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"THE BEST INTERESTS OF THE CHILD: A PERSPECTIVE INTO THE REFUSAL OF NECESSARY MEDICAL CARE FOR CHILDREN, BY PARENTS, ON THE BASIS OF RELIGIOUS BELIEFS"

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28 November 2014

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Dedications:

This dissertation is dedicated to **My Nephew, Jesse Connor Moonsamy** who has inspired my topic. He is 3 years old and a special needs child with the smile of an angel. His parents are strong believers in the Christian faith and rely solely on faith healing as opposed to conventional medicine.

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ABSTRACT

The best interests of the child is of paramount importance as indicated by our supreme law of the land, the Constitution of the Republic of South Africa.

South African law creates a firm basis for the protection of children's right. One such right is the right to receive adequate medical care and not to be refused such care for any religious reasons. Parents have the primary and legislative duty to provide the child with all needs required, including the right to health care, in order to ensure the wellbeing and best interest of the child. The "best interests of the child" standard has been one which has received extensive court intervention but application in South African law has been truncated. Parents often refuse medical care for their children based on their personal religious objections, and rather tend to opt for faith healing. Sometimes such refusal tends to harm the child rather than benefit the child. The adverse effects unreasonably placed on children by such refusal, have resulted in severe harm, damage or even death of the child. Often parents are not held accountable.

The law needs to promulgate more stringent provisions creating liability on parents who neglect and harm their children. The High court acts as the upper guardian of all children and are obliged to limit parental rights in order to serve the best interests of the child. Although the courts play an active role in the child's life, the need for intervention by third parties is looked at as a possibility. Third parties who have an interests in the child's health and wellbeing should be allowed to make decisions regarding heath care which is in the child's best interest. This dissertation will seek to introduce third party intervention into South African law.

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CHAPTER 1: INTRODUCTION

1.1 BRIEF OVERVIEW OF THE CONCEPT

There has been as growing concern under South African regarding the rights of children. Children require extensive protection under the law and should be afforded such protection by the legislature and judiciary. The medical sphere is faced with infringement of children's rights on a daily basis. Such concern raises the awareness of medical practitioners to administer medical treatment in a vigilant manner taking heed of children's rights and interests.

This paper is a conceptual framework relating to the refusal of parental consent[1] for minors[2] under age 12 for necessary[3] medical care[4], on the basis of religious objections, beliefs or the reliance on faith healing[5]. The focus of this paper will relate to the circumstances in which parents refuse medical consent for their children and how such refusal may negatively impact the child's health. In approaching the legal implications of the refusal of parental consent for the medical care for a child due to the parent's reliance on the word of God and their religious beliefs[6], this paper will address case law and both domestic and international legislation pertaining to such refusal. A critical evaluation of key concepts and terms will be explained indicating its relevance to the topic, core standards will be evaluated in the context, and both ethical and legal arguments will be put forward.

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[1] RS Harper *Medical Treatment and the Law; The Protection of Adults and Minors in the Family Division* (1999) 3 - Consent means 'the voluntary and continuing permission of a patient to receive a particular medical treatment based on an adequate knowledge of the purpose, nature, likely effects and risks of that treatment including the likelihood of its success and any alternative to it'

[2] The Children's Act 38 of 2005 (Children's Act) defines a minor/ child to mean 'any person under the age of 18'. For the purpose of this paper the word child and minor will be used interchangeably. However as defined in the Children's Act, for the purposes of providing consent a child or minor is regarded as being below 12 years old..

[3] AH Marckwardt et al *Webster Comprehensive Dictionary* International Edition (1992) Volume two 847 – the definition of necessary is being in such a state or condition that exists which requires an action that is essential or absolutely needed to preserve the given state of affairs.

[4] For the purpose of this paper the term "medical care" will be used to encompass both surgical operations and medical treatment as defined in Section 1 of the Children's Act. The term Care 'means in relation to a child where appropriate, within available means, providing the child with living conditions that are conducive to the child's health, well-being and development and to protect the child from maltreatment, abuse, neglect and degradation and ensuring that the best interests of the child is of paramount importance in all matters relating to the child' – section 1 of the Children's Act.

[5] J Stanfield 'Faith Healing and Religious treatment exemptions to child endangerment laws: Should parents be allowed to refuse necessary medical treatment for their children based on their religious beliefs?' (2000) Hameline J.Pub. L & Pol'y, 45, 49 – defines "Faith healing" to mean healing through prayer and the reliance on God's word that one's faith in god will heal the child from any illness.

[6] Ibid 46.

1.2 STRUCTURE OF THE STUDY

The dissertation is presented as follows:

Chapter 1 introduces the main focus and purpose of the topic and broadly defines the key terms and concepts. The problem indicated in this chapter is whether the refusal of medical care, by parents, which result in harm to the child, is justifiable under South African law. In evaluating the problem the concept of the "best interests of the child" as laid down in the Constitution will be defined. Boundaries and liability of parents for such wilful refusal of medical care will be explained in relation to legislation and judicial decisions.

Chapter 2 is the literature review which provides a literary framework of the views of the different authors which relate to the topic. Authors, both domestic and international explain their opinions on the refusal of medical care for the child and indicate how such refusal may resort to harm, detriment to or even death of the child. Such opinions will be assessed in the hope of finding a solution for the protection of children's rights under South Africa law.

Chapter 3 indicates the legal framework. This chapter includes domestic and international legislation and judicial decisions which govern medical care, children's rights, parental rights, consent for medical care, the behaviour of parents in relation to providing or refusing consent for the child, neglect of children and liability of parents. This chapter will set out the standards, rules, obligations, and parameters which apply in all concerns regarding the child. The "best interests of the child" standard under section 28(2) of the Constitution and section 7 of the Children's Act will be extensively discussed affording protection to the child. The parameters of such standard will be laid out incorporating in its concept when parental refusal of medical care will be regarded as contrary to the child's interest. Further this chapter will encompass how court intervention is a much needed facility in procuring the child's best interests with regard to medical care. This chapter will touch on a comparative analysis with the United States of America, indicating their similarities, differences and solutions in the protection of children's rights.

Chapter 4 will discuss the analysis of the refusal of parental consent based on religious objections and how such parental autonomy requires limitation in order to secure the child's right to health care under the South African Constitution and Children's Act. This chapter divulges

into a complete application and explanation of the concepts and laws, drawing reference from international law which provides a basis for which South African law may utilize in its enhancement of protecting children's rights. This chapter will further include the limitation enquiry as set out in Section 36 of the Constitution and how such limitation of parental rights serve the interests of the child's rights. Recommendations in favour of third party intervention, enacting neglect laws and liability of neglectful parents are desirable solutions for the protection of the child and will be discussed regarding its application or lack thereof, under South African law.

Chapter 5 is the concluding chapter which will complete the discussion on the topic and provide a clear basis for the reader to understand the entirety of the dissertation. Certain main arguments will be reiterated in order to encapsulate the reader's attention to its importance and significance under the law. It is critical to make repetitions in order to ensure that the reader obtains a clear understanding of the topic from the beginning and how all the above concepts relate to the topic.

1.3 BACKGROUND AND PURPOSE OF THE STUDY:

This study emerges out of a lacuna in South African law regarding minor children who lack the capacity under the Children's Act[7], for autonomously consenting to medical care. South African law having addressed the needs of children in relation to medical care has not fully addressed a certain category of children, who are unable to consent to medical care due to their incompetence or incapacity. Such category includes those children who are below the legal age for consent that is 12 years old, and those who may have mental or physical disability, in other words, those who have a disadvantage to receiving medical care without the consent of the parent. Minors with age or disability impediments suffer the consequence of their incompetence. Thus, it would appear that parental power is absolute and unrestrained. Therefore, in order to limit such parental power indiscriminately, the best interest of the child has to be addressed. Hence this paper aims to introduce the notion of a "*third party interest*" as a solution for the protection of children.

[7] Children's Act (note 2 above).

The South African legal framework includes the Constitution[8] and the Children's Act[9] which indicate that all persons, which include children, are entitled to access to health care[10] and not to be refused emergency medical treatment[11]. Both these pieces of legislation indicate that children are protected by the law when it comes to receiving medical attention. With regard to medical care, the child will be required to provide consent him/herself, if competent[12] to do so, or such consent will need to be provided by the parent or persons possessing parental responsibilities in terms of the Children's Act[13]. Consent for children fall under the provisions set out in section 129 of the Children's Act.

It is assumed that parents hold a position of absolute power in providing consent for minors due to their natural obligation to 'nurture and protect the physical and emotional wellbeing of their children'[14]. However, some parents refuse consent for their child to receive medical care on the basis of religious belief in faith healing. This study will examine how a parent's right to parental autonomy in exercising their religious belief can be limited under section 36[15] in order to protect the child's right to health care. Further to protect the child from abuse, maltreatment, neglect and degradation[16].

I raise concerns in respect of circumstances where a parent's refusal of consent for their minor child to receive medical care, thus exercising their autonomy, may be to the detriment of their child. Such parental autonomy will border on abuse on a number of grounds in particular, the ground of abuse and neglect which stems from the parents religious belief in faith healing and the word of God as opposed to conventional medical treatment and care. Having placed the concept of abuse within the parameters of this study, it will need to be analysed whether such neglect by a parent is tantamount to abuse and whether any further recommendations can be made to prevent such abuse from occurring.

[8] Constitution of the Republic of South Africa, 1996 (hereafter referred to as the Constitution).
[9] Children's Act (note 2 above).
[10] Section 27(1) (a) of the Constitution and Section 28(1) (c) of the Children's Act.
[11] Section 27 (3) of the Constitution. (Note 8 above).
[12] Competence is dependent upon the competency test referred to in *Gillick v West Nortfolk & Wisbech AHA & Department of Health and Social Security* [1986] 1 AC 112 & *Gillick v West Nortfolk & Wisbech AHA & Department of Health and Social Security* [1985] 3 All ER 402 (discussed later).
[13] Children's Act (note 2 above).
[14] S N Katz *When parents fail: the laws response to family breakdown* 1971, 10.
[15] Constitution (note 8 above).
[16] Section 28(1) (d) of the Constitution (note 8 above).

The problem faced by the South African legal dispensation is that there is no legal basis for the liability of parents who neglect or refuse to provide consent to medical care r their child based on the parent's religious beliefs and objections, thus the legal approach of this paper will endorse the protection of children's right to medical care. The position taken will substantially focus on the child's interests and the measures that may be incorporated into South African law to give added protection to minors especially those below the age of 12 or those unable to provide consent due to incapacity. I am essentially proposing that the refusal of parental consent for medical care of minors may very well amount to child neglect because it negates what is the "best interests of the child." However this issue requires further analysis and will be dealt with in chapter 4.

The core feature to be analysed under this paper is the standard of "*the best interests of the child*" enshrined in the Constitution which takes into account the child's best interest in all matters involving the child. This concept has its supporting evidence under the Children's Act which states that any matter relating to the child, and his or her interests are of paramount importance[17].

The "best interests of the child" will include matters relating to the medical care of the child. The standard has been interpreted by various statutory works and the judiciary has contemplated its own meaning thereof. It is evident from these statutory sources that the standard has been applied for the protection of a child who is incapable of providing autonomous consent for his or her medical care. Thus having such incapacity to consent a child will require consent from a parent, guardian, caregiver[18] or third party. It is submitted that the following are examples persons to be recognised as third parties having an interest in the child's health and well being: the child's maternal or paternal grandparents; the child's immediate aunts or uncles; or the child's legal guardians. It is recommended that such persons indicate a legitimate and reasonable basis for which they exercise their concern for the child health or wellbeing. Thus, when determining the importance of a child's health parental consent is necessary in situations where the child is unable to provide such consent or when such consent is vital. When consent is required the best

[17] Section 28(2) of the Constitution and Section 9 of the Children's Act.

[18] Section 1 of the Children's Act (note 2 above) – Caregiver 'means any person other than a parent or guardian who factually cares for the child and includes a foster [parent; a person who cares for a child with the implied or express consent of a parent or guardian of the child; a person who cares for a chid whilst the child is in temporary safe care; the person of the head of a child and youth care centre where a child has been placed; head person of the shelter; a child or youth care worker who cares for a child who is without appropriate family care in the community and; the child of the head of a child headed household.

interests of the child standard should be used as a conclusive factor in instances of making decisions for the child.

Any child below the age of 12 years requires parental consent for any medical treatment and surgical operation provided they fall within the categories as stated under the Children's Act.[19] It is implicit that parents and guardians are given such power over the child's medical care; however, the Children's Act fails to include the extent to which such consent must be given. In providing consent a parent must put forth a decision that highlights what is in the best interests of the child and that which will serve the child's well-being. A parent, guardian or caregiver has certain rights and responsibilities[20] towards the child[21]. The definition of a child has been interpreted using the various provisions of the Children's Act which includes biological children and adoptive children.

Parental rights and responsibilities include caring for the child and maintaining the child's well-being[22]. The general concept of care for someone is wide enough to be interpreted to include ones medical care and well-being. Having this concept in place it can easily be said that care for the child would include preserving the health and condition of the child. This would mean providing the child with necessary medical care and treatment. A parent's responsibility would extend to the child and not to other persons. Lord Fraser[23] indicated that 'parental rights to control a child do not exist for the benefit of the parents, they exist for the benefit of the child…'[24] Thus, a parent is in a position to provide such consent for the necessary medical care of the child.

