



PARENTS' RIGHTS VS. CHILDREN'S RIGHTS TO MAKE HEALTH CARE DECISIONS

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INTRODUCTION

Under Pennsylvania law, “the control of one’s own person and the right of self-determination are closely guarded through the principle of informed consent, which declares that absent an emergency,¹ medical treatment may not be imposed without a person’s permission.”¹ Further, “the right to refuse treatment or to withdraw treatment once it has begun is a logical corollary to that principle.”

Nonetheless, when it comes to health care, minors typically do not enjoy the right of self-determination. Minors are generally considered incompetent as a matter of law to make health care decisions or to consent to medical treatment.² Therefore, a competent surrogate decisionmaker must do so on their behalf. Until a child reaches 18 (the age of majority in Pennsylvania), parents³ have the legal power and duty to make decisions for their children.³

Parents also have a legal duty to protect their children, which includes the “affirmative duty . . . to seek medical help when the life of a child is threatened, regardless of, and in fact despite, their religious beliefs.”⁴

Although parental rights and duties are well-established under federal and Pennsylvania law, those rights are not absolute. In 1944, the United States Supreme Court stated the following about the parent-child relationship as a matter of constitutional law: “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And it is in

recognition of this that these decisions have respected the private realm of family life, which the state cannot enter. But the family itself is not beyond regulation in the public interest, as against a claim [of] religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth’s well-being, the state as *parens patriae*. may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child’s course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter [to] ill health or death.”⁵

Parents’ rights are thus limited and must give way to countervailing interests and rights of the minor child, whether as a result of statutorily defined circumstances, the minors’ constitutional rights, or compelling governmental interests. This article will discuss those circumstances.

MINORS’ STATUTORY RIGHTS TO MAKE HEALTH CARE DECISIONS

The Pennsylvania General Assembly has articulated a limited number of circumstances in which, contrary to the general rule of parental consent, minors have the right to make their own health care decisions. Though this can create tension between a minor’s

¹The emergency exception is reflected in Pennsylvania regulations. See 28 Pa. Code § 103.22(b)(9) (“Except for emergencies, the physician must obtain the necessary informed consent prior to the start of any procedure or treatment, or both.”); 55 Pa. Code § 6000.1012 (“Consent is implied by law for emergencies and there is no need to seek a surrogate health care decision maker before providing emergency medical treatment.”); cf. 28 Pa. Code § 119.23(b)(2) (“If trainees in patient care, reflecting the concept of team care, the patient shall be so informed, and his consent shall be obtained, unless an emergency precludes such consent, which emergency shall be documented by the treating physician.”).

³If a child has a legal guardian, the guardian generally has the same duties to the child as a parent, and, for the purposes of this article, would have the same rights.

choice and a parent's preference, *if the minor has the power to make the decision, a health care provider must defer to the minor regardless of the parent's wishes.* This situation can be difficult for parents to accept, especially if they believe their child, regardless of age, lacks the maturity to make an informed decision. Nevertheless, minors in Pennsylvania have the decision-making power under circumstances specified by the state legislature, which seems to have implicitly indicated that, in specified circumstances, minors generally have the necessary maturity level.

MINORS' CONSENT ACT

The Minors' Consent Act⁶ provides that parental consent for any minor is not required for medical, dental, and health services if doing so "would result in delay of treatment which would increase the risk to the minor's life or health." This is similar to the rule that consent is not required in an emergency but is more general.

Other than this safety exception to the general requirement of parental consent, the Act sets forth the following four specific circumstances in which a minor has the power to consent for medical, dental, and health services as well as mental health treatment without a parent or anyone else also consenting: the minor is (1) at least 18 years old, (2) a high-school graduate, (3) married, or (4) "has been pregnant." Only one of the four criteria must apply for the minor to have the power to consent. Furthermore, "*if the physician or other person relied in good faith*" upon a minor's representation in concluding that the minor had the power to consent under the Act, but, in reality, the minor did not, such consent is deemed effective even in the absence of parental consent.

