or disability, and that the need for such treatment is urgent. This would ordinarily be considered an emergency situation requiring immediate intervention, and as such no consent would ordinarily be required in terms of section 6, 7 and 8 of the National Health Act. However, what this section does do, is specifically empower the superintendent or hospital manager to intervene specifically for a child under those circumstances stated.

The Minister may overrule a parent that refuses:

In terms of section 129(7) the Minister of Health may intervene and overrule the refusal of a parent or guardian under certain circumstances. In particular, section 129(7) states that:

Section 129(7) The Minister may consent to the medical treatment of or surgical operation on a child if the parent or guardian of the child –

- (a) Unreasonably refuses to give consent or to assist the child in giving consent;
- (b) Is incapable of giving consent or of assisting the child in giving consent;
- (c) Cannot readily be traced; or
- (d) Is deceased.

The court may intervene and provide consent:

Section 129(9) recognizes that the High Court or Children's Court may consent to the medical treatment of or surgical operation on a child in all instances where another person that may give consent in terms of this section refuses or is unable to give such consent.

What to do when the child refuses or has insufficient maturity to understand?

There may be circumstances where a child which is over the age of 12, and which has sufficient maturity and mental capacity to understand the benefits, risks, social and other implications of his or her medical or surgical treatment, but nonetheless refuses.

In these circumstances due effect must be given to the right of any patient (including a minor patient) to refuse medical or surgical treatment. However, the National Health Act requires that the health care practitioner explain fully and in detail the consequences of that refusal to the child. More specifically section 6(1)(d) of the National

Health Act states that:

6. (1) Every health care provider must inform a user of-
 - (a) the user's health status except in circumstances where there is substantial evidence that the disclosure of the user's health status would be contrary to the best interests of the user;
 - (b) the range of diagnostic procedures and treatment options generally available to the user;
 - (c) the benefits, risks, costs and consequences generally associated with each option; and
 - (d) the user's right to refuse health services and explain the implications, risks, obligations of such refusal.**

If the consequences of the refusal are explained to the child, and the child still refuses then the health care practitioner must determine if that refusal is reasonable or not. If he or she is of the opinion that the refusal is unreasonable, than application can be made to the Minister of Health who in turn is authorized in law to intervene when a child is refusing unreasonably. More specifically section 129(8) states that:

129(8) The Minister may consent to any medical treatment of or surgical operation on a child if the child unreasonably refuses to give consent.

Remember the child's consent to a medical or surgical procedure is considered to be valid, if he or she has sufficient maturity and mental capacity to understand the benefits, risks, social and other implications of that treatment. Similarly, if he or she is of sufficient mental capacity his or her refusal is also deemed to be a valid exercise of his or her right to refuse.

It is up to the Minister of Health acting in accordance with section 129(8) to determine what constitutes unreasonable refusal, and in order to do so it is highly likely that he will consult with the relevant health care practitioner.

A parent or guardian is only authorized to give consent to a medical procedure, where a child is over the age of 12 years, but lacks sufficient maturity and mental capacity to understand the benefits, risks, social and other implications of such medical procedure. The parent may not overrule a valid, reasonable refusal of a child that meets the requirements of law (he or she is 12 years and has sufficient maturity and understanding). See section **129(4) and (5)**.

Where the child is over the age of 12 and has insufficient maturity, the parent or guardian may provide consent to any medical treatment or surgical procedure, subject to section 31 of the Children's Act. That section states:

31. (1) (a) Before a person holding parental responsibilities and rights in

respect of a child takes any decision contemplated in paragraph (3) involving the child, that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development decision referred to in paragraph (a) is any decision;

- (i) in connection with a matter listed in section 18(3)(c);
- (ii) affecting contact between the child and a co-holder of parental responsibilities and rights;
- (iii) regarding the assignment of guardianship or care in respect of the child to another person in terms of section 27; or
- (iv) which is likely to significantly change, or to have an adverse effect on, the child's living conditions, education, health, personal relations with a parent or family member or, generally, the child's well-being.

(2) (a) Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b), that person must give due consideration to any views and wishes expressed by any co-holder of parental responsibilities and rights in respect of the child.

(b) A decision referred to in paragraph (a) is any decision which is likely to change significantly, or to have a significant adverse effect on, the co-holder's exercise of parental responsibilities and rights in respect of the child.

Care Givers:

In many instances a child may be in the custody of a care giver, who in turn may not be a parent or legal guardian. In these circumstances the law recognizes that a care giver may provide consent only for a medical examination or treatment, and not for a surgical intervention. More specifically section 31 of the Children's Act states that:

32. (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.

In terms of section 31(2) a care giver may provide consent in the manner a parent or guardian would for any medical examination or treatment, only if the parent or guardian's consent cannot reasonably be obtained.

In regards to any surgical operation on a child, only the parent or

guardian is authorized or recognized in law as having the right to consent. A care giver may not give consent to any surgical operation.

Conclusion.

Quite clearly this is a difficult and complex area of law, and as such it is advised that where there is any doubt, that clarity be sort prior to the rendering of any medical or surgical treatment.

Copies of the Act and the Regulations, can be obtained from HASA by requesting such from contact@hasanet.co.za

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