The Children's Act is indicative of the specific duties listed under parental rights and responsibilities[25]. One of the parental duties are to protect the child from maltreatment, neglect and abuse[26] and this shall be interpreted to include providing medical care to the child, when necessary to protect the child from harm. This is turn will be acting in the child's best interests

[19] Section 129(4) and 129(5) of the Children's Act.
[20] Parental rights and responsibilities: means those responsibilities referred to in section 18 of the Children's Act (note 2 above).
[21] Chapter 3 Part 1 of the Children's Act (note 2 above).
[22] Section 18(2) of the Children's Act (note 2 above).
[23] *Gillick v West Nortfolk & Wisbech AHA & Department of Health and Social Security* [1986] 1 AC 112 in R Probert et al (1st Ed) *Responsible parents and Parental Responsibility* (2009) 3.
[24] Ibid 3.
[25] Section 20-22 of the Children's Act (note 2 above).
[26] Section 28(1) of the Children's act (note 2 above).

and thus fulfilling the obligations under the legislative framework[27]. In performing these duties parents are to make decisions on behalf of the child ensuring that such decisions that will not adversely affect the child's well-being and medical condition. These decisions will include the child's right to have access to medical care timeously and effectively.

A parent as the primary caregiver should provide independent consent for the medical care and not allow such consent to depend on circumstances external to the child's need for medical care. A parent should not unreasonably refuse consent to medical care for their child. Such reasons for the refusal of parental consent may be motivated by parent's religious beliefs. However, the Children's Act states that parents are obliged not to refuse medical care for their child[28]. This refusal shall include the withholding of parental consent for medical care solely on the basis of religious beliefs[29].

Such refusal of parental consent may have negative implications on the child's right to health and medical care thus conflicting with the child's best interests. Parents often believe that their actions are in the best interests of their child and that as parents they know best. However this does not prevent parents from refusing medical care for their children due to their reliance on faith healing on the premise that complete faith in their religion and God himself will cure their child from any illness or sickness. It has been noted that there are various religious denominations that opt to utilise faith healing rather than medical care[30]. Lederman[31] claims that 'obedience to God's word regarding the welfare of one's child is a fundamental element of most upbringings'[32]

The Christian religious denominations are one of the largest groups which practice faith healing and will be looked at in detail under this paper. 'Healing through prayer is at the core of Christian denomination'[33]. This reliance on God encompasses the heartfelt and sincere discipline to prayer in order to understand the essence of faith healing. A known example of faith healers

[27] Constitution (Note 8 above).
[28] Section 129(10) of the Children's Act (note 2 above).
[29] Section 129(10) of the Children's Act (note 2 above).
[30] JL Hartsell 'Mother May I … Live? Parental Refusal of Life Sustaining Medical Treatment for Children Based on Religious Objections' (1998-1999) 66 *Tenn.L.Rev.* 499.
[31] AD Lederman 'Understanding Faith: when Religious Parents Decline Conventional Medical Treatment for their Children' in J Stanfield (note 5 above) 47.
[32] Stanfield (note 5 above) 55.
[33] Hartsell (note 30 above) 503.

are the followers of Jehovah's witnesses and Christian Science thinkers reject the use of conventional medical treatment and instead opt for reliance on their belief in God and faith to heal them[34]. The interests of parents may sometimes result in opposing consequences for their minor children. Parents will then be faced with the dilemma of choosing between breaking a law and being condemned by God.

Over the years, the courts have taken an active role in children's right and have acted as legal guardians over the child.[35] The South African legal system has incorporated the concept that the 'High Court or a Children's Court will serve as the guardian over the minor child in any matter concerning the child'[36]. There has been much inclusion of the concept of *parens patraie.* The term *parens patraie* means that the High court will have inherent jurisdiction over the minor child and that such power given to the court will allow the court to propose decisions on behalf of the minor child to the exclusion of the parent's choice or opinion if such decisions to be made for serving the best interests of the child.[37] This term incorporates inherent jurisdiction of the High Courts. This inherent jurisdiction has given courts the power to 'step into the shoes of the parents'[38] and make decisions pertaining to the child's best interest regardless of the parent's choice. Such decisions should include providing consent for the child to receive medical care when the parent refuses to provide such consent based on their reliance that God will heal through faith.

This jurisdiction granted to the court will allow the court to weigh up the right of the child to receive adequate medical care in his or her best interests against parent's right to practice their religion under the Constitution[39]. In a leading international case[40] the court formulated the principle that where the exercise of religious freedom, by parents, are concerned, such right is not absolute especially when the right of the parent will be contrary to legislative enactment

[34] Ibid 503-504.
[35] Section 129(9) of the Children's Act (note 2 above).
[36] Ibid.
[37] Harper (note 1 above) 26.
[38] Harper (note 1 above) 26.
[39] Section 15 of the Constitution (note 8 above).
[40] *Prince v Massachusetts* 321 US 158 (1944) in J Stanfield (note 5 above) 54-55.

which entails societal norms and values regarding what is vital for a child'[41]. These rights are relative rights and are not beyond the call for limitation[42]

McQuoid-Mason (2005)[43] critically analyses the case of *Hay v B*[44] where the court granted an order authorising the doctor to administer a blood transfusion to a baby, against the wishes of the parents. The decision was based on the grounds of the child's best interest and that such interest was of paramount importance in the medical health of the child. Further that although the parent's religious beliefs had to be respected and their concerns understandable, they were not reasonable and justifiable and could not override the child's right to health care. Mason studied various American Court decisions and submitted that South African courts would most likely have reached the same conclusion by deciding that the medical treatment would serve child's best interests.

A more recent unreported South African judgement, *Life Healthcare Group (Pty Ltd) v JMS*[45] has incorporated the Children's Act into its decision relating to the refusal of medical care for the minor child. This case will be analysed in more detail throughout the dissertation under the relevant subheadings.

When comparing these competing rights, attention must be accorded to the limitation clause under the Constitution[46]. Due to the failure to provide necessary consent for medical care, one needs to consider whether the right to religious belief under the Constitution should be prohibited or limited to give effect to the child's best interest. Courts will apply the steps indicated under the limitation clause to ensure that the limitation of the right to practice ones religion is reasonable and justifiable in order to protect the right to receive medical care for the child. By limiting parental autonomy and restricting parents from freely practicing their religion, to the

[41] Stanfield (note 5 above) 55.
[42] Ibid 54.
[43] D McQuoid-Mason 'Religious beliefs & the Refusal of blood transfusion for children: What Should Doctors do? Hay v B 2003 (3) SA 492 (W)' 2005 (68) THRHR 315, 315.
[44] *Hay v B and Others* 2003 (3) SA 492 (W).
[45] *Life Healthcare Group (Pty Ltd) v JMS* 2014 JDR 2391 (GJ) – the case dealt mainly with the right to life as expressed in the Constitution. The minor child was hospitalised at Life Healthcare Group, where the child was attended to by Dr.Moodley. Dr.Moodley had treated the child from the birth and was of the opinion that due to the child's condition the child would suffer imminent heart and cardiac failure unless a blood transfusion was administered. The parents had refused a blood transfusion due to their reliance on their religious beliefs and practices. (at 2391) The courts analysis of the case will be discussed in the chapters to follow.
[46] Section 36 of the Constitution, 1996 (note 8 above).

detriment of their minor child we are serving the best interests of the child and adhering to the standard, which ultimately takes precedence.

Greenawalt[47] (2006) refers to a critical quote in which he says 'parents may martyr themselves but they are not free to make martyrs of their children'[48]. This captures the essence that parents are free to make religious choices however when such choice interferes with the rights of the child, there needs to be some adjudication on the priority of the rights of the child. He indicates that there is no argument that a parents autonomy is of absolute importance thus leaving it open for limitation. Lamparello[49] (2001) illustrates that the right to health care in children must be adhered to by parents. The right of parents in raising their children include the right to ensure that the child's health and well-being is protected. If parents themselves fail to ensure such right then it is clear that the right to religion must be limited.

Courts have not always attended to issues about whether faith healers or persons reliant on faith healing should be civilly liable if their choices result in harm to the child.[50] Liability on parents who unreasonably refuse consent for their minor children has not been incorporated into South African law thus far. However English courts have stated that the "free exercise clause" is used as a defence for parents who refuse consent for medical treatment for their minor child[51]. The court[52] indicated that the free exercise clause having its basis under English law is not beyond limitation and that such exercise of the right to practice one's religion should be limited if such practice is a contrary response to the well-being of the child.

The doctrine of *parens patriae* has been viewed as the most fundamental weapon in controlling the upbringing of children by parents. In using this doctrine it is aimed at extending this principle to include third parties that are interested in the well-being of the child to provide consent for a child's health care only if parents unreasonably refuse to do so based on religious beliefs. Having

[47] K Greenawalt 'Objections in Conscience to medical procedures: Does Religion make a difference?' (2006) 4 *Univ. of Illinois LR* 799.
[48] Ibid 800.
[49] A Lamparello 'Taking God out of the Hospital: Requiring parents to seek Medical care for their children regardless of Religious Belief' (2001) *Tex. F. on C.L & C.R* 47, 49.
[50] LA Greenberg 'In God we Trust: Faith healing subject to liability' (1997-1998) *14. J. Contemp. Health L & Pol'y,* 451, 454-455.
[51] Stanfield (note 5 above) 52.
[52] *Prince v Massachusetts* in Stanfield (note 5 above) 55.

the basis of the “free exercise clause” does not indicate that it is not totally free from legislative intervention.

1.4 RECOMMENDATIONS

Having indicated the approach by English courts we can look at the South African legal framework. In giving effect to the limitation clause, this paper will indicate recommendations regarding the consequences of refusal of medical care or consent for such care by a parent. South African law does not include in its inherent jurisdiction over the child, the criminal or civil liability of the parent who refuses such consent. However one can say that by refusing such consent the parent is actually harming the child and not acting accordingly to serve the best interests of the child. Thus this goes against the provisions as stated in the Constitution and this will ultimately result in a constitutional infringement and would warrant liability.

However South African law should include the concept of third party intervention. This type of intervention serves many purposes. It will eliminate the liability of a parent but most importantly it will serve the best interest of the child and will allow for the well-being of the child to be protected from harm. This paper will seek to interpret what is meant by third party intervention and will use the concept of state intervention as introduced by many states in North America as a basis to discover whether such intervention will be appropriate in South African law. The main reason for the introduction of third party intervention is to protect the child’s interests and to acknowledge that a parent’s right to freedom of religion should not infringe on the child’s right to health.

This paper will look at the approach of various authors and the legislative framework currently in place and will try to serve as a basis for a new intervention appropriate enough to cater for the child’s medical rights in South Africa.

1.5 KEY TERMS

Child/Minor, Medical care, Parents/guardian/caregiver, Consent, Best interests of the Child, Faith Healing, *Parens Patriae,* limitation, Neglect, Liability.

CHAPTER 2: LITERARY OPINIONS ENCAPSULATED UNDER DOMESTIC AND INTERNATIONAL LAW

2.1 INTRODUCTION

'Various religious denominations oppose the use of conventional medical treatment'.[53]

Conflicts arise when parents have to decide between controlling the upbringing of their child and the law.[54] Parents are faced with the choice of whether to disobey their religious beliefs and provide medication for their child or whether to disobey the law and be liable for the death of their child which could have been prevented through treatment.[55]The state has been active in its participation in protecting children from neglect and endangerment.[56] This chapter will focus on the opinions of various authors regarding the refusal of medical care.

However, the parent-child relationship has drifted from affording extensive protection to parental rights over children's rights. Legislation and judicial pronouncements have been increasingly choosing children's rights as a predominant aspect when the child is involve instead of the rights of parents.[57]

2.2 PARENTAL RIGHTS AND RESPONSIBILITIES

In the eyes of the law, children have been granted legal rights of parental care; autonomy and the right to receive medical and health care. Parents are the natural guardians of their minor children and are thus placed with responsibilities and duties over the minor child. 'Common law viewed children as the virtual property of their parents.'[58] In their duty as parents they are to provide health care to their child as one of the child's basic needs. 'Parents are under a duty to care and provide for their dependent children'[59] this can be interpreted to include medical health care.

[53] Stanfield (note 5 above) 46.
[54] Stanfield (note 5 above) 47.
[55] Stanfield (note 5 above) 45.
[56] Stanfield (note 5 above) 46.
[57] B Clark 'my right to refuse or consent: The meaning of consent in relation to children and medical treatment' (2001) 64 *THRHR* 605, 612.
[58] Stanfield (note 5 above) 76.
[59] M Brazier & E Cave Medicine, *Patients and the law* (2007) 4th ed Lexis Nexis Butterworths 384.

Parents believe that their actions are beneficial to their child and by doing so they do not intend to harm their child.[60] All persons responsible for children are to act in the child's best interests and ensure that when decisions are made on behalf of the child that such decision is beneficial to the child. Should parents transgress such a duty to provided necessary medical care, even in a non-emergency situation, they have violated their duty to act in the child's best interest and to protect the child from neglect and maltreatment.[61]

Children lack the capacity of making autonomous decisions regarding their medical care. Thus they are placed under the care and responsibility of their parents who have the authority over such decisions. As part of their obligations as parents they are granted an unrestrained discretion to make decisions on behalf of their child, as their legal guardian[62]. However such discretion shall not be abused and shall not harm the child in anyway. However in exercising their discretion parents must always act in a manner which ensures the child's well-being regardless of other objection.[63] The authority placed upon parents includes their ability to make decisions regarding the medical care of their child.

With regard to informed consent, parents are statutorily[64] bound to provide consent for their child. The medical practitioner must explain the risks benefits, consequences and social implications to both the child and parents of the proposed treatment or operation prior to obtaining consent from the parents on behalf of the child.

