

LIMITATION OF PARENTAL CONSENT IN RESPECT OF VACCINATIONS IN SOUTH AFRICA: GUIDANCE FROM THE UNITED KINGDOM AND THE UNITED STATES

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SUMMARY

For decades, immunisation has saved millions of lives in South Africa and prevented countless illnesses and disabilities in South Africa. Vaccination is the most important thing we can do to protect ourselves and our children against ill health. One example is paediatric immunisation, which prevents approximately three million child deaths worldwide each year and saves 750 000 more from disability. In addition to alleviating suffering and the prevention of infectious diseases by vaccination, it is also more cost-effective than treatment of infectious diseases once contracted. Nonetheless, the current vaccine climate is polarised, with some vaccine hesitancy in the population. Another conundrum that arises is the vaccine gauntlet between parent and child. The Department of Health announced in 2021 that children are to be vaccinated in South Africa with or without parental consent. In the context of our law and the requirements of informed consent, a child as young as 12 years of age can be vaccinated, unassisted. Several issues and concerns arise in the given circumstances: in one instance there might be an implied threat that a parent's wish will be undermined and circumvented by the Department of Health and, in another, that a child's own wish to be vaccinated or not will be ignored. This article examines the conflict over parent and child consent in relation to the Covid-19 vaccination. The current legal framework regarding minors' consent in South Africa is discussed. Thereafter, the article analyses the consent in respect of children required for the Covid-19 vaccination in the United Kingdom and the United States. The article concludes by exploring recommendations to bridge the divide that exists between parent and child when they have opposing views on vaccinations in certain instances.

1 INTRODUCTION

Vaccine hesitancy in Africa is often rooted in distrust, shaped by a long history of inequality. An effective pandemic response includes addressing

those doubts.¹ Some fears are rooted in colonialism, oppression and exploitation, which are easily stirred up in situations like a pandemic, especially in light of the world's vaccine inequity, where some countries have been able to buy up a disproportionate number of vaccines. Hesitancy could mean a longer road to herd immunity and slower economic recovery amid second and third waves.² For months, many African governments struggled to secure vaccines in a system where wealthy countries took the lion's share, shining a spotlight on global inequalities. For most of the region, this challenge continued. However, as campaigns eventually rolled out across the continent, the lingering issue of distrust came into sharp focus. The reasons vary. In South Africa, distrust of the weakening, overburdened public health systems (and government that manages it) runs deep. So does scepticism that people's lives here really matter to the foreign companies and countries behind most Covid-19 research concerns.³

1 1 Vaccine hesitancy in Africa

The continent's lower number of deaths, compared with many other regions, has given many Africans a false sense of immunity. As recently as December 2021, around a quarter of Africans surveyed felt vaccines were not safe, according to the African Centers for Disease Control and Prevention.⁴ A recent survey found that only 61 per cent of South Africans would get a vaccine, lower than any other of the 14 countries surveyed.⁵ Some concerns about vaccine safety stem from its quick development, spooked by unverified claims of death following immunisation in Europe. These worries can be countered with accurate targeted information.⁶ For decades, groups like Rotary International worked to overcome polio vaccine rejection in Nigeria by working with local health workers and volunteers who were known and trusted by their communities, and who helped carry out the door-to-door immunisation push across the country; the country is now declared polio-free.⁷

¹ See, for e.g., Brown "Behind Vaccine Doubts in Africa, a Deeper Legacy of Distrust" (2021) <https://www.csmonitor.com/World/Africa/2021/0304/Behind-vaccine-doubts-in-Africa-a-deeper-legacy-of-distrust> (accessed 2022-01-11) 1; Cooper, Van Rooyen and Wiysonge "COVID-19 Vaccine Hesitancy in South Africa: How Can We Maximize Uptake of COVID-19 Vaccines?" 2021 20(8) *Expert Review of Vaccines* 921.

² See Brown <https://www.csmonitor.com/World/Africa/2021/0304/Behind-vaccine-doubts-in-Africa-a-deeper-legacy-of-distrust> 1.

