

Avant factsheet:

Children and consent

Quick guide:

1. In many cases, children younger than 18 years of age can independently provide consent for medical treatment, or refuse it, if a doctor assesses that they have attained sufficient capacity.
2. If a child cannot consent to medical treatment, generally either parent can provide consent provided the treatment is in the best interests of the child.
3. Court approval is needed for special medical procedures for children. It may also be required when there is a dispute about what is in the best interests of the child.

Parents and guardians provide consent for their child's health care in most cases. However, if a child understands the significance of their decision they may provide consent themselves. There are circumstances where neither a parent nor the child can provide consent, and a court will need to make an order about a child's treatment. If the case is life threatening you should treat the child as an emergency and consent is not required.

When can children provide consent?

The law presumes that people have capacity to make decisions about their health care at 18 years of age. In South Australia it is 16 years. However, before reaching this age children can develop the capacity to make decisions about their health care. Capacity to consent relates to the specific decision. While a child may be competent to make some medical decisions, it does not mean they have the capacity to make all medical decisions independently.

'Gillick competence' and the 'mature minor'

The legal test used to determine if a child is capable of giving consent is when he or she "achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed". This is referred to as 'Gillick competent' or a 'mature minor'.

Children develop this competence at different rates. When deciding if a child is competent, you should consider the child's age, their insight into the nature of the treatment and their understanding of its possible side effects. Other relevant considerations include the child's intelligence, attitude and personality, and health. One of the challenges can be assessing if a child understands the long-term implications of a procedure or treatment. Generally, the more risky the procedure, the more carefully you should assess whether the child fully understands the nature of the procedure.

If a child is competent to make decisions about their own treatment, their consent alone is sufficient. The consent of a parent or guardian is not required. This also means it is not required or appropriate to contact the child's parent or guardian without the child's consent.

Ultimately, the child is entitled to the same confidential treatment of their medical information as an adult would receive. Nevertheless,

if you feel it would benefit the child to inform their parents about their condition and proposed treatment it is advisable to raise this with the child.

Public and private hospitals may have their own policies regarding the age that a child can provide consent independently of their parents. You should check for any specific requirements in the hospitals or organisation where you work.

Disputes between parents and children

If a child has the requisite maturity to provide consent and there is a dispute between the child and their parents about the appropriate treatment, then wishes of the child will override those of the parents.

Medicare

Medicare recognises that children may seek medical treatment independently of their parents or guardians. Children can have their own Medicare card from 15 years of age. Doctors can also bulk-bill Medicare for consultations with patients who are 14 years of age without advising the child's parent. If parents request information from Medicare about their child who is aged 14 years or over, they will need the child's permission.

My Health Record

Generally a parent or guardian will have control over a child's My Health Record until the child turns 14, which is when their parents will be automatically removed as their authorised representative. Children under 14 who can prove to the Australian Digital Health Agency that they are a mature minor can register themselves and take control of their existing record.

Cosmetic procedures

Cosmetic treatments for children have some specific requirements. In Queensland, cosmetic procedures may not be performed on children unless they are reasonably believed to be in the child's best interests. The Medical Board of Australia's guidelines on cosmetic procedures also set out additional steps for patient assessment and informed consent for cosmetic procedures. These include either a seven-day or three-month cooling-off period for patients

under 18, plus evaluation requirements, depending on whether the treatment is 'major' or 'minor'.

Parents providing consent

In most cases, one parent can give consent for their child to receive medical treatment and can refuse medical treatment on behalf of their child. However, parental rights gradually diminish as the child matures and are qualified if:

- the child has capacity to make their own decisions (see above on 'Gillick competence' and the 'mature minor')
- there is an applicable parenting order in place (see below on *Separated parents*)
- there is a question about whether the consent or refusal is in the best interests of the child, in which case the court may be asked to intervene
- the treatment is one which always requires court authority. (see below *Special medical procedures*)

Separated parents

If parents separate, the parent who is with the child at the time will generally be able to provide consent. However, some court orders only permit one parent to make medical decisions for the child or state that one parent must notify the other parent before consenting to medical treatment. If parents are separated or divorced it is a good idea to enquire whether there are any parenting orders giving authority to only one parent.

Disputes between parents

Doctors can find themselves in the middle of a dispute when one parent consents to treatment and the other objects. A court order may be required to settle this dispute and you should seek legal advice in this situation.

Courts making decisions

The Supreme Court in all states and territories and the Family Court of Australia have powers to protect the welfare of children. The main consideration for judges making these decisions must be the best interests of the child. Legislation in some states also empowers tribunals to make certain decisions on behalf of children.

When will the courts get involved?

There are two main reasons why the courts may be approached to provide consent to or refuse medical treatment for a child. They are:

1. when there are disputes about what is in the best interests of the child, and
2. for 'special medical procedures'.

Disputes about the best interests of the child

Courts may use their powers to give consent to the treatment of a child where there is a dispute about what is in the child's best interests. This may include a disagreement between parents or between parents and a doctor. The court may also use its powers to settle a dispute between a child who is 'Gillick competent' or a 'mature minor' and their parents or a doctor.

What are the best interests of a child?

There are particular factors that the court uses to determine what is in the best interests of a child. These factors may weigh more heavily in particular cases. The context of the specific case will influence what is taken into account to determine what is in the best interests of the child. While the following list is not exhaustive, some of the main factors that will be taken into consideration include the:

- particular condition of the child
- nature of the proposed procedure or treatment
- reasons it is proposed to be carried out
- alternative procedures or treatments that are available
- views of the child, their parent or guardian
- physical effects and the psychological and social implications for the child of authorising or not authorising the treatment.

Special medical procedures

The authorisation of a court, or tribunal in some states, is required for certain special medical procedures, even when the child, parents and doctor all agree.

Special medical procedures are those:

- that are irreversible and invasive
- where there is a significant risk of making the 'wrong' decision and the consequences of a wrong decision are particularly grave, and
- where the treatment is non-therapeutic.

What is considered a special medical procedure can change over time. You should seek legal advice or contact Avant before approaching a court about making orders to settle a dispute about what is in the best interests of a child or regarding a special medical procedure.

Additional resources

You can find additional resources including articles, podcasts and webinars in the Avant Learning Centre under Consent: avant.org.au/avant-learning-centre

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