2.3 BEST INTERESTS OF THE CHILD STANDARD

The standard of the 'Best Interests of child' will be evaluated to determine the effect upon the child in decisions made by parents The 'Best interests of the child should be of utmost

[60] Stanfield (note 5 above) 48.
[61] Stanfield (note 5 above) 75.
[62] Clark (note 57 above) 606.
[63] H Armand, M Antommaria et al. 'Conflicts between religious or spiritual beliefs and Paediatrics care: informed refusal; exemptions and public funding' (2013) 132 5 *Journal of American Academy of Paediatrics* 962,963
[64] The Children's Act (note 2 above) addresses that 'a parent must provide consent for the child for any medical treatment or surgical operation if the child is below the age of 12 and incapable of consenting or if the child is above the age of 12 but does not have the sufficient maturity to understand and appreciate the risks, consequences benefits and social implications of the proposed treatment or operation' (s129 (4) & s129 (5)).

importance in all issues involving children.'[65] The 'standard' was introduced into South African law in the case of *Fletcher v Fletcher*[66] where the courts found that this standard is significant when making choices that affect a child.[67] The authors have looked at what the courts have ruled and affirmed that it is the most important concept in decision making. The Court has indicated that the main concern was not the parents' rights but rather the child's best interests that were largely at stake. When making any decision, the decision maker must adhere to the standard and ensure that the child's best interest's is catered for.[68] Ferreira (2010) looks at how s28 of the Constitution is child-centered and that it has been accepted that the "child", is the main criterion looked at in resolving any issue relating to the child.

Therefore certain factors should be considered in this assessment. Such factors include age, culture and individual circumstances of the child. All these relevant factors must be considered in its entirety when determining what is in the child's best interest. South Africa has founded this principle from common law in the case of *McCall v McCall*[69] where the court stated that the factors are open-ended and these factors serve only as a guideline to regulate what is in the child's best interest.

Various authors have looked at the legislative principles and have decided that the constitution indicates 'that a court, tribunal or forum must consider international law and may consider foreign law in their deliberations.'[70] Therefore there has been much influence form international law regarding the best's interest of the child standard. The United Nations Convention on the Rights of the Child 1989 (herein after referred to as CRC)[71] and the African Charter on the Rights and Welfare of the Child 1990 (herein after referred to as African Charter)[72], which was ratified by South Africa in 2000 are two international instruments that will, be discussed in relation to the rights of children. However these principles and instruments will be discussed further in Chapter 3.

[65] S Ferreira 'the best interests of the child: From complete indeterminacy to guidance by the Children's Act' (2010) 73 *THRHR* 201, 201.
[66] 1948 (1) SA 130 (A).
[67] Ferreira (note 65 above) 201-202.
[68] Clark (note 57 above) 606.
[69] 1994 3 SA 201 (C).
[70] The Constitution s39 (1) (b) & (c).
[71] The United Nations Convention on the Rights of the Child 1989 (herein after referred to as CRC).
[72] African Charter on the Rights and Welfare of the Child 1990 (herein after referred to as African Charter).

Ferreira (2010) seeks to ensure that the "best interests of the child" standard must be regarded as a 'primary consideration in all actions of the child.'[73] Ferreira (2010) creates a foundational basis on when the standard shall apply. Thus she indicates that it is of 'paramount importance'[74] that this standard is properly applied to ensure optimal protection for the child. There has been inclusion of the common law regarding this standard and some basic principles have developed. These are to be considered when looking at the child's best interests are as follows: (a)The child should be allowed to participate in his or her own decisions; (b) Protection against neglect and maltreatment; (c) Prevention of harm to the child; (d) And the right to receive basic health needs. These principles are further enshrined in s28 of the Constitution.

Katz (1996) states that when such patient refuses the medical treatment for himself or on behalf of his or her child, the medical practitioner may have to consider the following conditions: (a) in the professional opinion of the medical practitioner the administration of such medical treatment is necessary to preserve the life of the patient and prevent death or injury; (b) the patient is unconscious; (c) the patient is a minor child who requires parental consent.[75] A medical practitioner, in consideration of the above circumstances, must indicate whether in his professional opinion such patient requires administration of medical care in order to ensure his or her interests are promoted and whether if such care is not provided then serious injury or even death may occur.[76] The author illustrates that by taking into account all these factors the best interests of the child will be preserved.[77]

The best interest of the child standard has faced the courts on many occasions. The courts have deliberated on this matter and have almost always turned to the Constitution as the guiding principle for their final decision. The principle has been criticized in various ways. Ferreira (2010) states that the standard has sometimes been difficult to assess objectively thus creating problems in its application in court situations.[78] Ferreira (2010) indicates that sometimes it becomes difficult to apply and when this difficulty arises the courts are challenged in determining whether to apply the standard subjectively or to weigh up the competing interest and

[73] Ferreira (note 65 above) 203.
[74] Section 28(2) of the Constitution.
[75] M Katz 'The Doctor's Dilemma: Duty and risk in the Treatment of Jehovah's Witnesses' 1996 113 *SALJ* 484, 492-493.
[76] Ibid.
[77] Ibid.
[78] Ferreira (note 65 above) 204-207

rights. [79] This poses a major problem especially in cases where the child's health is a necessary right that requires urgent protection. None of the authors have provided a fixed and determinable meaning of the standard and have basically left it open for interpretation by the courts.[80]

2.4 PARENTS RIGHT TO RELIGION AND RELIANCE ON FAITH HEALING

The concept of the right to freedom of religious practice has been grounded into the South African Legal system for many years. The Bill of Rights has stated that every person has a 'right to freedom of conscience, and religion'[81]. This right however has been argued to carry with it a type of protection for parents not to be criminally liable for practices that are within their religious realm.[82]

The right of the parents to practice their religion is regarded as a civil right and shall be exercised in terms of the legislation granting it its protection. The most vital question that one generally asks is 'whether anyone should have a legal right to make the choice to choose refuse or decline medical treatment for children?'[83] Persons who believe that their reliance on medical care will contravene God's law are those that will possess the strongest claim on the right to freedom of religion.[84]

The Van der Schyff (2002) indicates that when a parent exercises their right to participate in a religious activity they also have the corresponding right to refuse to do anything that is against their religious practice.[85] Thus when parents choose to rely on faith healing as a medical treatment for their child, they are exercising their Constitutional right to freely practice their religion. The US Supreme Court[86] indicated that 'the right to practice ones religion freely does not include liberty to expose the child to communicable disease, ill health or death'[87].

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[79] Ibid.
[80] Ferreira (note 65 above) 207.
[81] Section 15 of Constitution (note 8 above).
[82] G Van der Schyff 'The Right to Religious objection in South African Law' (2002) 19 *SALJ* 526, 526.
[83] Greenawalt (note 47 above) 800.
[84] Greenawalt (note 47 above) 800.
[85] Van der Schyff (note 82 above) 527.
[86] *Prince v Massachusetts* (note 40 above).
[87] Armand et al (note 63 above) 963-964.

The rights of parents and guardians are therefore, subject to the principles stated in the constitution. The parent's right to practice their religion includes their right to make choices regarding their child's treatment in accordance with their particular faith.[88] Although the right to freedom of religion has featured in the Constitution religious objections have featured in the medical arena.

'Parents may decide whether to bring their child up in a particular religious faith but they have no duty to do so'[89]The aspect of parenthood becomes increasingly challenging when parents are faced with making decisions regarding whether or not to grant consent for medical treatment or to rely on faith healing. Thus, the concept of faith healing will be defined, outlined and contrasted with the right to medical care. Faith healing is regarded as an alternative to conventional medical care.[90] Faith healing as an alternative has conjured many issues surrounding legality.

These issues relate to: 1) 'when a parent chooses faith healing over conventional medical care for their child and refuse medical care for the child'[91] and 2) 'where an adult patient chooses faith healing.'[92]

'Healing through prayer is at the center of Christian science theology'[93]. Christian Science has laid down its foundation of curing illness through faith healing. They strongly proclaim that the church should educate and encourage its subjects about the advantages and disadvantages of faith healing[94]. They feel that conventional medicine is incapable of curing the child of the illness that has presented itself. Thus, if churches encourage faith healing and do not introduce medication as a cure for injury and illness then the only viable option for cure or treatment will be reliance on God. Faith healing is regarded as voluntary free prayer by a faith healer for the

[88] Van der Schyff (note 82 above) 532.
[89] Hoggett B M *Parents and Children: The law of parental responsibility* (1987) 3rd Edition Sweet & Maxwell 14.
[90] Greenberg (note 50 above) 451.
[91] Treatment refusal is defined as:

> 'the overt reaction by the patient or his or her representative of medication, surgery, investigative procedures, or other components of hospital care recommended or ordered by the patients physician'

[92] Greenberg (note 50 above) 453-454.
[93] Stanfield (note 5 above) 49.
[94] Greenberg (note 50 above) 455.

benefit of the patient. Thus faith healing is a form of prayer that Christian scientists proclaim to be an expression of their right to practice their religion.[95]

'Christian Science practice consists of heartfelt yet disciplined prayer that brings to a case needing healing a deeper understanding of a person's actual spiritual being, as a child of God.'[96] Christian Science healers feel that their sincere and loving devotion to God will be the cure that they require for their child's wellbeing.[97] 'Faith healers profess to cure disease utilizing faith and prayer and denounce the use of conventional treatment.'[98] However one needs to be cautious in accepting just any 'faith healers' prayer as not all faith healers are of the same denomination. Christian Science thinkers believe that healers of a particular faith can only heal through the prayer of that faith. This belief is what drives the healers to seek persons of that particular faith and introduced this type of faith healing to ensure that they receive those benefits. Any remuneration accepted by any faith healers would not be regarded as exercising ones freedom of religion.[99]

'Christian scientists believe that diseases and sickness are manifestation of the mind that can be overcome only by praying and drawing closer to God'[100]. Some Christian Science thinkers believe that healing methods are inconsistent with medical care and thus believe that parents who are actors of that Christian faith should resort to faith healing rather than medical care for their child.[101]

Parents therefore, choose to rely on their right to religion[102] and their reliance on faith and God as opposed to medical care for the reason that they are 'safer and the best choice for their child'.[103] 'Having these strong beliefs in spiritual healing often forced parents to choose between breaking the law and being condemned by God'.[104] A parent's action to refuse necessary medical care for their child has been perceived by the public norm as immoral and illegal. However

[95] Greenberg (note 50 above) 467-468.
[96] Hartsell (note 30 above) 504.
[97] Stanfield (note 5 above) 49.
[98] Greenberg (note 50 above) 455.
[99] Greenberg (note 50 above) 467-468.
[100] Hartsell (note 30 above) 504.
[101] Armand et al (note 63 above) 963.
[102] Section 15 of the Constitution (note 8 above).
[103] Stanfield (note 5 above) 48.
[104] Stanfield (note 5 above) 57.

sanctions have not been put into place to date.[105] This will be discussed in more detail in later chapters. Some churches do not solely believe in faith healing but allow their followers to seek medical attention for their children when faith healing as an option has been unsuccessful or where the incident is of such a high need or priority to save the child's life. However Christian Science churches are sole believers of faith healing as a method of treatment for children[106] regardless of consequences.

A classic example of Christian Science thinking is grounded in the, Jehovah's witnesses who believe that they shall not accept any type of blood transfusion or any procedure relating to blood irrespective of the result or outcome. Blood transfusions are one such form of necessary medical treatment. Blood transfusions replace lost blood or decreased blood[107]. However Jehovah's witnesses' reliance that god will save the child opposed to the transfusion is what gives them their basis for the refusal of medical intervention.[108]Jehovah's witnesses do however; accept other types of medical care.[109] A few other real life examples will be illustrated to indicate how parents choose for faith healing as a medical alternative.

A case study of an 8 year old Murray illustrated that the parents wanted their critically ill child to be released into their custody to be treated by a Christian healer. The case study showed that the parents strongly believed that their belief in their faith would cure their child of his life threatening illness.[110] The parents had taken control of their child's recovery and by chance the child had recovered. However some situations are simply not that lucky. Such a situation is in fact unlikely. One can believe in their faith and religion but such belief should not be to the detriment of the child's life or to such an extent that it gambles with a human life. Another scenario of 11 year old, Ian, whose mother refused to provide him with medical care, when he complained of a stomach-ache, and opted to call a Christian practitioner to pray for him. The child died a few days later.[111]

[105] Hartsell (note 30 above) 502.
[106] W Glauser 'United states still too lenient on "faith healing" parents, say children's rights advocates' *CMAJ* August 9, 2011, 183 (11) at E709-E710, 709-710.
[107] Greenawalt (note 47 above) 800.
[108] Stanfield (note 5 above) 50-57.
[109] Hartsell (note 30 above) 506.
[110] Hartsell (note 30 above) 499-500.
[111] Hartsell (note 30 above) 500-501.

Another example is from Oregon State in the United States where 'two parents refused to opt for medical treatment for their infant daughter who had a tumour. Their reason for their refusal was based on religious grounds. The parents have recently been sentenced for these actions.[112] They were found guilty of criminal mistreatment for allowing their 18 month old daughters haemangioma to grow to the size of a golf ball which covered her eye.'[113] I would assume from these circumstances that such behaviour may well amount to neglect or maltreatment by the parents.

These parents were strong believers in the Christian faith and relied on prayer and healing by the hands of God to cure any illness. Dr. Seth Asser contends that the legislative making bodies fail to realize the risks associated with faith healing. Religious exemption clauses are still very prominent in some countries and are exercised as a possible defence for parents who neglect their child. However, Canada is one such country that does not have these exemptions and that neglect of the child could lead to criminal sanction placed upon parents.[114]

South African law does not have much evidence on the concept of faith healing. Nevertheless some incidents have reached the courts for judicial intervention. The most prominent leading case under the South African legal system is *Hay v B*. This case will be dealt with in detail under chapter 3. Therefore it is situations like these that bring, to the laws attention, that children require protection even from their own parents. Further, parents need to realise that their choices for their child's health and well-being may sometimes have adverse effects and may actually not be the in the child best interest.