³ *Ibid.*

⁴ See, for e.g., Brown "Behind Vaccine Doubts in Africa, a Deeper Legacy of Distrust" (2021) <https://www.csmonitor.com/World/Africa/2021/0304/Behind-vaccine-doubts-in-Africa-a-deeper-legacy-of-distrust> (accessed 2022-01-11) 1.

⁵ Brown <https://www.csmonitor.com/World/Africa/2021/0304/Behind-vaccine-doubts-in-Africa-a-deeper-legacy-of-distrust> 1.

⁶ *Ibid.*

⁷ NDoH "Strategies to Address COVID-19 Vaccine Hesitancy and Promote Acceptance in South Africa" (2021) <https://sacoronavirus.co.za/2021/04/12/strategies-to-address-covid-19-vaccine-hesitancy-and-promote-acceptance-in-south-africa/> (accessed 2022-01-13) 2.

In South Africa, people are afraid because they lack information.⁸ They need help to understand the science, how vaccines work, and how they are tested. An earlier study on South Africans' vaccine confidence found that the most common reasons for doubts were fear of side effects and concerns about effectiveness.⁹ Targeting people with accurate information is especially important now. Activists argue that vaccine scepticism will decline as more Africans are vaccinated, and see for themselves that it is a safe and effective procedure, and that when more broadly offered, it could ease restrictions on movement and help reopen economies.¹⁰ Vaccinations remain one of the most successful, cost-effective public health interventions.

1 2 Factors in refusing consent

The reasons that parents refuse to vaccinate their child vary, ranging from medical reasons and safety concerns to religious or philosophical objections. Safety concerns underpin most decisions by parents not to vaccinate their child. Some parents are concerned about the number and variety of vaccines recommended, citing concerns that the antigens they contain may interact dangerously or act to overwhelm or weaken the child's immune system.¹¹ Despite such fears being addressed in medical literature¹² and scientific evidence, they still exist. Vaccine refusal on the basis of religious grounds stems from the belief that the body is sacred and should not be healed through "unnatural" means, but rather through prayer. It has been recognised that the family unit is the "crucible" for the transmission of religious and cultural beliefs,¹³ and that religious beliefs endorse a strong measure of parental choice.¹⁴ In South Africa, parents have discretion in deciding how and whether their children will worship, since the religious beliefs that parents adopt, and in accordance with which they raise their children, are intrinsically connected with parents' rights to human dignity and with their sphere of parental authority, in which the State should not arbitrarily interfere. Though careful to avoid unwarranted judicial interference in the realm of parental authority, courts have shown special solicitude to

⁸ See, for e.g., National Department of Health "Strategies to Address COVID-19 Vaccine Hesitancy and Promote Acceptance in South Africa" South Africa: National Department of Health (2021) <https://sacoronavirus.co.za/2021/04/12/strategies-to-address-covid-19-vaccine-hesitancy-and-promote-acceptance-in-south-africa/> (accessed 2022-01-13) 2.

⁹ NDoH <https://sacoronavirus.co.za/2021/04/12/strategies-to-address-covid-19-vaccine-hesitancy-and-promote-acceptance-in-south-africa/> 2.

¹⁰ *Ibid.*

¹¹ Blignaut *Calling the Shots on Vaccination: When is the State Justified in Overturning a Refusal to Vaccinate?* (LLM, University of Cape Town) 2013 13.

¹² Blignaut *Calling the Shots* 15; see Chen and DeStefano "Vaccine Adverse Events: Causal or Coincidental?" 1998 351 *Lancet* 61; DeStefano "Vaccines and Autism: Evidence Does Not Support a Causal Association" 2007 82 *Clinical Pharmacology and Therapeutics* 756; and Omer "Vaccine Refusal, Mandatory Immunization, and the Risks of Vaccine-Preventable Diseases" 2009 *The New England Journal of Medicine* 1981.

¹³ Brown "Freedom From or Freedom For? Religion as a Case Study in Defining the Content of Charter Rights" 2000 33 *UBC L Rev* 551 579.