Pregnancy and Children

When a minor "has been married or has borne a child" the minor "may give effective consent to medical, dental and health services for his or her child." This makes sense because it empowers the child's parent to consent to treatment even though the parent is still a minor. Similarly, a pregnant minor can give

effective consent for medical and health services (not dental services), but only for the purpose of determining "the presence of or to treat pregnancy . . ."

Venereal Diseases

The Disease Prevention and Control Law of 1955 allows a physician to provide treatment to anyone under 21 years of age who has a venereal disease and provides that, if the minor consents to the treatment, parental consent is not needed. Under the Minors' Consent Act, a minor can consent to medical and health services to determine the presence of and to treat venereal disease and other diseases that are reportable under the Disease Prevention and Control Law of 1955. Consequently, under both laws combined, a minor can consent, without parental consent, to services needed to determine the presence of a venereal disease as well as to treatment.

Mental Health

As previously stated, a minor can consent to mental health treatment if he or she fits into one of the four delineated circumstances (at least 18 years old, a high school graduate, married, or has been pregnant) includes the power to consent to mental health treatment.ⁱⁱⁱ The Minors' Consent Act also addresses some other minors' abilities to consent to voluntary mental health treatment under rules that vary for inpatient and outpatient treatment. Significantly, under both the Minors' Consent Act and the Mental Health Procedures Act ("MHPA"),⁷ only one parent needs to consent to mental health treatment. However, the Minors' Consent Act provides that, if a parent with legal custody rights disagrees with a consent for inpatient treatment granted by the other parent, the non-consenting parent may file a petition with a county court.

Inpatient mental health treatment^{iv} is complicated, which is not surprising considering constitutional liberty rights. Under the Minors' Consent Act, a parent may consent to voluntary inpatient treatment (pursuant to the MHPA) of a minor who is 17 years old or

ⁱⁱⁱ"Mental health treatment" is defined as "a course of treatment, including evaluation, diagnosis, therapy and rehabilitation, designed and administered to alleviate an individual's pain and distress and to maximize the probability of recovery from mental illness. The term also includes care and other services which supplement treatment and aid or promote recovery." 35 P.S. § 10101.1(d).

^{iv}"Inpatient treatment" is defined as "all mental health treatment that requires full-time or part-time residence in a facility that provides mental health treatment." 35 P.S. § 10101.1(d).

younger, provided that a physician who examined the minor recommended the treatment. The consent is for voluntary treatment even if the minor does not consent because, in that scenario, the parent alone has the power to consent. However, the Minors' Consent Act specifically defers to the MHPA, stating that it does not change any of the rights that the MHPA provides to minors.

The MHPA provides that a minor who is at least 14 years old can consent to voluntary inpatient treatment. Accordingly, either a parent alone (under the Minors' Consent Act) or a minor who is at least 14 years old alone (under the MHPA) may consent to voluntary inpatient treatment of the minor. However, the minor's consent is subject to the parent's right to be notified and object. Therefore, a facility that accepts a minor's application for examination and treatment must promptly notify the minor's parents of the acceptance and inform them that they have a right to file an objection, and a hearing must be held within 72 hours to determine whether the treatment is in the minor's best interest.

The MHPA's provision authorizing consent by the minor who is at least 14 years old contains a quasi-maturity provision. Specifically, the minor must not only "believe that he is in need of treatment" but also that he must "substantially understand the nature of the voluntary treatment . . ." Similarly, regarding the requirements for consent by a minor or an adult, the MHPA states the following: "Before a person is accepted for voluntary inpatient treatment, an explanation shall be made to him of such treatment, including the types of treatment in which he may be involved, and any restraints or restrictions to which he may be subject, together with a statement of his rights under this act. Consent shall be given in writing upon a form adopted by the department. The consent shall include the following representations: That the person understands his treatment will involve inpatient status; that he is willing to be admitted to a designated facility for the purpose of such examination and treatment; and that he consents to such admission voluntarily, without coercion and duress; and, if applicable, that he has voluntarily agreed to remain in treatment for a specified period of no longer than 72 hours after giving written notice of his intent to withdraw from treatment. The consent shall be part of the person's record."