2.5 THE REFUSAL OF CONSENT FOR MEDICAL CARE, BY PARENTS BASED ON RELIGIOUS OBJECTIONS

Greenberg (1997) has referred to the courts that are of the view that competent adults can autonomously refuse to provide consent for oneself to receive medical care due to their religious beliefs.[115] However such position cannot be accepted as a basis for the refusal of consent by a

[112] Glauser (note 106 above) 709.
[113] Glauser (note 106 above) 709.
[114] Glauser (note 106 above) 709.
[115] Greenberg (note 50 above) 460.

parent on behalf of an incompetent child. In the process of refusal of medical care one needs to realize that the reason for such refusal is not arbitrary but rather because such persons have an alternative for medical care. They are of the opinion that faith healing will be the best suited cure for the patient.[116] Thus parents are ignorant to the criteria which are required in determining medical care that is in the best interests of the child.[117]

It is common acceptance that a 'parent's decision should be presumed to be in the child's best interest'[118] It has been assumed that parents will not intentionally make decisions that harm the welfare and life of the child. However, the South African Constitution having guaranteed the right to freedom of religious practice further includes that when practicing ones religion, one must not do so in a manner that harms another.[119] The Common law view point of parental autonomy, to freely exercise one's religion, cannot be one that overrides the needs of the child enshrined in the Constitution. These authors have illustrated that the courts need to view such power of the parents over child as sometimes being against the child's best interest.

One needs to ensure that when looking at what the law states one needs to examine what are the benefits of such medication to the child.[120]

> 'The basic moral principles of justice and of protection for children as vulnerable citizens require that all parents as caretakers must be treated equally by the laws and regulations that have been enacted… [in order] to protect children'[121]

In order to determine when a parent may exercise his or her or their collective right to adhere to religious practice, and it will not be against the best interest of the child is a value judgment to be determined by the courts. Further a parents rights to their religion will need to be balanced against the more competing right of the child's best interests.[122] This balancing enquiry will be addressed further on. In such a situation the child's best interest will incorporate receiving necessary and adequate medical care regardless of the parents' wishes.

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[116] Greenawalt (note 47 above) 802.
[117] Ferreira (note 65 above) 208.
[118] Stanfield (note 5 above) 81.
[119] C Norman et al 'Religious Exemptions from Child Abuse Statutes' (1988) 81 *Journal of American Academy of pediatrics* 169, 169.
[120] Norman (note 124 above) 170.
[121] Norman (note 124 above) 170.
[122] Stanfield (note 5 above) 81.

Parents and doctors often have opposing views. Conflicts between religious beliefs and paediatric care often arise. The relationship between religion and medicine can be very intricate. The Paediatric Care policy in America is indicative of the following issues; that parents refuse medical treatment for their child; religious exemption clauses against neglect and abuse laws; and any alternative methods to avoid neglect and abuse of these religious practices.[123]

However doctors face a very controversial decision when life-saving medical care is necessary. Medical practitioners face legal consequences when refusals by parents impact on the child's right to health care. They face many ethical implications as well[124]. Medical practitioners have a legal and ethical duty under the guidelines of the Health Professional Council of South Africa (HPCSA) to always act in the best's interests of their patients. If the doctor disregards the parents' wishes and provides the medical care to the child, the doctor may be faced with a civil charge of assault on the child. [125] Katz (1996) referred to the *Phillips v De Klerk* case[126] where it is indicated that the patient believed that the choice to die was not the choice of the doctor but rather the choice of God. With this belief in mind he indicated that the patient puts forward that he rather trust the healing of God as opposed to medical care. [127]

Respecting autonomous decisions of patients is what is expected of all health care personnel. However this position cannot be said to apply in the case of children who are refused medical care as this will now lead to a circumstance not in accordance with the best interest of the child standard.[128] Therefore all medical practitioners or nurses shall use their skill, knowledge and expertise in making a medical decision best suited for the child's needs.

2.6 THE STATE AND COURT'S DUTY AS "*PARENS PATRIAE*"

Parents are entitled to raise their children according to their own faith[129]. However state authorities can only intervene if the choice of the parents causes any harm or injury to the

[123] Armand et al (note 63 above) 962.
[124] L L Palmer & S Kools 'Parents' refusal of Medical Treatment based on religious and/ or cultural beliefs: The Law, Ethical Principles and cultural implications' (2004) 19 *Journal of Pediatric Nursing* 352, 351.
[125] Katz (note 75 above) 485.
[126] Katz (note 75 above) 485.
[127] Katz (note 75 above) 485.
[128] Van der Schyff (note 82 above) 531.
[129] Hoggett (note 89 above) 14.

child[130], 'so as to bring them within the grounds for care proceedings or prosecution, sincere religious beliefs is then no defence'[131]. The state is in a position to allow for intervention in the parents and child relationship when there is a distinct failure by the parent to accomplish their duties towards the child.[132]

The Doctrine of *Parens patriae* is used by the courts to limit a parent's decision for refusal of medical care based on religion.[133] 'The doctrine of *Parens patriae* limits the use of the defence of parental autonomy for criminal liability imposed on parents who refuse medical treatment for their children based on religious objections and beliefs'.[134] The *Parens patriae* doctrine provides the state with powers to act as a parent for the country and to be able to provide a limitation on parental freedom of religion when it adversely affects the child's well-being and to further provide the child with the necessary medical care. The state would be justified in intervening in the rights of their child and this intervention would not be regarded as an unreasonable imposition on a constitutional right.[135]

The California Supreme Courts have affirmed that a parents right ends where someone else's right begins. [136] However, Hartsell (1998-1999) indicates that courts are facing a serious barrier with parents who try to escape liability. Parents are invoking the excuse that they are unaware of the extent to which spiritual healing is legal. Thus their actions, exceeding that extent, may result in liability to which they have not been informed.[137] Some international courts have agreed that there be a 'fair warning awarded to parents' however other courts such as the California sand Massachusetts reject that parents be given a warning at all and that refusal shall be simply criminal if it results in death or harm to the child.[138]The Tennessee Statute will be discussed in Chapter 3 and will be used to compare with similar South African Statutes that do not allow spiritual healing as an absolute alternative for Christian Scientists.

[130] Ibid 14.
[131] Ibid 14.
[132] Katz (note 75 above) 10.
[133] Stanfield (note 5 above) 73.
[134] Hartsell (note 30 above) 516.
[135] Hartsell (note 30 above) 516.
[136] Hartsell (note 30 above) 517.
[137] Hartsell (note 30 above) 519.
[138] Hartsell (note 30 above) 520-521.

Stanfield (2000) expresses her view on the doctrine as follows; 'when a state acts on the power granted to them by the doctrine, it has a wide range of authority in limiting parental freedom and protecting the rights of children.'[139] State intervention regarding a child's wellbeing and safety is vital in all countries. The state would have an active duty to intervene when a parent's choice is detrimental to the child's health. The states intervention is valid due to its underlying duty to protect the lives of its citizens.[140]

Thus using the State intervention approach the South African Constitution can be viewed as intervention with regard to the rights of persons, and an instrument to be used to protect such right. The right to life enshrined herein justifies the interference or intervention by a third party. In the protection of children, the law is expected to extend its protection to the child through legislation. This requires the legislature to provide clear penalties for when a child suffers maltreatment, neglect or even death based on the parents' choice to refuse medical care.[141] Authorities may only intervene in such cases when the parent's choices tend to impose some positive harm on the child.[142]

English law has supported the notion that the court will act as the upper guardian that is the *Parens patriae* of minors when the need arises. The doctrine of *Parens patriae*[143] has become increasingly supported in South Africa. This indicates that South African courts having this form of power, shall act as the parents of children who require necessary medical care should their biological parent refuses to provide such consent. In other states the doctrine has widely supported state intervention to limit the acts of parents who violate their parental responsibilities by refusing to provide medical care for their child.[144] Courts, in using this power will weigh the child's best interests against the refusal of the parents especially where the child's welfare is at stake and the medical care will provide the child with relief.[145]

[139] Stanfield (note 5 above) 74.
[140] Stanfield (note 5 above) 74.
[141] Stanfield (note 5 above) 83.
[142] Hoggett (note 89 above) 14.
[143] T L Beauchamp 'Methods and Principles in biomedical ethics' 2003 26 *J Med.Ethics*, 269, 271 - 'parens patriae' means 'parent of the country'.
[144] Beauchamp (note 143 above) 271.
[145]Beauchamp (note 143 above) 271.

In addition, South African law has affirmed this position in statutes and indicates that the court is best suited to intervene when requested to do so.[146]The High court as a custodian of the minor has the power to act on behalf of the parents and provide the child with medical care through a court order. Such intervention by the court is not limited. However the court will only act as a guardian should the parents unreasonably refuse? Although Clark (2001) indicates that the court is in a position of power over the parents, his indication does not protect a child indefinitely. Thus the intervention of third parties in a similar manner as to that of the court is what this dissertation aims to add to the realm of protection afforded to children. 'The High Court may override parental objections and… authorise medical care'[147] for the child. However this position is somewhat flawed as it gives the court a discretion by using the word "may" and does not provide an unfettered discretion to afford children protection.

Courts have also reflected on the negative implications, both physical and psychological, that a child may face when they are refused medical care.[148] Armand (2013) uses the Child Abuse Prevention and Treatment Act [149] 'which indicates that a parent or guardian who participates in their religious beliefs and refuse to provide medical care for that reason alone, shall not be considered as a negligent parent.'[150] However the Academy of Paediatrics has found that religious exemptions laws should be repealed. These laws fail to provide adequate protection to children as it fails to accommodate for the rights of children to receive medical care.[151]

2.7 LIMITATION OF THE RIGHT TO RELIGION

The right to exercising ones religion is not an absolute right but rather it is a relative right. This would indicate that a right to exercise ones religion can be limited in the face of the law and may be reasonable and justifiable in an open and democratic society.[152] The courts and the state are tasked with the duty to limit the right to religion in order to protect the child's right to health.

[146] Clark (note 57 above) 614-615.
[147]Clark (note 57 above) 615.
[148] Armand et al (note 63 above) 963-964.
[149] Act of 1974.
[150] Armand et al (note 63 above) 964.
[151] Armand et al (note 63 above) 964.
[152] Stanfield (note 5 above) 55; Constitution of the Republic of South Africa, 1996 (The Constitution) s36.

'Religious exemption clauses do not exist in most states'[153] and certainly do not apply in South African law. This will be discussed in further chapters. However under South African law the Constitution has extended the application of its power to ensure that all rights be protected and that no right be restricted without valid cause. This would mean that the right to freedom of religion exercised by the parent would enjoy constitutional protection to an extent but not to a point that it impinges on some other right enshrined in the Constitution.

'Religious parents want to raise their children according to their religious beliefs'.[154] This principle shall be adhered to as far as it does not affect some other person or some other right. Therefore the rights of a parent may be limited in order to protect the child from harm especially where decisions by the parent, in exercising their freedom of religion, may be detrimental to the child. The parents may feel that they are acting in the best interest of the child; however such interpretation of their decision may only be confirmed by the court who decides if such decision by the parent is in the best interest of the child.[155]

American law enforces the position that parental autonomy shall be subject to limitation clauses. The South African Constitution has clearly expressed its limitation of rights under section 36.[156] Although parents enjoy the 'liberty'[157] of making decisions regarding their child's health, such liberty can be limited or restricted if any decision made would harm or cause damage to a child and which conflicts with the "best interests of the child" standard. The exercise of one person's right shall be no reason for the violation of another's.[158]

The United States have indicated that only in rare exceptional cases will the refusal of consent, for medical care for the child, be justified. Parents are expected to make themselves aware of such exceptions. Should they fail to do so or are ignorant or uneducated on these facets they are likely to face criminal or civil liability in the event of the death of the child.[159]

[153] Stanfield (note 5 above) 57.
[154] Greenawalt (note 47 above) 799.
[155] Van der Schyff (note 82 above) 532.
[156] Van der Schyff (note 82 above) 532.
[157] Armand et al (note 63 above) 963.
[158] Armand et al (note 63 above) 963.
[159] Stanfied (note 5 above) 83.

Greenawalt (2006) has referred to the 'Supreme Court [which] held many years ago, [that] parents may martyr themselves, but they are not free to make martyrs of their children.'[160] This creates a valid argument in that the right to parental freedom and autonomy of religion should not be regarded as an unqualified right. The crucial aspect that needs to be decided on, when limiting the right to freedom of religion, is whether the parents will have the final decision making authority regarding necessary medical treatment of their child or will the courts provide alternative relief?[161]

The dilemma that presents to the courts is to determine whether the right to religion as a sole condition is justifiable and permissible for the refusal of medical care for the child? This criterion is sometimes viewed in relation to the free exercise element of the right to religion. Mostly those that exhibit their views that practicing their religion to an extent, where they refrain from the use of medical treatment as a whole, view this refusal to form part of their free exercise, high lightened within their right to freedom of religion[162]. Some states, like South Africa, do not believe in this interpretation of 'free exercise'. In relation to this interpretation, the court will need to investigate the legislative reasoning behind the free exercise of religion and in doing so they will have to consider the well-being and the best interest of the child[163]. This international interpretation is somewhat similar to the limitation clause under South African law.