¹⁴ Bekink "Parental Religious Freedom and the Rights and Best Interests of Children" 2003 66 *THRHR* 246 248.

protect children from what they have regarded as potentially injurious consequences of parents' religious practices.¹⁵

2 THE LEGAL FRAMEWORK FOR MINOR'S CONSENT IN SOUTH AFRICA AND THE CONFLICT BETWEEN PARENT AND CHILD

2 1 A minor's capacity to act independently

Children under the age of 18 are legal minors who, in South African law are not fully capable of acting independently without assistance from parents or legal guardians.¹⁶ However in recognition of the evolving capacity of children, there are exceptional circumstances where the law has granted minors the capacity to act independently. Some of these circumstances are briefly discussed below.

2 1 1 Medical treatment

According to section 129 of the Child Care Act,¹⁷ a child may consent to their own medical treatment if they are over the age of 12 years and of sufficient maturity and decisional capacity to understand the various implications of the treatment, including the risks and benefits thereof. However, the Act does not provide a definition for what qualifies as "sufficient maturity", nor does it stipulate how health professionals ought to assess the decisional capacity of a child.¹⁸ This dilemma is discussed further in the article.

2 1 2 HIV testing

In respect of HIV testing, children can consent independently to an HIV test from the age of 12 when it is in their best interests, and below the age of 12 if they demonstrate "sufficient maturity" – that is, they must be able to understand the benefits, risks and social implications of an HIV test. Once again, the pressure rests on a health-care professional to assess the decision-making capacity of the child.¹⁹

¹⁵ *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC) 41.

¹⁶ Strode, Slack and Essack "Child Consent in South African Law: Implications for Researchers, Service Providers and Policy-Makers" 2010 100 *South African Medical Journal* 247.

¹⁷ 38 of 2005.

¹⁸ Ganya, Kling and Moodley "Autonomy of the Child in the South African Context: Is a 12-year-old of Sufficient Maturity to Consent to Medical Treatment?" 2016 17 *BMC Medical Ethics* 1 66.

¹⁹ Strode *et al* 2010 *South African Medical Journal* 247; s 130 of the Children's Act 38 of 2005; McQuoid-Mason "The Effect of the New Children's Act on Consent to HIV Testing and Access to Contraceptives by Children" 2007 97 *South African Medical Journal* 1252 1253.

2 1 3 *Termination of pregnancy*

As the law currently stands, girls can consent to the termination of pregnancy at any age.²⁰

2 2 **Medical treatment and informed consent**

2 2 1 *Children's Act*

Section 129 of the Children's Act expressly dictates the pre-requisites for medical treatment of a child and stipulates as follows:²¹

- (2) A child may consent to his/her own medical treatment or to the medical treatment of 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 treatment.”

Under the Children's Act, a child must satisfy two requirements before accessing medical treatment on their own – that is without parental, guardian or caregiver's consent being required. The first requirement is that the child must have reached 12 years of age. The second requirement is that the child must have “sufficient maturity” and decisional capacity to understand the benefits, risks, social and other implications of the treatment. However, this section of the Act is deficient with regard to certain definitions, regulations and sufficient descriptions. The Act fails to provide a definition for what ought to be considered as medical treatment. Moreover, the Act does not provide a definition for “sufficient maturity”. According to Ganya,²² “sufficient maturity” may infer a degree of cognitive development that affords a child the kind of engagement necessary in decision-making comparable to that of fully developed persons, namely adults. Ganya²³ further demonstrates that there is no provision in the Act specifying how the health practitioner ought to assess a child's decisional capacity. This deficit is exacerbated by the fact that there is currently no standard objective tool for assessing the decisional capacity of children. Nonetheless, the informed consent principle holds that persons are their own sovereign and should thus be allowed to make the final decision on affairs concerning themselves, provided that the elements required for informed consent have been satisfied.²⁴ In this light, it may be deduced that informed consent has occurred when a competent person has received a thorough disclosure,

²⁰ S 5 of the Choice on Termination of Pregnancy Act 92 of 1996.

²¹ Ganya *et al* 2016 *BMC Medical Ethics* 67.

²² Ganya *et al* 2016 *BMC Medical Ethics* 68.

²³ Ganya *et al* 2016 *BMC Medical Ethics* 69.