Thus, before admitting a minor who can give effective consent for voluntary inpatient treatment, health care providers should satisfy themselves that the minor

has the requisite level of understanding and document that opinion and the underlying conversation.

Recall that a parent can unilaterally consent to inpatient treatment for minors over the age of 14 years. If the minor objects to being admitted for treatment, the minor can file a petition with the county court to ask for withdrawal from or modification of treatment, in which case the court will appoint an attorney for the minor and hold a hearing within 72 hours.⁸ Inpatient treatment cannot continue against the minor's wishes unless the court finds by clear and convincing evidence that (1) the minor has a diagnosed mental disorder; (2) the disorder can be treated; (3) treatment can be provided at the facility where the minor is an inpatient; and (4) the inpatient treatment setting represents "the least restrictive alternative that is medically appropriate." If the court determines that treatment is needed, it can be continued for up to 20 days.

For voluntary outpatient treatment, a parent can consent for a minor younger than 14 years old. For a minor who is 14 years or older, the Minors' Consent Act allows either the minor alone or a parent alone to consent to examination and treatment. This provides finality and allows providers to rely upon the consent.

Also under the Act, for both voluntary inpatient and voluntary outpatient treatment, consent cannot be undone as if it never existed, but for voluntary inpatient treatment, consent can be revoked. Whoever consented to the inpatient treatment has the power to revoke the consent, but the revocation is not effective if the other party has consented to continued inpatient treatment.

Release of Medical Records

The Minors' Consent Act also identifies who has the power to consent to the release of mental health records of minors who are at least 14 years old, subject to the provisions of the MHPA. Generally stated, but subject to exceptions, the person who consented to the mental health treatment holds the power to consent to the release of the treatment records.

The Act provides that, generally but not always, the minor "shall control the release of the minor's mental health treatment records and information to the extent allowed by law." For example, minors who consented to outpatient mental health treatment under the Minors' Consent Act control the treatment records to the same extent that they would control the records

of inpatient care or involuntary outpatient care under the MHPA. However, if a parent consented to voluntary outpatient or inpatient treatment for a minor who is at least 14 years old, the parent may consent to the release of the minor's records and information, including records of any prior mental health treatment for which the parent consented, to the provider currently providing the mental health treatment as well as to the minor's primary care provider, provided that the current mental health provider believes that release to the primary care provider would not be detrimental to the minor. Under those circumstances, the parent also may consent to the release of records for prior mental health treatment to which the minor consented, but only if the minor's current mental health provider deems them to be pertinent to the current treatment.

Blood Donation

A 17-year-old "is eligible to donate blood in a voluntary and non-compensatory blood program without the permission of a parent or guardian."⁹ Contrary to this statutory right, however, a regulation provides that a donor "between the age of 17 and 18 must have a written consent signed by a parent or guardian."¹⁰ Additionally, the minor's consent cannot later be disaffirmed based on their minority status. A 16-year-old also can donate blood in the same type of program, but a parent or guardian's written permission is required.¹¹

Drug and Alcohol Treatment Services

The Pennsylvania Drug and Alcohol Abuse Control Act¹² states that if a minor "suffers from the use of a controlled or harmful substance" the minor can consent to "medical care or counseling related to diagnosis or treatment" without parental consent, and the minor's consent is valid, binding, non-voidable, and cannot be disaffirmed based on the age of minority. However, if a physician or "agency or organization operating a drug abuse program" provides counseling to the minor, they are allowed, but not required, to notify the minors' parents about the treatment provided or the treatment needed. The statute does not articulate factors to consider when making that decision, but the focus should be on the minor's best interests. Factors to consider should be fact specific, and the provider might want to consider the minor's opinions on the subject and description of the family relationship and

situation, including whether the parents would be supportive of or hurtful to the treatment. In any event, even if parents are notified, the statute expressly prohibits the minor's consent from being invalidated. Similarly, it can be inferred from the power granted to the minor to consent that a parent cannot withdraw the minor from treatment in which the minor chose to engage.