An evaluation must be made when rights of the child are at stake. There must be an evaluation of the rights of the child and the need for medical care which should be weighed up against the risks, harm and consequences of the refusal of medical care by the parent.[164] This evaluation has been viewed by authors as the limitation of the right to freedom of religion, which in turn is the right of parental autonomy, against the right of the child to receive medical care. Writers have been careful in not concluding that the refusal to provide medical care to the child amounts to neglect and maltreatment. They have, instead, left this interpretation open to the courts for deliberation.

[160] *Prince v Massachusetts* in Greenawalt (note 47 above), 800.
[161] Greenawalt (note 47 above) 808.
[162] Greenawalt (note 47 above) 800-801.
[163] Greenawalt (note 47 above) 801.
[164] Armand et al (note 63 above) 963.

2.8 RELIGIOUS EXEMPTION LAWS, NEGLECT AND LIABILITY OF PARENTS

Many authors have looked at how liability can be awarded to parents and whether such measures are forceful enough to ensure no repetition of such acts. The United States has introduced the concept of the "Free Exercise Clause" which allows for parents to successfully indicate their choice of not providing medical care to their child.[165] This clause entails that parents are free to believe in a particular faith or religion and that, that belief is considered an absolute freedom of belief. Case law has been used to discuss the free exercise clause; however it will be dealt with in Chapter 3. This free exercise clause is used to include the rights of a parent to practice their religion and not to be restricted in the upbringing of their own child.[166]

Prior to the introduction of the religious exemption clauses in the United States courts have convicted parents who refused medical care for their child based on religious reasons.[167] There is a general assumption that a parent should be free to exercise their autonomy and render decisions for their children.[168] However this right of parental autonomy is looked at as a justification for parents to decide not to facilitate medical care for their child. Courts are in the position to balance the 'right to freely exercise ones religion with the right of a child's health and well-being.'[169] Faith healers, are not regarded as the everyday doctor, thus their liability has become difficult to define. If they are to be civilly liable then, are they negligent or is it medical malpractice?[170]

The Tennessee Legal system has introduced penalties against parents who refuse medical care for their child. Their courts have found many parents criminally and civilly liable for declining conventional medical care for their child. Such parents were charged for involuntary manslaughter when their child died due to lack of medical care. Courts have been extensive in its application of holding parents criminally or civilly liable.[171] These cases will be discussed in chapter 3. Parents have been said to invoke the defence of religious rights in respect of refusal of

[165] Stanfield (note 5 above) 52.
[166] Stanfield (note 5 above) 53.
[167] Stanfield (note 5 above) 64.
[168] Stanfield (note 5 above) 71.
[169] Greenberg (note 50 above) 453-454.
[170] Greenberg (note 50 above) 453-454.
[171] Hartsell (note 30 above) 508.

medical care in order to be exempt from liability. This defence encapsulates spiritual healing as an exemption to child abuse and neglect. This is regarded as a statutory exemption because the state caters for a parent to be released from liability due to their practice of their faith and religion.[172] This has only been effective in the United States and only three states allow for parents who refuse medical care for their child and such action results in death can be exempt from conviction for such death.

'The American Academy of Paediatrics and American Medical Association opposes spiritual healing exemption'.[173] The academy has already formulated policy stating that a parent who relies on religious beliefs should not deny a child medical care based on that reason alone.[174] 'The policy states that constitutional guarantees of freedom of religion do not permit children to be harmed through religious practices nor do they allow religion to be a valid defence when an individual harms or neglects a child.'[175] Further section 129(10) of the Children's Act under South African legislation has indicated that refusal of medical care shall not be done if the only reason for doing so is religious reasons. Spiritual healing exemptions have been frowned upon by societal norms.

CHILD (Children's Health Care is a Legal Duty), is an organization founded by Rita Swan in 1983. This organization was inspired by Swan's personal experience as a Christian Science thinker and as strong believer in Christian faith who had lost her 16 month old son to meningitis which could have been prevented by medical treatment as she chose to rely on faith healing as a medical option. It is due to this tragedy that she realized that 'everyone should have the right to pray but with children (parents) should not have the right to deprive them of all the resources of medical science.'[176] 'After their reliance on spiritual treatment to heal a child, parents often seek to escape liability for a Childs death on the free exercise clause of the first amendment in the US constitution. Fortunately for South Africa there has been no inclusion of a free exercise clause. The evaluation of the limitation clause under 36 the Constitution will be dealt with in Chapter 3.

[172] Hartsell (note 30 above) 510.
[173] Hartsell (note 30 above) 511.
[174] Hartsell (note 30 above) 511.
[175] Hartsell (note 30 above) 511.
[176] Hartsell (note 30 above) 512.

If a judgment is made that the child had the ability to recover if they were given timeous treatment then the punishment imposed on the parents should be of a greater scale. The fact that parents raise the defence that they were ignorant of their child's illness is no excuse. Such reasons are inexcusable as the primary duty of the parent is to protect his or her child from any harm or danger.[177]

Asser in Glauser (2011) believes that parents who refuse or prevent medical care for their child should be treated and punished in the same manner as any other person who neglects or harms a child.[178] For those parents who go unpunished by the law, based on their religious belief that they will be condemned by God, have in fact philosophically, committed a greater evil. 'Neither deterrence nor retribution is served by imposing criminal penalties on conscientious parents who already suffer greatly if their child dies.'[179] Therefore it is submitted that there be no exemption from liability, as this does not provide adequate protection for the child. Thus, by introducing minor penalties for parents who fail to provide medical care for the child may be a start to a change in behavioural patterns of the parents. The reason for this is because criminal sanctions after the child has died has a "little too late" effect, to seek restitution for the child's life.[180]

It can be proposed that by not having parents appropriately reprimanded by the law and having parents escape liability, a far more protective approach should be adopted. At present there are measures that can be used to ensure that the child receives the appropriate medical care.

It is interpreted from Greenawalt (2006), who critically argues whether the state should compel treatment? In our case this would be whether the courts should compel treatment against the will of the parents or whether the legal system should impose sanctions on parents who fail to render such treatment to the child?

Some states utilize the power of their judicial system to order the treatment for the minor regardless of the religious exemption clause or the parent's objections.[181] This position is similar to that which is enshrined in the Children's Act[182] under the South African Legal system. The position indicates that the courts will act as the upper guardian of all minors and will order the

[177] Greenawalt (note 47 above) 815.
[178] Glauser (note 106 above) 710.
[179] Greenawalt (note 47 above) 815.
[180] Greenawalt (note 47 above) 816.
[181] Stanfield (note 5 above) 63.
[182] 38 of 2005.

medical care for the child if the parents unreasonably refuse. This will be further illustrated through legislation and cases analysis in the following chapters. The United States Constitution introduces that parents have the legal capacity to make decisions for their children. However, having this capacity does not stipulate that parental autonomy is absolute and that which cannot be limited.

The Department of Health and Human sciences have introduced its revised regulations in 1983 in the United States which catered for the terms maltreatment and neglect to include a 'failure to provide adequate medical care.'[183] Looking at what the United States defines as neglect, South African law can use this as a stepping stone to indicate that failing to provide necessary medical care to a child is tantamount to neglect and maltreatment. In making such a choice, those parents who elect to refuse medical care for their minor child and as a consequence the child suffers harm or dies as a result of failing to receive such care, may face the wrath of the court, which will classify such failure as neglect and then serve punishment in relation to its severity.[184]

Parents have been held to ignore their child's medical needs by resorting to faith healing and thus neglect their child's health and wellbeing. Failure to provide medical care when needed has been classified as neglect in the United States. The Department of Health and Human Science (HHS) has defined 'negligent treatment to now also include failure to provide adequate medical care.'[185] If South Africa is to follow upon the approach adopted by the United States, then South African courts will fail in their justice system. Rather they should encourage the disciplinary steps taken against parents for their lack of providing medical care to the child.

'Failure to provide proper care and medical aid where necessary will result in a conviction for wilful neglect of the child provided the parent is aware of the risk of the child's health'[186]. It is therefore submitted that by voluntarily refusing medical care for the child, the parent with full knowledge of the child's health and condition, would likely be engaging in wilful neglect. Should the child die, many states have said that this would justify a conviction of

[183] Stanfield (note 5 above) 59.
[184] Greenawalt (note 47 above) 814.
[185] Armand et al (note 63 above) 963.
[186] Brazier (note 59 above) 384.

manslaughter.[187] Religious objections will then be no defence for the injustice caused to the child.

If neglect is chosen as the crime for such failure then criminal sanction is justified. The courts will have to enquire into the severity of the failure and further to establish whether the person, i.e. the parent, making the decision on behalf of the child had any legal duty to act in the best interests of the child? If such duty existed then such person's failure will amount to an omission and will face criminal liability. The courts in determining the severity of the situation should consider what harm was caused to the child; the degree of harm caused to the child; whether there were any less restrictive means of treating the child and whether steps were taken to prevent the harm to the child? A main consideration which courts should undoubtedly look at is whether there was a possibility that the child having received such treatment would have survived the illness? Such consideration will fall within the discretion of the courts under South African law.

2.9 ETHICAL VIEWPOINT

Authors have become profoundly interested in the overlap between the ethical principles that govern the protection of children with the legally aspects of refusal to provide medical consent. This paper will briefly take the path into the ethical principles which affect the refusal of medical care for the child. Medical practitioners owe every patient a legal and ethical duty. One such duty will be to care for the patient and to ensure that the patient's best interests are taken into account.[188]

It has been indicated that physicians have an ethical duty towards their patient. This duty begins when the parents bring the child to the medical practitioner. Such duty shall be adhered to in order to protect the child's best interests.[189] The medical practitioner's duty is towards the child as his patient and not the parents as the legal guardian or authority, which provides consent. Thus if he refuses to respect the parents' choice he is not in contravention of any rule or law[190]. This

[187] *R v Lowe* [1973] QB 702.
[188] Katz (note 75 above) 484.
[189] Beauchamp (note 143 above) 271.
[190] Beauchamp (note 143 above) 271.

may be justified in any instance where the doctor can show that substantial harm would have been caused to the child had he not provided the medical treatment and that the parents have unreasonably refused to provide medical care for the child. [191]

The medical practitioner must ensure that he or she has advised and consulted with the patient prior to beginning medical care[192]. Such consent from patients is regarded as a legal prerequisite in terms of the National Health Act[193] before any form of medical care is administered. In certain situations children lack the capacity to provide autonomous consent, thus parents will also be ethically viewed as the principal caregivers of their children. Hence, parents would be in the position to provide consent for their child to receive medical care. However when such parents are put in this position, doctors often face a dilemma of whether or not to adhere to the parent's requests or to act in the best interest of the child if such request is harmful to the child, in terms of their ethical guidelines under the Health Professional Council of South Africa (HPCSA).

Ethically the principle of self-determination cannot be one that is used as a sole criterion[194]. The parent cannot be allowed to use his or her autonomous choice to refuse medical care required by the child. The parent also has an ethical duty towards the care and treatment of the child and such disregard for the child's health will not be ethically justified.

The South African constitution accepts respecting a person's autonomy however this does not include one person's choice or right to die. Such reasoning is not justified in a court of law. The law is explicit that persons shall not and are not able to use the defence that one consented to die, thus having this explanation in mind the courts cannot justify the parents to autonomously choose to refuse medical care for the child. There has been extensive controversy involving the responsibilities of parents and the rights of children especially with regard to the medical decision making.[195] Parental autonomy and respect for such is not regarded as an inconclusive factor. Such a right must be weighed against the child's best interest and be used as a determinative factor. [196]

[191] Beauchamp (note 143 above) 271.
[192] Katz (note 75 above) 484.
[193] National Health Act 61 of 2003.
[194] Katz (note 75 above) 484.
[195] Clark (note 57 above) 605.
[196] Clark (note 57 above) 613.

In determining how and when the state or courts should act in the bests interests of the child, medical practitioners will be faced with the four ethical principles, autonomy, beneficence, non-maleficence and justice.[197] Parental refusal of consent for medical care is also an ethical issue that must be determined by using the 4 basic ethical principles.

Autonomy means self-determination[198]. This can refer to parental autonomy as well as the child's autonomy. The parent may be free to practice their religion and in doing so they make decisions based on that practice. Medical practitioners, in ensuring autonomy, must respect the decisions of the parents. The converse of this relates to the child's autonomy, in that the practitioners are to respect the autonomy and the person of the child and do what has the best outcome for the child.

Beneficence means to 'act in the best interests of the patient.'[199] Thus the medical practitioner when treating the child as his patient must make decisions that are in the best interests of the child even if such decision violates that of parent's autonomy. This ethical principle further adheres to the best interests of the child standard. By respecting this principle the medical practitioner will be acting in his ethical duty to promote the welfare of the child who is his patient and not that of the parent.

Non-maleficence means to do no harm[200]. In using this principle the medical practitioner must, when attending to the patient, do no harm. Thus by adhering to the wishes of the parent and refusing to administer medical care for the child the medical practitioner will be doing harm to the child and will therefore be in violation of his ethical principles.

Justice means to act fairly and impartially[201]. Therefore the medical practitioner must act fairly and equally towards all his patients and if he is putting this principle into practice then he must administer the medical care to the child if such treatment is required.