²⁴ The elements being: competence; disclosure of information, understanding and appreciation of information disclosed; voluntariness in decision making; and the ability to express a choice; Ganya *et al* 2016 *BMC Medical Ethics* 68.

understands and appreciates the disclosure, acts voluntarily, and consents to the intervention.²⁵

2 2 2 *The National Health Act*

The National Health Act²⁶ stipulates that informed consent must be obtained prior to any health-care intervention. Patients must have full knowledge of the procedure to which they are consenting. As part of informed consent, patients are entitled to know their health status and should be informed by their health-care provider of the range of diagnostic procedures and treatments available to them, and of the benefits, risks, costs and consequences associated with their options.²⁷ Moreover, the patient should be informed of their right to refuse health services, and the health-care practitioner must explain the implications, risks and obligations of such refusal.²⁸ Unfortunately, health-care professionals have an additional burden, especially when the patient is a child;²⁹ they are required to inquire into the patient's beliefs and culture that may have a bearing on the information that they need in order to reach a decision. The health-care professional has the task of acquiring this information from a child, which may prove to be onerous. The health-care professional involved must also, for obvious reasons, be capable of undertaking this evaluation. With regard to vaccines, this will need to be done at a vaccination centre by the available staff whose primary task is to administer vaccines and who may not have the necessary training or information available to perform this critical assessment in an already time-constrained environment.³⁰

2 2 3 *The Constitution*

In terms of section 12(2)(b) of the Constitution:³¹

“Everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body.”

The right to physical and psychological integrity in the context of health is about being the ultimate decision-maker on what one allows to be done to one's body. However, patient autonomy is not absolute, as the Constitution permits a limitation of rights in terms of the law of general application, to the

²⁵ Ganya *et al* 2016 *BMC Medical Ethics* 68.

²⁶ 61 of 2003.

²⁷ S 36 of the National Health Act 61 of 2003.

²⁸ *Ibid.*

²⁹ See, for e.g., Seale “Legal Obstacle Course: Vaccinating Children Aged 12 to 17 With or Without Parental Consent” (2021) <https://www.dailymaverick.co.za/opinionista/2021-10-26-legal-obstacle-course-vaccinating-children-aged-12-to-17-with-or-without-parental-consent/> (accessed 2022-08-01) 1.

³⁰ *Ibid.*

³¹ Constitution of the Republic of South Africa, 1996.

extent that it is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom.³²

In terms of section 28(2) of the Constitution:

“A child’s best interests are of paramount importance in every matter concerning the child.”

The above section also applies to matters that affect the health and well-being of the child. Naturally, parents want the best for their children and some parents’ concerns stem from the potential harm that a vaccine may pose. Parents want to be involved in the decision-making of their children between the ages of 12 and 17.³³

2 3 South African law cognisant of international law instruments

The Constitution, the Children’s Act and the National Health Act are some of the domestic pieces of legislation that reflect the international position regarding the choices and views of children. Despite a child being incapable of consenting in certain instances, a child’s opinion should not be disregarded. International legal instruments mandate that even very young children should be included in the decision-making process insofar as this is possible. The principle of “evolving capacity” in terms of article 5 combined with article 12 of the Convention on the Rights of the Child,³⁴ and of article 7 of the African Charter on the Rights and Welfare of the Child,³⁵ provide that a child who is able to form and communicate their own views has the right to express these views and have them taken into consideration. These provisions lean towards the capacities of older children and adolescents evolving towards independent decision-making as they mature. Similarly, the Children’s Act provides that in major decisions involving a child, the person making the decision “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”.³⁶ Where the child is of an age, maturity and stage of development so as to be able to participate in any matter concerning that child, the Act provides that the child “has the right to participate in an appropriate way and views expressed by the child must be given due consideration”.³⁷

³² Blignaut *Calling the Shots* 21; Thomas “Where to From Castell v De Greef? Lessons From Recent Developments in South Africa and Abroad Regarding Consent to Treatment and the Standard of Disclosure” 2007 124 *South African Law Journal* 188 203.

³³ See, for e.g., Rall “Here Is What the Law Says When It Comes to Consent for Covid-19 Vaccination in SA Children” (2021) <https://www.iol.co.za/capeargus/news/here-is-what-the-law-says-when-it-comes-to-consent-for-covid-19-vaccination-in-sa-children-26e086bc-e733-4743-896f-b84b88bc58b5> (accessed 2022-08-01) 2.