On the contrary, "if the minor is incapable of accepting or unwilling to accept voluntary treatment" the statute gives a parent the right to petition a county court to have the child involuntarily committed for drug and alcohol treatment services, including inpatient services. The court will appoint counsel for the minor, order the minor to undergo a drug and alcohol assessment to include a recommendation of the level of care needed and the length of treatment, and hold a hearing. If the court finds, by clear and convincing evidence, that the minor is drug dependent, is incapable of accepting or unwilling to accept voluntary treatment services, and would benefit from involuntary treatment services, the court can order such treatment for up to 45 days.

Abortion

Although minors in Pennsylvania have the right to make health care decisions relating to STDs and pregnancy, they do not have the right to be completely self-determinative as to abortion. Pursuant to the Abortion Control Act,¹³ absent a medical emergency, a woman can have an abortion based upon her "voluntary and informed" consent. As to minors, again absent a medical emergency, an unemancipated minor^v cannot have an abortion unless she and one of her parents consent to the procedure. The statute instructs that, in deciding whether to consent, a parent must consider only the child's best interests; however, parents are prohibited from coercing the minor to have an abortion, and a minor threatened with such coercion has the right to apply to a county court for relief upon expedited consideration. If her parents withhold financial support because she refuses to have an abortion, she will be considered to be emancipated so that she may be eligible for assistance benefits.

The Act does provide an option for a pregnant minor who either wants an abortion but whose parents will not consent or who chooses not to ask her

^vAn emancipated minor is legally responsible for himself or herself. This is different from a "mature minor."

parents for consent: she can file a petition or a motion with a county court to ask the court to authorize a physician to perform the abortion. The court can grant the requested relief if it determines that “the pregnant woman is mature and capable of giving informed consent to the proposed abortion, and has, in fact, given such consent.” This “mature minor” provision is important as a matter of constitutional law because the United States Supreme Court struck down an abortion statute as being “unconstitutional for failure to allow mature minors to decide to undergo abortions without parental consent.”¹⁴

If the court finds that the abortion would be in the minor’s best interests, the court must authorize the abortion under the Abortion Control Act even if the minor is not of sufficient maturity and capability.¹⁵ Mandatory factors for consideration are the following: “emotional development, maturity, intellect and understanding of the pregnant woman, the fact and duration of her pregnancy, the nature, possible consequences and alternatives to the abortion, and any other evidence that the court may find useful in determining whether the pregnant woman should be granted full capacity for consenting to the abortion or whether the abortion is in the best interest of the pregnant woman.” All court proceedings are confidential and must proceed promptly and without delay in order to serve the pregnant minor’s best interests and, in any event, the hearing must be held within 3 business days of the initial filing.

This provision of seeking judicial relief in the absence of parental consent, and perhaps even of parental notification, is commonly referred to as “judicial bypass.” Even though this maturity exception is embodied in the abortion law by the state legislature, the legislature has not adopted a similar maturity analysis in other statutes, with the exception of the MHPA’s quasi-maturity analysis previously mentioned. Instead, the statutes authorizing minors to consent, as previously described, imply that minors who fall within the delineated categories are of sufficient maturity by status or circumstance but without regard to any fact inquiry. Their age combined with the specified status or circumstance is sufficient.

In 2011, the Supreme Court of Pennsylvania rendered a decision involving an unemancipated minor’s request for judicial bypass.¹⁶ The minor was 17 years old and 10 weeks pregnant with her boyfriend’s baby. She was a high school senior, planned on attending college immediately after graduation, and wanted to be a lawyer. She was unemployed, had seen her siblings struggle

financially to care for children from unplanned pregnancies, and had been informed by a physician about abortion and its risks, complications, and alternatives. She believed that she was unable and unprepared to care for a child and that her future plans would be jeopardized if she had to do so. She chose not to ask for parental consent because she believed that her mother would throw her out of the home if she learned about the pregnancy.