The four principles approach has been intensively described by Beauchamp (2003). He has indicated that the ethical principles under the HPCSA have been evident in all cases where the

[197] Palmer & Kools (note 124 above) 354.
[198] Palmer & Kools (note 124 above) 354.
[199] Palmer & Kools (note 124 above) 354.
[200] Palmer & Kools (note 124 above) 354.
[201] Palmer & Kools (note 124 above) 354.

parents have refused medical care for their child. There are two moral rules that have to be considered as indicated by Beauchamp (2003):

'1) it is morally prohibited to risk death of a patient if his or her life threatening condition can be medically managed by suitable medical techniques;

2) It is morally prohibited to disrespect a parental refusal of treatment'. Parents who refuse such medical care state that they do so as they genuinely believe that they are acting in the child's best interest. The second rule can be further explained as follows, 'it is morally prohibited to disrespect a parental refusal of treatment unless the refusal constitutes child abuse, child neglect or violates a right of the child.'[202] This role can be explained to mean that practitioners are not obliged to follow the choices of parents in refusing to provide medical care. Thus this would indicate that it would be morally acceptable to override the parent's decision of refusing treatment because should the doctor adhere to the parent's refusal then that would amount to neglect and abuse of the child.[203]

The right to parental autonomy may affect the states duty to intervene in the protection of the child. However the courts must look at how the right to parental autonomy should be limited in order to save the life of the child.[204] Parents, who are adamant in not providing medical treatment for their child as they feel that they will be condemned by God, are actually endangering their child's life and wellbeing[205] and are not protecting the child's best interest.

2.10 THIRD PARTY INTERVENTIONS AS A SOLUTION

Parents may not believe that they have a positive duty to secure medical care for their child; however the academy of paediatrics realizes the importance and the need for the protection of children.[206] There have been no current viewpoints regarding the intervention by related or unrelated third parties in the protection of the child's health. Thus it is submitted that third party

[202] Beauchamp (note 143 above) 270.
[203] Beauchamp (note 143 above) 271.
[204] Beauchamp (note 143 above) 271.
[205] Beauchamp (note 143 above) 271.
[206] Armand et al (note 63 above) 964.

intervention will be looked at, as a positive recommendation for the legislature to protect children against maltreatment. This recommendation will be discussed in Chapter 4.

2.11 CONCLUSION

It is evident from the various deliberations by the authors that parents are the primary caregivers of a child. They are responsible for the wellbeing and development of the child. In this, they are to exercise all responsibility with care and all conduct shall pertain to the best interest of the child standard. All parents are to ensure that whatever decisions they make, such decisions must be in the interests of the child.

Thus having evaluated the various aspects that relate to the refusal of medical care for the child, and having looked at what views have been expressed by other authors, it is safe to conclude that the core of any decision is the best interests of the child, and that any matter concerning a child should always be decided using that standard. Further that the rights of parents are not the primary concern regarding medical care and that the right to prefer faith healing as an option for medical treatment is not absolute, especially when it impacts on the child's life.

Therefore should any parent fail to provide medical care for their child, the law will regard such parent as being in violation of their duty as a parent and will punish such person accordingly.

CHAPTER 3: DISCUSSION OF DOMESTIC AND INTERNATIONAL LEGISLATION AND JUDICIAL DECISIONS

3.1 INTRODUCTION

This chapter will interpret the various legislative measures and judicial interventions that have been used over the years to illustrate the child's rights and to provide support for the protection of children. The Constitution[207] is regarded as 'the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'[208] This provision has been introduced into the South African Constitution to award further protection to all citizens of the republic. This means that other laws can be enforced, but when doing so, such laws need to be in line with the Constitution.

Having the constitution as a firm grounding for the enforcement of laws this chapter will look at the various pieces of legislation that will discuss the rights provided to a child and how such rights can be protected. The hierarchy of legislation will be as follows. Firstly, the Constitution which is the most important piece of law in the protection of the child. This paper will then discuss the Children's Act[209] and its provisions in relation to the child and how these provisions offer protection to the child's rights. South African law indicates that in assessing any matter, international law must be considered.[210] International law has played a very prominent role in the protection of children's rights. International law has promulgated the United Nations Convention on the Rights of the Child 1989 (herein after referred to as CRC) which has become prominent in protecting children's rights worldwide. South African has ratified this convention in 1995. Further the African Charter on the Rights and Welfare of the Child 1990, which was ratified by South Africa in 2000, has contributed to the protection of children.

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[207] Constitution (note 8 above).
[208] Section 2 of the Constitution (note 8 above).
[209] Children's Act 38 of 2005(note 2 above).
[210] Section 39 of the Constitution – (note 8 above).
'(1) When interpreting the Bill of Rights, a court, tribunal or forum-
(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law; and
c) may consider foreign law.

3.2 THE RIGHT TO LIFE AND THE RIGHT TO HEALTH CARE

'Everyone has the right to life'[211]. This provision has been enshrined in the constitution which protects every person's right to life. The right to life has been referred to in *Life healthcare Group v JMS*[212] where the court ruled that the 'right to life is an invioable right'[213] and that all steps should be procured to ensure preservation of the child's right to life.[214] The court granted the order for the doctor to administer the blood transfusion irrespective of parental preference, in light of preserving the child's right to life.[215]

The meaning of everyone includes a child. Thus the child's life is constitutionally protected and he or she shall not be deprived of such right. In addition to the 'right to life, the child also has the right to dignity'[216], 'the right to bodily and psychological integrity'[217], 'the right not to be refused emergency medical treatment and the right to receive health care services'[218]. Right to health care has also been protected internationally. The child has a right to good health and to receive the 'highest attainable standard of health and access to facilities for the treatment of illness…'[219] It is the state's duty to afford full execution of this right by ensuring that necessary medical care is provided to all children and to ensure that parents and children are able to access health care.[220]

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[211] Section 11 of the Constitution (note 8 above).
[212] Supra (note 45 above) - *Life healthcare Group v JMS*
[213] Ibid at 2391
[214] Ibid at 2391
[215] Ibid at 2391
[216] Section 10 of the Constitution which states that 'Everyone has inherent dignity and the right to have their dignity respected and protected.' (note 8 above).
[217] Section 12 of the Constitution (note 8 above)-
'(2) Everyone has the right to bodily and psychological integrity, which includes the right-
(a) to make decisions concerning reproduction;
(b) to security in and control over their body; and
(c) Not to be subjected to medical or scientific experiments without their informed consent.'
[218] Section 27 of the Constitution –
'(1) Everyone has the right to have access to-
(a) health care services, including reproductive health care;
(b) sufficient food and water; and
(c) Social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.
(3) No one may be refused emergency medical treatment.'
[219] Article 24 of CRC (note 70 above); Article 14 of the African Charter (note 71 above).
[220] Article 24.2 of CRC (note 70 above); Article 14 of the African Charter (note 71 above).

The courts[221] have referred to the constitutional provision that everyone has a right to life[222]. The court directed that this right is one that is afforded to all persons; this will included the child in question. Thus the parents having refused to provide lifesaving treatment to the child was in fact robbing the child of his right to life. This right to the child is worthy of protection and as the upper guardian of the court they have a specified duty in protecting the right to life of the child.[223] Jajbhaj J insisted that, although he respects the parents religious beliefs, the right to life of the child cannot be questioned. These religious beliefs of the parents would have to be placed on hold, as their refusal of medical treatment was not regarded as reasonable or justifiable.[224]

These are a few important rights to which the child is entitled to by virtue of the law and by being a human being. The child should receive protection from the constitution in the same manner as any other person who wishes to express a constitutional right.

The child, although being a person under the age of 18[225] has the right to make decisions regarding his or her own body[226]. The child's recognition to be able to provide consent on his or her own behalf is evident in section 129(2)[227] and (3)[228] of the Children's Act. The child is

[221] *Hay v B and Others* (note 44 above) - The facts of this case are as follows: a paediatrician had made an urgent application to court for the administration of a blood transfusion to a child, who was refused the transfusion by his parents. The paediatrician said testified that there was no assurance that the child would survive after the transfusion had been given however there was a 'probability that if the blood transfusion was not administered the infant would be unlikely survive and that a survival period of 3-4 hours was given'. The paediatrician's advice was that the best chance of life would be the blood transfusion. However the parents of the child had refused for the blood to be administered. Their reasons were based on religious beliefs. They indicated that the 'acceptance of the blood transfusions was contrary to the tenets of their beliefs' as Jehovah's witnesses. They were also concerned of the various risks associated with the blood transfusion and expressed their concern by refusing to administer the blood transfusion. at 494.

[222] Ibid 494.

[223] Ibid 494.

[224] Ibid 494.

[225] Section 1 of the Children's Act 38 of 2005 (note 2 above); Article 2 of the African Charter (note 71 above).

[226] This right has been interpreted from section 12 of the constitution where a child has a right to make decisions regarding his or her own body and to security in and control over their body.

[227] Section 129 (2) A child may consent to his or 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.

[228] Section 129 (3) A child may consent to the performance of a surgical operation 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

regarded as having the necessary competence and capacity to consent on his or her own behalf if he or she satisfies the *Gillick* competency test. This test has been affirmed in the case of *Gillick v West Nortfolk & Wisbech AHA & Department of Health and Social Security.*[229] The majority of the Lords 'rejected the Court of appeals findings that consent given by a child under 16 was of no effect.'[230] Thus the test which was established by the courts was that a 'child will be able to consent to medical treatment for an on his own behalf when he achieves a sufficient understanding and intelligence to enable him to understand full what it proposed.'[231] The Gillick test has been used as a basis for courts when determining whether the child is capable of exercising his or her right to refuse medical care.

The court further indicated that:

> 'parent's rights were recognized by the law only as long as they were needed or the protection of the child and such rights yielded to the child's right to make his own decisions when he reached a sufficient understanding and intelligence to be capable of making up his own mind'[232]

Thus children who are capable of making decisions for themselves should be respected and their decisions followed taking into account their age and maturity.[233] One such example is the case of *Re E* (a minor)[234] where a 15 year old boy refused medical treatment on his own accord on the basis of religion, being a follower of Jehovah's Witness. The court held that the boy had sufficient intellect to make such a decision and his autonomy should be upheld.[235]

(c) The child is duly assisted by his or her parent or guardian.

[229] 1985 1 AC 112 (note 12 above) – this case involved the dispute of a mother who had applied for legal action against the local health authority as they had refused not to provide advice on contraception and treatment to her daughters without her prior consent. The House of Lords held that the relevant test was whether the minor was of 'sufficient understanding and intelligence to enable her to understand fully what was proposed' and thus had she been able to do so the doctor was not liable, at 114.

[230] [1985] 3 All ER 402 at 422 (note 12 above).

[231] Harper (note 1 above) 8.

[232] Romano-Critchley G & Sommerville A *Consent, Rights and Choices in Health care for children and young people* (2001) BMJ publishing group 34.

[233] Article 12 of CRC (note 70 above) – says that 'the child who is capable of forming his or her own views and the right to express those views should be given due weight in accordance with their age and maturity.

[234] 1993 1 FLR 386 at 386.

[235] Ibid 386.

The converse is that many children may be unable to make decisions regarding the medical treatment of his or her life and thus requires the assistance to make decisions to or have decisions made on his or her behalf by another person holding parental rights and duties.

3.3 PARENTAL RIGHTS AND RESPONSIBILITIES

In terms of South African common law the parents are seen as the natural guardians of the child and thus they have the duty to make such decisions on behalf of the child. In *Christian Education South Arica v Minister of Education*[236] the court further confirmed the point that parents are the natural and legal decision makers of minor children. However legislation can be interpreted in such a way as to allot the word "parent" to mean a person who has a duty over the child in respect of all matter relating to the child. The Children's Act states that 'a parent is any person who has parental responsibilities and rights in respect of the child'[237]. The African Charter also makes provision for providing parental care to the child[238] as well as parental rights and responsibilities in respect of the child.[239] 'Custody, care and nurture of the child reside first with the parent, whose primary function and freedom include the preparation for obligations that the state cannot supply.'[240]

Therefore parents can be interpreted to include those persons who make decisions on behalf of the child as it is their responsibility to act for the child in any matter. However the Children's Act further indicates that a caregiver[241] may make decisions on behalf of the child in certain instances.

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[236] 2000 (4) SA 757 (CC).
[237] Section 7(2) of the Children's Act (note 2 above).
[238] Article 19 of the African Charter (note 71 above) - Every child shall be entitled to the enjoyment of parental care and protection…
[239] Article 20 of the African Charter (note 71 above).
[240] *Halederman v Pennhurst st. Sch & Hosp*. 707 F 2d 702, (1977) at 706.
[241] Section 1 of the Children's Act (note 2 above) -
'care-giver' means any person other than a parent or guardian, who factually cares for a child and includes-
(a) a foster parent;
(b) a person who cares for a child with the implied or express consent of a parent or guardian of the child;
(c) a person who cares for a child whilst the child is in temporary safe care;
(d) the person at the head of a child and youth care center where a child has been placed;
(e) the person at the head of a shelter;
(f) a child and youth care worker who cares for a child who is without appropriate family care in the community; and

Parents are also regarded as the legal guardian of the child. The Children's Act has indicated that the mother[242] and father[243] both have joint and separate duties and responsibilities in respect of their child. They should be able to exercise such responsibilities with due diligence and care as a reasonable parent should.

The Court in *Gillick*[244] pronounces that the parents' rights are received from their duties to protect the child. Further that legislation has created new developments, in that, parents rights can be limited by 'placing the welfare of the child as its first priority.'[245] Therefore it is indicative that the parent as the decision maker should give priority to the best interests of the child standard in all decision involving or effecting a child.

(g) the child at the head of a child-headed household

[242] Section 19 of the Children's Act (note 2 above) -
(1) The biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child.
(2) If-
(a) the biological mother of a child is an unmarried child who does not have guardianship in respect of the child; and
(b) The biological father of the child does not have guardianship in respect of the child; the guardian of the child's biological mother is also the guardian of the child.
(3) This section does not apply in respect of a child who is the subject of a surrogacy agreement.