³⁴ UNGA *Convention on the Rights of the Child* 1577 UNTS 3 (1989). Adopted 20 November 1989; EIF: 02/09/1990.

³⁵ Organization of African Unity (OAU) *African Charter on the Rights and Welfare of the Child* CAB/LEG/24.9/49 (1990). Adopted: 11/07/1990; EIF 29/11/1999.

³⁶ S 31(1)(a) of the Children’s Act 38 of 2005.

³⁷ Blignaut *Calling the Shots* 22; s 10 of the Children’s Act 38 of 2005.

2 4 Conflict between parent and child regarding consent

As noted earlier in this article, the focus in the parent-and-child relationship has moved from the rights and powers of parents to the rights of the child.³⁸ A parent is no longer perceived to have absolute control and power over a child. This fact can cause tension between the rights. Despite the recognition that a child's right to health care has received, the right does not function in isolation. The family is the fundamental unit of society. It functions as an important support system for individuals. Although the family unit is viewed as a private domain, the State may in certain instances interfere, if necessary, to ensure respect for the right of the particular individual.³⁹ For example, where a child is neglected, the State is obliged to intervene in order to protect the child's interests. The State's obligation is recognised in terms of international human rights law as seen in article 16 of the Universal Declaration of Human Rights,⁴⁰ as well as article 23(1) of the International Covenant on Civil and Political Rights,⁴¹ which South Africa has ratified. Surprisingly, South Africa does not expressly protect the right to family life, but the Constitution has affirmed that the family is a social institution of importance that provides for the security and support of raising children.⁴² The Constitutional Court has recognised this in the decisions of *Dawood v Minister of Home Affairs*⁴³ and *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*,⁴⁴ where the right to family life is held to be protected by the right to dignity, which entails protecting the rights of individuals. Both international and national law recognise the importance of a family structure. In South Africa, despite the absence of an explicit right to family life, our courts in particular have recognised this importance, which is protected by the foundational constitutional right to human dignity.

In instances where parents refuse to vaccinate their children, the rights of parents and children are brought into conflict. Children's rights to health care are infringed by parents' refusal to vaccinate. How can this dilemma be resolved? According to Blignaut, the best-interests-of-the-child standard serves as a useful tool for resolving the conflict. This standard is widely used as an ethical, legal and social basis for decision-making that involves children.⁴⁵ It is the legal benchmark when decisions regarding children are

³⁸ Blignaut *Calling the Shots* 23.

³⁹ Blignaut *Calling the Shots* 26; s 10 of the Constitution.

⁴⁰ See for e.g., United Nations "Universal Declaration of Human Rights" <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (2022-08-21).

⁴¹ See for e.g., Council of Europe "International Covenant on Civil and Political Rights" <https://www.coe.int/en/web/compass/the-international-covenant-on-civil-and-political-rights> (accessed 2022-08-21).

⁴² Blignaut *Calling the Shots* 24; *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 8 BCLR 837 (CC) 30.

⁴³ 2000 8 BCLR 837 (CC) 30 par 31.

⁴⁴ *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 8 BCLR 837 (CC) 31.

⁴⁵ Blignaut *Calling the Shots* 25.

involved. The Constitutional Court, in the case of *Christian Education South Africa v Minister of Education*,⁴⁶ affirmed that a child's best interests are of paramount importance. In addition, section 7(1)(a) of the Children's Act lists factors to consider when applying the standard in a particular case. These include the nature of the parent-and-child relationship;⁴⁷ the parents' capacity to fulfil the child's needs;⁴⁸ the need for the child to be raised in a stable environment;⁴⁹ and the need to protect the child from physical or psychological harm that may be caused by maltreatment, abuse or neglect.⁵⁰ In South Africa, our courts have recognised that the best-interests standard should be a flexible one as individual circumstances will determine which factors secure the best interests of a particular child.⁵¹ However, placing limitations on a child's best interests is permissible in certain instances.⁵²