The trial court ultimately denied the request for judicial bypass, thereby not allowing the abortion based on its finding that, because the minor chose not to seek parental consent, she lacked the maturity and capability of giving informed consent independent of a parent. The Superior Court of Pennsylvania affirmed. On appeal before the Supreme Court of Pennsylvania, the appellate court initially held that an appeal from a court’s denial of a petition for judicial bypass must be reviewed under the abuse-of-discretion standard, meaning that the decision would not be overturned unless the trial court abused its discretion when it rendered the decision under appeal. It also held that “a trial court lacks statutory authority to deny a minor’s petition for judicial authorization for an abortion based on her failure to obtain parental consent.” Simply put, it did not allow the trial court to impose, in a circuitous manner, a requirement of parental consent when the legislature specifically did not require it and expressly designed the procedure at issue to allow a pregnant minor to obtain an abortion even if she chose not to seek a parent’s consent. Therefore, it vacated the trial court’s order even though the trial court also specifically considered the statutory factors for its analysis and, further, found the minor to lack credibility. In fact, the appellate decision turned on the legal issue and specifically offered no opinion on the trial court’s conclusion that the minor lacked maturity and capacity to consent.

CONCLUSION

As a general matter, parents continue to enjoy many rights, privileges, and duties associated with child-rearing and protecting their children. However, those rights are not absolute, particularly once a child reaches the age of 14 years old, or once the child begins making decisions relating to his or her own reproductive health. Parents’ rights and minors’ rights can come into tension with each other. Therefore, it is important that health care providers understand who has the legal right to make decisions about health services for minors.

REFERENCES

(Editor's Note: A more comprehensive list of references that includes all page and section citations is provided with the online version of this article at www.jlgh.org)

1. Commonwealth of Pa. v. Nixon, 761 A.2d 1151, 1157 (Pa. 2000) (citing *In re Fiori*, 673 A.2d 905, 909 (Pa. 1996)) (Cappy, J., concurring).
2. See, e.g., *Parents United for Better Schools v. Sch. Dist. of Phila.*, 978 F. Supp. 197, 206 (E.D. Pa. 1997).
3. *Nixon*, 761 A.2d at 1153.
4. Commonwealth of Pa. v. Foster, 764 A.2d 1076, 1082 (Pa. Super. Ct. 2000). In *Foster*, a 2-year-old was terminally ill with renal carcinoma because his parents failed to seek medical care. They believed instead that "God would raise Patrick up and restore him to perfect health." The Department of Human Services intervened with a restraining order, and the child survived after medical treatment. *Id.* at 1078-80.
5. *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166-67 (1944) (citations and footnotes omitted), quoted in *Nixon*, 761 A.2d at 1153; see also *Parents United*, 978 F. Supp. at 206 ("Parental consent may be waived when the parent's refusal of consent likely would compromise the minor's long-term prospects for health and well-being.").
6. 35 P.S. §§ 10101 - 10105.
7. 50 P.S. §§ 7101 - 7503.
8. 35 P.S. § 10101.1(b)(8).
9. *Id.* § 10002 (emphasis added).
10. 28 Pa. Code § 30.30(2).
11. 35 P.S. § 10002.
12. 71 P.S. §§ 1690.101 - 1690.113.
13. 18 Pa. C.S.A. §§ 3201 - 3220.
14. *H.L. v. Matheson*, 450 U.S. 398, 408 (1981) (describing *Bellotti v. Baird*, 443 U.S. 662, 651 (1979)).
15. 18 Pa. C.S.A. § 3206(d).
16. See generally *In re Doe*, 33 A.3d 615 (Pa. 2011).

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