[243] Section 20 of the Children's Act (note 2 above)-
(1) The biological father of a child has full parental responsibilities and rights in respect of the child-
(a) if he is married to the child's mother; or
(b) if he was married to the child's mother at-
(i) the time of the child's conception;
(ii) the time of the child's birth; or
(iii) Any time between the child's conception and birth.
Section 21 deals with parental rights and responsibilities of biological unmarried fathers as follows:
(1) The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child-
(a) if at the time of the child's birth he is living with the mother in a permanent life-partnership; or
(b) if he, regardless of whether he has lived or is living with the mother-
(i) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law;
(ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and
(iii) Contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.
(2) This section does not affect the duty of a father to contribute towards the maintenance of the child.
(3) *(a)* If there is a dispute between the biological father referred to in subsection (1) and the biological mother of a child with regard to the fulfilment by that father of the conditions set out in subsection (1) *(a)* or *(b)*, the matter must be referred for mediation to a family advocate, social worker, social service professional or other suitably qualified person.
(b) Any party to the mediation may have the outcome of the mediation reviewed by a court.
(4) This section applies regardless of whether the child was born before or after the commencement of this Act
[244] [1985] 3 All ER 402 at 422 (note 12 above).
[245] Ibid in Brazier (note 58 above), 401.

3.4 THE "BEST INTERESTS OF THE CHILD" STANDARD

The parent, either mother or father, is in the position of making decisions regarding the medical care of the child and in doing so, they must be guided by the constitutional principles and make decisions whilst acting in the "best interests of the child".[246] The courts introduced the provisions under the South African Constitution. The courts[247] have held that s28 (2) of the Constitution is the most prominent section which indicates that the best interests of the child is the paramount factor that is to be considered when weighing up conflicting rights between the parents and the child[248]. This provision has afforded extensive protection to the child when parents unreasonably refuse medical care[249] Whilst the constitution affords children extra protection in that all decisions made on behalf of the child must be considered according to the "best interests of the child standard", the African Charter has also created a primary duty of the parent is to act in the child's best interests.[250] The child's best interests must be of paramount importance and sets out a broad perspective of the rights of a child to be of primary consideration.[251] This indicates that the child's interests are the only conclusive factor to be considered, and no other factor should be considered when deciding on matters for the child. Common law has defined the standard of the best interest of the child 'as a golden thread which runs throughout the whole fabric of our law relating to children.'[252]

This factor has faced much debate by the legislature. The "best interest of the child" principle has been recognized by the Constitution and legislation. The Children's Act sets out certain

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[246] Section 28 of the Constitution (note 8 above) –

(1) Every child has the right-

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services;

(d) to be protected from maltreatment, neglect, abuse or degradation;

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section **'child'** means a person under the age of 18 years.

[247] Supra (note 44 above) – *Hay v B* at 494.

[248] Supra (note 44 above) – *Hay v B* at 494.

[249] Ibid 494.

[250] Article 20 of the African Charter (note 71 above) - 1. Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development the child and shall have the duty: (a) to ensure that the best interests of the child are their basic concern at all times…

[251] Article 3 (1) of the African Charter (note 71 above).

[252] *Kaiser v Chambers* 1969 (4) SA 224 (C) at 228.

criterion under section 7[253] which is used in the interpretation of the best interest of the child standard. These factors are regarded as a prerequisite for determining any matter in relation to a child. South African common law has also given attention to the best interests of the child standard in is judicial context. The African Charter also explicitly indicates that 'the best interests of the child are of utmost importance.'[254] It 'expressly proclaims its supremacy over any

[253] Section 7 of the Children's Act (note 2 above)-
(1) whenever a provision of this act requires the best interests of the child standard to be applied the following factors must be taken into consideration where relevant, namely;
(a) the nature of the personal relationship between –
(i) the child and the parent, or any specific parent and;
(ii) the child and any other caregiver or person relevant in those circumstances;
(b) the attitude of the parent or any specific parent and;
(i) the child and
(ii) the exercise of parental rights and responsibilities in respect of the child;
(c) the capacity of the parent, or any specific parent or any other caregiver or person, to provide for the needs of the child including intellectual and emotional needs;
(d) the likely effect on the child of any change in the child's circumstances including the likely effect on the child of any separation from –
(i) both or either of the parents or
(ii) any brother or sister or other child or any other care giver or person with whom the child has been living;
(e) the practical difficulty and expenses of a child having contact with the parents or any specific parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents , or any specific parent on a regular basis'
(f) the need for the child –
(i) to remain in the care of his or her parent, family and extended family and
(ii) to maintain a connection with his or her family, extended family, culture or tradition;
(g) the child's –
(i) age, maturity, and stage of development;
(ii) gender
(iii) background and
(iv) any other relevant characteristic of the child;
(h) the child's physical and emotional security and his or her intellectual, emotional , social and cultural development;
(i) any disability that a child may have;
(j) any chronic illness from which a child may suffer;
(k) the need for the child to brought up with a stable family environment and where this is not possible , in and environment resembling as closely as possible a caring family environment ;
(l) the need to protect the child from any physical or psychological harm that may be caused by-
(i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour or ;
(ii) exposing the child to maltreatment, abuse, neglect, degradation, ill-treatment, violence, or harmful behaviour towards another person;
(m) any family violence involving the child or a family member of the child and ;
(n) which action or decision would avoid or minimize further legal or administrative proceedings in relation to the child,
(2) In this section 'parent' includes any person who has parental responsibilities and rights in respect of the child.

[254] Article 4 of the African Charter (note 71 above) - 1. In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

customs, traditions, cultural or religious practice that is inconsistent with the rights, duties and obligations in the charter.'[255] The CRC does not define what the best interests of the child are. However the decision of what is in the best interests of the child is best left up to the judge to determine whilst considering all the relevant factors.

The best interests of the child standard as first articulated in 1948 in the case of *Fletcher v Fletcher*[256] and have been extensively applied. The question of what is in the best interests of the child has been given much judicial scrutiny. The Court in *M v S*[257] have articulated a number of signals to be used as a guiding principle in determining the bests interest of the child such as participation in decisions affecting their health; protection against any harm; prevention of harm to the child and provision to have their rights met and protected. These signals must be applied collectively to ensure proper determination of the standard.

In *Christian Education South Africa v Minister of Education*[258] the court deals with the enforcement of the parents religious rights onto the child through other mechanisms. In analyzing the impact of corporal punishment on the child, the court looks at what is in the best interests of the child. This principle has become a norm for all persons making decisions on behalf of a child. Thus the parents in this case where not acting in the child's best interests but rather were adamant on practicing their religious beliefs.[259]

For example in *Jooste v Botha*[260] '[The] wide formulation [of section 28(2)] is ostensibly all-embracing so that the interests of the child would override all other legitimate interests of

[255] Article 1(3) of the African Charter (note 71 above).
[256] Supra (note 68 above).
[257] *M v S* 2007 (12) BCLR 1312 (CC) at 1322.
[258] *Christian Education South Africa v Minister of Education* (note 229 above) – The facts of the case are briefly stated as follows. The parents wished to introduce corporal punishment on their children in schools based on their religious beliefs in the Christian ethos and indicated that this practice provided children with a basis for discipline. The Schools Act, proposed to enact laws that abolished corporal punishment in schools. The respondents made an urgent application for the limitation of parent's religious practices to inflict corporal punishment on children as this practice subjected children to violence, degradation and maltreatment, and violated many constitutional rights including what was to be in the best interests of the child. (At 759-760)
[259] Ibid 777-778.
[260] *Jooste v Botha* 2000 (2) SA 199 (T) at 210. The case was decided on whether, in respect of the interests of a child, the courts could force a father to provide love and care to his child. The Court held that there has been no legally enforceable obligation placed upon parents to provide love and care for their children to date, however this is a question that must be decided by the courts.

parents, siblings and third parties.'[261] Further this concept was endorsed in *M v S*[262] where Judge Madala concluded in the minority judgment that the child's best interests must override any other right or interest; thereby indicating the utmost supremacy in the principle. The English court of appeal held that in such cases the most important consideration was 'the welfare of the child and not the reasonableness of the parents.'[263] Courts have applied this principle in a number of judgments to ensure that children are given adequate protection.

Certain factors, which are used to determine the best interests of the child, have been proposed in the case of *McCall v McCall.*[264] Therefore we can conclude that both legislation and common law have provided the courts with an extensive interpretation of how to determine whether a decision will be in the child's best interest. With reference to the decision of medical treatment, one can ascertain that a parent will be acting in the best interests of the child if they consent to the medical care of the child as opposed to failing to do so, resulting in the child's wellbeing, and physical, emotional, and psychological integrity being compromised. Further if one had to look at the child's age and developmental state on its own, apart from the other factors, this would be indicative that a child is likely to be incapable of deciding medical care that will be best suited for them, thus the parents when making such a decision will be doing so to protect the child from

[261] Ibid 210.
[262] Supra, *M v S* (note 248 above) at 1352.
[263] *Re T* (a minor*)* [1997] 1 All ER 906, at 911– *C, a baby boy needed surgery for a liver transplant. The mother re*fused consent for the surgery regardless of the doctor's advice that such surgery was vital and in the child's best interest. The local authority issued summons to have C undergo such surgery as without it his life expectancy was only 12-18 months. (At 909; 910).
[264] *Supra* (note 68 above), 205 which involved a custody battle between two parents over a 12 year old son. Here the court formulated certain factors to be taken into consideration when determining what would be in the best interests of the child. Court must determine which parent is more equip to ensure the child's physical, moral, emotional and spiritual welfare. They stated the following criterion to be considered (a) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child; (b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires; (c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings; (d) the capacity and disposition of the parent to give the child the guidance which he requires; (e) the ability of the parent to provide for the basic physical needs of the child, the so-called `creature comforts', such as food, clothing, housing and the other material needs generally speaking, the provision of economic security; (f) the ability of the parent to provide for the educational wellbeing and security of the child, both religious and secular; (g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development; (h) the mental and physical health and moral fitness of the parent; (i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the status quo; (j) the desirability or otherwise of keeping siblings together; (k) the child's preference, if the court is satisfied that in the particular circumstances the child's preference should be taken into consideration; (l) the desirability or otherwise of applying the doctrine of same sex matching; (m) any other factor which is relevant to the particular case with which the court is concerned.

harm, maltreatment, abuse and neglect, as medical care is a vital aspect to ensure a child's safety and protection.

International case law has also interpreted the best interests of the child in medical care matters relating to the child. In *Re B (a minor) (warship: medical treatment)*[265] the issue arose when the child had moved to another hospital for the operation, where the surgeon declined to operate on the child and rather decided to obey the wishes of the parents.[266] The judge found from the evidence that if the operation is not performed the minor would die but if it is performed and it is successful then she has a possible life expectancy of 20 to 30 years.[267]

Templeman J states that as much as the views of caring and loving parents are to be respected, the decision of a child's life rests with the courts, after having looked at all evidence , views and opinions of doctors and parents. The judge refers to the decision by Ewbank J in the Court a quo who refused the application for the operation to take place and rather respected the choice of the parents.[268] He states that 'the duty of the court as the upper guardian of the child is to determine whether the medical treatment is in the best interests of the child'[269], by looking at the evidence provided and not to give attention to whether the life expectancy would be normal or not. Based on these factors he concluded that the operation was in the best interests of the child and ordered the local authority to order the operation to be performed. Dunn LJ concedes with Templeman J that the court 'must step in to preserve this baby's life'[270] and that the operation should take place.

In *Re S*[271], Thorpe J indicated that it was in the child's best interest to have the blood transfusion as this was the best treatment for a prolonged life. Thus they rejected the parent's objections and

[265] [1990] 3 All ER 927 at 927.
[266] *Supra* (note 256 above), 927 – the facts of the case are as follows; a minor girl was born with Down syndrome and an intestinal blockage which would have been fatal unless she was operated on. The parents refused to allow the operation on the child believing this to be the kindest thing to be done in the child's interest in order to prevent the child from undergoing such an invasive procedure. The parent's refusal was solely based on the fact that the child even whilst having the life expectancy, would not live a full normal life and would thus be a handicapped, which was not in her best interests. The doctors then applied to the local authority that made the child a ward of the court. The judge then granted the procedure and directed for the operation to take place.
[267] Ibid.
[268] Ibid 927.
[269] Ibid 928.
[270] Ibid 929.
[271] *Re S (a minor)* (Medical Treatment) [1993] 1 FLR 376 – here the child was suffering from T cell leukaemia and required a blood transfusion for survival. The parents raised objections as they believed it to be a non-religious act.

were uninterested in their reasons for refusal being the parents' concerns about family matters instead of the child's best interest.

In *Minister of Welfare & Population Development v Fitzpatrick*[272] the court held that the best interests of the child principle should be 'flexible' because each case will reveal its own circumstances which would determine the best interests of that specific child.[273] What is in the child's best interests cannot be strictly applied. This standard calls for a valued judgment to determine the best interests of the child.[274]

The best interest standard can be interpreted in many ways. However the overriding factor is what is best for the child. In *Re T (a minor)*[275] the court expressed a fairly different view on how the standard was to apply. Here the court discovered that in looking at the unusual circumstances and the factors of the standard it would not be in the best interests of the child to disturb his current lifestyle by providing consent to undergo invasive surgery, as it would cause more stress and trauma for the child.[276] The court in *Re J (a minor)*[277] also stated that there will be cases where the courts will have to pronounce that it is not always in the child's best interest to grant the treatment because it will increase suffering and produce no benefit given the circumstances of the case.

From this it can be noted that the standard of the best interest of the child can be interpreted in different ways by the courts, but the sole criterion that is present in all interpretations is the child centered approach, placing emphasis on what suits the child's needs best given the specific circumstances.