3 COMPARATIVE ANALYSIS OF MINOR'S CONSENT IN THE UNITED KINGDOM AND THE UNITED STATES

3.1 United Kingdom

In the United Kingdom, children aged 16 and older are entitled to consent to their own treatment in terms of the Children's Act 1989. As with adults, young people aged 16–17 are presumed to have sufficient capacity to decide on their own medical treatment, unless there is significant evidence to suggest otherwise. Children under the age of 16 in the United Kingdom can consent to their own treatment if they are believed to have enough intelligence, competence and understanding to appreciate fully what is involved in their treatment. This is known as the *Gillick* component,⁵³ following a court case in the 1980s between Ms Victoria Gillick and the NHS (National Health Service) regarding consent to treat children under 16.⁵⁴ The court case eventually made its way to the House of Lords, which ruled that the parental right to determine whether their minor child below the age of 16 will have medical treatment terminates if and when the child achieves sufficient understanding and intelligence to grasp what is proposed. The rule is valid in England and Wales. Whether a child is *Gillick*-competent is

⁴⁶ *Supra*.

⁴⁷ S 7(1)(a) of Children's Act 38 of 2005.

⁴⁸ S 7(1)(c) of Children's Act 38 of 2005.

⁴⁹ S 7(1)(i) of Children's Act 38 of 2005.

⁵⁰ S 7(1)(j) of Children's Act 38 of 2005.

⁵¹ In *Hay v B* (2003) (3) SA 492 (W) 4941J, the court authorised a blood transfusion for an infant against the parents' religious views, stating that the child's best interests are "the single most important factor to be considered when balancing or weighing competing rights and interests concerning children". Although the parents' reasons for refusing consent were duly considered, they were outweighed by the potentially fatal harm to the child if the transfusion were not given.

⁵² S 36 of the Constitution.

⁵³ See, for e.g., NHS "Children and Young People: Consent to Treatment" (2022) <https://www.nhs.uk/conditions/consent-to-treatment/children/> (accessed 2022-08-01) 1.

⁵⁴ *Gillick v West Norfolk and Wisbech Area Health Authority* 1985 3 All ER 402.

assessed using criteria such as the age of the child, their understanding of the treatment (both benefits and risks) and their ability to explain their views about the treatment. If deemed to be *Gillick*-competent, the child can make their own decision about a medical intervention such as a Covid-19 vaccination.⁵⁵ Health-care professionals administering the vaccine without parental consent will assess the individual child's capacity to consent for themselves (*Gillick* competence) and be responsible for deciding the appropriateness of administering the vaccine. If no consent is received, and the child is not *Gillick*-competent or does not want to be vaccinated, the immunisation will not proceed.⁵⁶

In addition, with regard to children younger than 16 who are not *Gillick*-competent, a person with parental responsibility must have the capacity to give consent. If a parent refuses to give consent for a particular treatment, this decision can be overruled by the courts if treatment is thought to be in the best interests of the child. Health-care professionals only require one person with parental responsibility to give consent for them to provide treatment. In cases where one parent disagrees with the treatment, doctors are often unwilling to go against their wishes and will try to secure agreement. If agreement about a particular treatment or what is in the child's best interests cannot be reached, the courts can decide. In an emergency, where treatment is vital and waiting for parental consent would place the child at risk, treatment can proceed without consent.⁵⁷

3 2 United States

In May 2021, the United States Food and Drug Administration approved the emergency use of the Pfizer-Biotech Covid-19 vaccine in adolescents aged 12–15 years.⁵⁸ In the United States, vaccine hesitancy among parents is also prevalent. Despite clinical data indicating that the vaccine is safe and 100 per cent efficacious for this age group, some parents and guardians may remain hesitant or outright opposed to vaccinating their children, particularly in politically and culturally conservative communities. During 2022, the United States accounted for approximately 22 per cent of positive Covid-19 cases reported worldwide, and hospitalisations among this population spiked.⁵⁹ Weekly reported cases for individuals aged 14–17 have generally mirrored or exceeded rates among adults. As cases in the United States in adults declined, the rate of infection in teenagers exceeded that of

⁵⁵ Morgan, Swartz and Sisti "COVID-19 Vaccination of Minors Without Parental Consent Respecting Emerging Autonomy and Advancing Public Health" 2021 175(10) *JAMA Pediatrics* 995.

