

INTRODUCTION

The provision of health care requires that health care professionals examine patients, perform investigations, diagnose health conditions and formulate and implement a management plan. This may only be undertaken with informed consent from the patient or his/her guardian.^{1,2}

Although a holistic management plan encompasses preventative, promotive, curative and rehabilitative components, it may occasionally include a palliative care plan resulting in the withholding or withdrawing of life sustaining or life prolonging treatment. The purpose is to minimise suffering in cases where it is recognised that life is limited in quantity or quality and that continuing life may not be in the best interest of the child.^{3,4}

The law differentiates between children of different ages:

- Those below the age of 12 years are considered to be incapable of consenting for their health care therefore parents or guardians are primarily responsible for providing consent.⁵
- Between the ages of 12 and 18 years, it is recognised that children have evolving levels of maturity and capacity, which, together with the nature of the intervention determines whether a child is eligible to provide consent.
- Over the age of 18 years, a child is considered an adult and is considered capable of providing informed consent.

The court is the upper guardian of all minors, and when those who are authorised to provide consent are unable or unwilling to do so, it may be necessary to request consent from the court or the Minister of Social Development.

RATIONALE

The Children's Act makes provision for the court or Minister of Social Development to provide consent for the medical care of children in circumstances where consent from the child's parent(s) or guardian(s) is not forthcoming. The procedure to be followed to obtain such consent is poorly understood by health professionals. This policy outlines the process of applying for court consent and the roles and responsibilities of each person in the pathway.

LEGAL FRAMEWORK

1. Constitution of the Republic of South Africa, N^o 108 of 1996 - Chapter 2: Bill of Rights⁶
 - Rights pertaining to dignity, life, freedom and security and health (sections 10, 11, 12, 27);
 - Rights specific to children including health, protection and the principle of the best interests of the child (section 28);
 - Applicability of the Bill of Rights to include all organs of State as duty bearers (section 8).

2. The Children's Act, N° 38 of 2005⁵
 - Rights to life, development, protection and participation (sections 2, 6, 10, 11, 12);
 - Right to have the best interest of the child considered (sections 2, 7, 9);
 - Right to information on health care (section 13);
 - Provisions around parental responsibilities and rights (sections 18, 31, 32);
 - Duty of organs of state to fulfil, respect, protect and promote the rights of children (sections 4, 5, 6, 8);
 - Protective measures relating to the health of children including consent provisions (sections 129 -142);
 - In matters pertaining to children there should be a conciliatory approach and avoidance of conflict (section 6);
 - Access to court (sections 14, 15, 42-62, 65, 69 -72).

3. National Health Act, N° 61 of 2003¹
 - Duty of health care providers in respect to patient's rights (section 2);
 - Provisions regarding informed consent (section 7).

POLICY

Considering the duty to provide health care services that are in the best interest of the child and the requirement to have informed consent to provide these services, the following applies:

1. In situations where the health care team develops a management plan deemed to be in the best interest of the child, but are unable to implement it as they are either not able to obtain consent, or such consent is refused, they need to seek court consent.

2. An exception to the above arises when the management plan will save the child's life or prevent permanent disability AND is so urgent that there is not enough time to obtain the informed consent that would otherwise have been required. In this instance, the person in charge of the hospital may provide consent.

PROCEDURE

The following parties from the Department of Health must participate in the process of obtaining court consent:

1. The health care provider(s) in charge of the child's care;
2. The head of the paediatric unit (in the case of a regional or tertiary hospital) or medical manager (in the case of a district hospital);
3. Chief Executive Officer (CEO) of the hospital;
4. Legal services' staff of the provincial Department of Health.

Responsibilities:

1. Health Care Provider(s):
 - a. Contact the child's parents / guardians / caregivers.
 - b. If unable to contact them consult with the hospital social work and/or South African Police Service to do so.
 - c. Once contacted counsel them re the required intervention and obtain informed consent.
 - d. If consent is refused:
 - i. Explore the reason(s) why;
 - ii. Address all concerns of the family members;
 - iii. Consider alternative treatment options raised by the family or colleagues.
 - e. To increase the likelihood of obtaining informed consent:
 - i. Involve other members of the healthcare team with counselling experience;
 - ii. Engage with other members of the family or community as required.
 - f. If informed consent is still withheld:
 - i. Prepare a case summary;
 - ii. Notify the head of the paediatric unit or medical manager to inform them that court consent may be required.
 - g. Continue to deliver care to the child according to the available informed consent.
 - h. Monitor the child's condition and relay any change to the head of the paediatric unit or the medical manager until consent is obtained or is no longer required.

NB If withholding or withdrawal of treatment is being considered then consult the hospital clinical ethics committee for guidance on the suitability of the management of the child.

2. Head of paediatric unit (regional or tertiary hospital) or medical manager (district hospital):
 - a. Review the case to:
 - i. Confirm the need for the proposed intervention; and
 - ii. Assess the need for court consent.
 - b. Meet with the child's parents / guardians / caregivers to:
 - i. Confirm the proposed intervention;
 - ii. Confirm that they will not sign consent;
 - iii. Inform them that the matter is being referred to obtain court consent.
 - c. Prepare a report, for the Chief Executive Officer and legal services, with the following details:
 - i. Diagnosis;
 - ii. Treatment options;
 - iii. Rationale for choosing the treatment option that requires consent;
 - iv. Prognosis with and without the treatment option;
 - v. Reason for not obtaining consent;
 - vi. Measures taken to attempt to obtain consent.
 - d. Notify the Chief Executive Officer of the need for court consent.

- e. Work with the appointed advocate to provide an affidavit for presentation to the court.
 - f. Be prepared to appear before court at any hour of the day or night.
 - g. Monitor both the clinical case and the legal process and inform legal services if any delays in the legal process have negatively impacted on the child until consent is obtained or is no longer required.
3. The Chief Executive Officer
 - a. Contact the Legal Services of the Provincial Department of Health.
 - b. Facilitate any interaction between Legal Services and the head of the paediatric unit or medical manager.
 - c. On receipt of the court order, instruct the unit head or medical manager to carry out the requirements set therein.
 - d. Confirm that the instructions have been carried out.
 4. Legal Services of the Provincial Department of Health
 - a. Contact the State's Attorney to brief an advocate to act for and on behalf of the Department of Health.
 - b. Act as liaison between the health facility and the advocate.
 - c. If there are delays in the legal process; explore reasons why and facilitate the resolutions.
 - d. Provide ongoing legal advice to the facility until the conclusion of the matter.

NB If considering the withholding or withdrawal of care, where there may be a conflict between the interests of the child and the hospital, legal services should request that an advocate be appointed to act on behalf of the child.

REFERENCES

1. South Africa. National Health Act, N° 61 of 2003.
2. Health Professions Council of South Africa. Booklet 4: Seeking patients' informed consent: the ethical considerations. Guidelines for good practice in the health care professions. Pretoria: HPCSA; 2016.
3. Health Professions Council of South Africa. Booklet 7: Guidelines for the withholding and withdrawing of treatment. Guidelines for good practice in the health care professions. Pretoria: HPCSA; 2016.
4. Larcher V, Craig F, Bhogal K, Wilkinson D, Brierley J. Making decisions to limit treatment in life-limiting and life-threatening conditions in children: a framework for practice Archives of Disease in Childhood. 2015;100 (Suppl 2):s1-s26.
5. South Africa. Children's Act, N° 38 of 2005.
6. Constitution of the Republic of South Africa, N° 108 of 1996 - Chapter 2: Bill of Rights.