⁵⁶ UK Health Security Agency "Covid-19 Vaccination Programme for Children and Young People: Guidance for Schools" (19 January 2022) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1042559/UKHSA-12222-COVID-19-parent-leaflet-v3.pdf (accessed 2022-08-01) 2.

⁵⁷ See for e.g., NHS "Children and Young People: Consent to Treatment" (8 December 2022) <https://www.nhs.uk/conditions/consent-to-treatment/children/> 1.

⁵⁸ Shevzov-Zebrun and Caplan "Parental Consent for Vaccination of Minors Against COVID-19" 2021 39 *Vaccine* 6451 6451.

⁵⁹ Shevzov-Zebrun and Caplan *Vaccine* 6451–6453.

adults. Most state laws in the United States presume that minors lack medical decision-making capacity and therefore require parental consent for most health-care decisions, including vaccination. There are exceptions to this requirement for stigmatising or sensitive interventions, but few states authorise vaccination without parental consent.⁶⁰

The age requirement for a minor to consent to medical intervention, including vaccines, in six states is as follows: Alabama, age 14; District of Columbia, age 11; Oregon, age 15; Washington, no age requirement; Tennessee, no age requirement; and North Carolina, age 16. Sometimes, court interventions may also grant permission for 'mature minors' (adolescents who, after clinical evaluation, are deemed to possess competence) to consent or refuse treatment. Currently, in many US states that still believe capacity to consent is reached at 18 and over, there has been discussion regarding lowering the age for consent to vaccine/medical treatments.⁶¹ Scholars argue that allowing children below the age of 18 to consent without parental consent in the majority of states respects the emerging autonomy of young people and would advance public health. The concept of evolving emerging autonomy is in keeping with the universal evolving autonomy principle endorsed by the World Health Organization and United Nations.⁶²

4 CONCLUDING REMARKS

This article has sought to provide the reader with a brief background on vaccine hesitancy in Africa, and also highlight the current legislative framework pertaining to parental consent in respect of vaccinations in South Africa. Parent-child conflict was also discussed. Thereafter, the article sought to discuss the comparative legal position pertaining to parental consent in the United States and United Kingdom respectively.

As highlighted in this article, the family forms the foundation of South African society. It is acknowledged that children's rights in South Africa take cognisance of international standards and the protection of family life. The law affords parents a considerable measure of discretion in their decision-making regarding their child. In order to prevent parental decision-making powers from being arbitrarily countermanded by the State, parents may rely on their right to dignity. The best interests of the child is always of paramount importance and must be considered when determining whether to vaccinate a child. Even though courts may be reluctant to interfere with parental responsibilities, they will nonetheless protect a child from harmful consequences of their parents' choices.⁶³ The courts do this by exercising their common or statutory powers to protect the child. In respect of vaccination refusal, this may involve the court ordering treatment where it is

⁶⁰ Shevzov-Zebrun and Caplan *Vaccine* 6453.

⁶¹ Shevzov-Zebrun and Caplan *Vaccine* 6452.

⁶² Shevzov-Zebrun and Caplan *Vaccine* 6453. The universal evolving autonomy principle is explained as being part of the emerging autonomy of young people and their freedom to choose.

⁶³ Blignaut *Calling the Shots* 32.

unreasonably refused by the parent to ensure the child's best interests. Whether vaccinations are indeed in the child's best interests is contingent upon the vaccination coverage in that community and whether a child may benefit from herd immunity or not.

Ultimately, there is a need for continued education and communication between health-care practitioners and the public to dismiss vaccine suspicion and promote effective immunisation policies. It should also be noted that there are circumstances where the State could legitimately intervene in a vaccination refusal, and mandate vaccinations, as has been witnessed early on in 2022 in South Africa. Ultimately, the courts bear the daunting task of balancing the best interests of the child with honouring parental discretion at times; courts have demonstrated their willingness to fetter parental rights where their exercise undermines the best interests of the child.⁶⁴

⁶⁴ Bignaut *Calling the Shots* 32–45.