[272] 2000 (3) SA 422 (CC).
[273] Ibid, 428-429.
[274] *K v M* [2007] 4 All SA 883 (E) at 891; *P v P* 2007 (5) SA 94 (SCA) at 99.
[275] Supra *Re B* (note 256 above) at 920.
[276] Ibid at 920.
[277] *Re J* [1990] 3 All ER 930 at 938– J was a ward of the court, who was born premature with severe brain damage. His life expectancy was low but he could have survived a few years. (at 931-932).

3.5 CONSENT TO MEDICAL TREATMENT ON BEHALF OF THE CHILD

Decisions regarding the medical care of the child have been governed by section 129 of the Children's Act which provides a hierarchy of persons who are in the position to provide consent for the medical care of the child. Thus, it is best illustrated by stating the provisions and explaining them as follows under Section 129 of the Children's Act which is stated below:

'(1) Subject to section 5 (2) of the Choice on 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 either subsection (2), (3), (4), (5), (6) or (7).

(4) The parent, guardian or care-giver of a child may, subject to section 31, consent to the medical treatment of the child if the child is-

(a) Under the age of 12 years; or

(b) Over that age but is of insufficient maturity or is unable to understand the benefits, risks and social implications of the treatment.

(5) The parent or guardian of a child may, subject to section 31, consent to a surgical operation on the child if the child is-

(a) Under the age of 12 years; or

(b) Over that age but is of insufficient maturity or is unable to understand the benefits, risks and social implications of the operation.

(6) The superintendent of a hospital or the person in charge of the hospital in the absence of the superintendent may consent to the medical treatment of or a 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 purpose of obtaining consent that would otherwise have been required.

(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.

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

This section provides the child with added protection regarding the consent of medical care. Section 129 grants the child many avenues to obtain consent for medical care. However parents owe the child a legal duty to provide consent for the medical treatment if it is in the child's best interest, without regard to their own interest.[278]

3.6 PARENTS RIGHT TO RELIGION

Parents may try to invoke their constitutional 'right to freedom of conscience, religion, thought, belief and opinion'[279] and their 'right not to be discriminated against'[280] based on their religion, in order to refuse medical care for their child. Parents firmly believe that, being in the position of decision maker; they are condemned for making decisions if such a decision is based on their right to religious freedom. Although parents possess such rights, the courts are likely to derive that all parental rights are "trumped" by the child's constitutional right to life and by what is in the child's best interest.[281] In *Life healthcare Group v JMS*[282] the court indicated that there is a conflict between the right to the parent's religion and the right to the child's life.

[278] *Supra* Re J (note 268 above) at 933.
[279] Section 15(1) of the Constitution (note 8 above) – 'everyone has the right to freedom of conscience, religion, thought, belief and opinion'.
[280] Section 9 of the Constitution (note 8 above) - all persons are entitled to be treated equally before the law and that no person shall be unfairly discriminated against based on one or more of the grounds listed below including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
[281] Supra, *Re E* (note 225 above) at 388.

A prominent international law case, *Prince v Massachusetts*[283] has dealt with the parent's right to freely practice their religion and the legislation which has restricted parents in how they wish to nurture their child. This matter was decided in the US courts where it was held that neither the right to religion nor the rights of the parents are beyond limitation.[284] The court stated that:

> 'Parents may be free to become martyrs themselves but it does not follow that they are free to make martyrs of their children'[285]

In some jurisdictions the courts have upheld the right of the parents to ensure the religious raising of their children but have indicated that these rights can be restricted if the need arises.[286]

In *Christian Education South Africa v Minister of Education*[287] the court has indicated that they could not prevent parents from practicing corporal punishment in its entirety, but what the courts could do was to prevent its application in the school setting.[288] The court in its judgment does not preclude parents from their religious practices but only limits their application, should such practice not be within the constitutional parameters. The court in doing so expressed that it was not placing a ban upon the capacity of parents to raise their child according to cultural and religious belief but rather limiting them from indulging the schools to practice this belief.[289] Thus the court held that the parents should be able to abide by the law and be able to give effect to their religious practices.

From this it can be noted that, as much as a parents right to religion is enhanced by the Constitution such right is also capable of being limited if it impacts on any other right in the

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[282] Supra, *Life healthcare Group v JMS* (note 45 above) *at 2391*
[283] *Prince v Massachusetts* (note 40 above) – Mrs. Prince is the legal guardian of Betty Simmons. Both of which are Jehovah's Witnesses. Mrs. Prince was charged for allowing Betty to partake in religious work such as selling religious magazines. Mrs. Prince relied on her right to religious freedom under the First Amendment. at 163
[284] Ibid at 166.
[285] Ibid at 170.
[286] *Wisconsin v Yoder* 406 US 205 (1972) at 207 – these parents where that of Amish faith who were convicted for contravention of the law that all children were obliged to attend school until 16 years of age. These parents refused school passed the 8th grade, reason being, their Amish Faith did not want the children to learn alternate lifestyles.
[287] Supra *Christian Education South Africa v Minister of Education* (note 227 above) at 780.
[288] Ibid at 780.
[289] Ibid at 780.

constitution. Further that a parent has the right to practice his or her religious rights in accordance with themselves and that which does not affect the body of another. Thus parents are free to make religious choices in the name of God but in no way does this right allow them to do the same in respect if their child.

3.7 THE REFUSAL, BY PARENTS, OF CONSENT FOR MEDICAL CARE FOR THE CHILD AND THE RELIANCE ON FAITH HEALING

Parents sometimes refuse medical care for the child based on religious grounds regardless of the child's interest. This consequence is endorsed in section 129(10)[290] which states that;

> 'No parent, guardian or care-giver of a child may refuse to assist a child in terms of subsection (3) or withhold consent in terms of subsections (4) and (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 treatment or surgical operation concerned'

The court in *Life healthcare Group v JMS* relied largely on section 129(10) in their judgment.[291] The court focused on the evidence provided by Dr.Moodley, which indicated that she had taken all steps reasonably possible to preserve the child's right to life.[292] The court ruled that having no other option besides the blood transfusion, that the limitation of the parents right to religion is justifiable in order to safeguard the child's right to life. Therefore we can assume that the parent is not prevented from refusing medical care based on religious reasons as a whole, but rather they are only prevented from doing such if there is lack of evidence to indicate that a medical alternative exists.

A parent cannot use religious reasons as a basis for the refusal of medical treatment or surgical operations in terms of the Act, without providing a medical alternative. This provision can

[290] Section 129 (10) of the Children's Act (note 2 above)
[291] Supra *Life healthcare Group v JMS* (note 45 above) at 2391
[292] Ibid

further, be interpreted, by looking at the 'Convention on the rights of the child, that traditional practices'[293] can be interpreted to include religious beliefs and opinions. Some traditional healing methods that have been practiced for many decades, by different types of religious groups or people include; healing with the hands; speaking in tongues; meditation; prayer; calling of spirits or ancestors and so on.[294] Therefore the child should be protected from invasive traditional practices or that which prevents him or her from receiving necessary medical care.

The refusal of medical treatment has faced much judicial muster over the years. Courts have adjudicated on matters or emergency and those of necessary medical treatment. The leading South African case which has become prominent in the discussion of parental refusal of medical care for a child is *Hay v B*[295] This case has specifically focused on the Jehovah's witnesses however it is used as a firm basis for deciding all types of refusal of medical care by parents. Here the court indicated that that the medical treatment was vital for the child and was in the child's best interest and that the parents' rights ought to be overridden if it is in the child's best interest.[296] In *Wisconsin v Yoder*[297] the court stated that parental rights can be respected and followed provided that the decision to refuse medical care for the child would not prejudice the health and safety of the child or cause significant harm or injury to their wellbeing.

Parents may not intentionally prejudice their child by refusing medical care. However, as discussed in Chapter 2, their reliance and faith placed in God gives them the basis for their refusals. They refuse the medical care because they believe that conventional treatment will not cure their child but rather that faith healing, as a form of their religion, will be the cure to their child's ailment. Faith healing has not been recognized by South African legislation nor has it been condoned by the courts. Most parents believe that should the child's death present itself, it is the will of God. However such debate is still to render notion in South African courts.

[293] Article 24.3 (note 71 above) – 'the state must take all appropriate and effective measures to abolish traditional practices that are prejudicial to the health of the child'.
[294] S Loue 'Parentally mandated religious healing for children: a therapeutic approach' (2011-2) 27 *Journal of Law and Religion* 397 at 397-399
[295] Supra *Hay v B* (note 44 above) at 494.
[296] Ibid.
[297] Supra *Wisconsin v Yoder* (note 276 above).

3.8 THE STATE AND COURT INTERVENTION AND THEIR DUTY AS "*PARENS PATRIAE*"

Section 129(9) of the Children's Act indicates that:

> 'A High Court or Children's court may consent to the medical treatment of or a 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.'

This provision is indicative of the intervention mechanisms provided by the court. The court having been granted the powers, under legislation, to consent to medical care for the child regardless of parental considerations proposes the urgency and the importance of medical care. The courts have been given inherent powers and being regarded as the upper guardian of all children within South Africa indicates that their intervention in the refusal of parental consent for medical care is one that is required as a matter which is in the best interests of the child.

Common law has much influence on court intervention. The courts have concluded in many cases how the application to the court, to grant medical care, is a decision which requires a valued, competent judgment. In *Hay v B* the court held 'that the High court was the upper guardian of all minors, and such courts will have the authority to order any decision over that of the parents if such decision would be in the best interests of the child.'[298] The court has also indicated that the powers conferred upon the court allows for the court to make decisions for the benefit of the child even if its decisions overrides that of the parent. Thus these powers permit the court to grant the child medical care in cases where the parents refuse such care. The court in *Life healthcare Group v JMS*[299] concluded that the use of section 129(9) in approaching the courts to exercise their powers in respect of the minor child was justified.[300] This case indirectly points out that this subsection has also been supported by the courts and that the protection of children is a matter of great concern for the courts.

[298] Supra *Hay v B* (note 44 above) at 495.
[299] Supra, *Life healthcare Group v JMS* (note 45 above) at 2391.
[300] Ibid

The High Court's inherent jurisdiction in relation to children relate to the *parens patriae* concept. The concept *Parens patriae* was introduced by many authors in Chapter two, thus we understand what this concept entails. This concept allows for the courts inherent jurisdiction to be exercised irrespective of whether the child is a ward of court or not.[301]

In *Re W*[302] the court held that:

> 'There is ample authority for the proposition that the inherent powers of the court, under the *parens patriae* jurisdiction, are theoretically limitless and that they certainly extend beyond the powers of the natural parent. There can therefore be no doubt that it has power to override the refusal of a minor or that of a parent'[303]

In *Re J* it was stated that the court' when acting as *Parens patriae* are considered to have the rights and duties of the parents, but this does not completely exclude parents from decision making. However the final decision to withhold consent or provide consent would lie with the court.[304] The inherent jurisdiction of the courts is not derived from the parents' rights but rather from the delegated duties of the Crown in order to ensure the protection of its citizens. [305]

The *Parens patriae* concept justifies the inference or intervention by the court in decisions of the child's health care. The courts will be able to grant the child medical care as the upper guardian or higher parental form of the child. The state in some jurisdictions has the same power as that of the court and the two are used interchangeably. State or court intervention must be shown to be compulsory for the protection of the child against clear or imminent harm or danger of harm.[306]

In respect of *Re Clark*[307] it was stated that the child is a person of the state. He belongs to both his parents and the state. Thus, imposing responsibilities on the parents and the state. Therefore

[301] *Re W* (a minor) (medical treatment) [1992] 3 WLR 758at 773.
[302] Supra *Re W* (note 286 above).
[303] Ibid at 769.
[304] Supra *Re J* (note 268 above) at 933.
[305] *Re C (a minor)* (Wardship Medical Treatment) [1990] 1 FLR 263 at 266.
[306] Supra *Prince v Massachusetts* (note 40 above) at 167.
[307] *Re Clark* 185 NE 2d 128 (1962).

when a state interferes in the care of the child it would be regarded as justifiable behaviour as there is an inherent interest in saving the child's life.

Thus the courts, having inherent jurisdiction over all its citizens will be able to provide consent for medical care for the child where a parent(s) unreasonably refuses to do so, even if such refusal is based on the religious beliefs of the parents.

3.9 THE LIMITATION OF PARENTAL AUTONOMY AND THE GRANTING OF CONSENT FOR MEDICAL CARE

All rights present in the Constitution are not absolute rights but rather relative rights. This indicates that these rights can be limited if it imposes upon any other right in the Constitution. The constitution has articulated a specific section which deals with the limitation of rights in the Bill of Rights. The limitation enquiry will face intervention by the courts as "*parens patriae*."

The limitation clause indicates that:

> '(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
>
> *(a)* the nature of the right;
> *(b)* the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d)the relation between the limitation and its purpose; and
> *(e)* Less restrictive means to achieve the purpose.

> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'[308]

Courts would have to balance the right to freedom of religion against the rights of the child to be given medical care. Thus, some religious practices must yield when it impacts on the child's health and safety.[309] Therefore although parents have the right to practice their religion, the extent to which they may do so extends only until the point at which they harm the child's health.[310]

In light of the judgment *Hay v B* the limitation clause was used to determine whether the right to life and health care of the child is justified in terms of the Constitution. This case stated that during a medical emergency it is an impairment on the child's rights, to have the parents refuse consent to medical care based on religious objections. Such limitation was regarded as 'reasonable and justifiable because the child's right to life was most important as his chances of survival without the treatment was minimal.'[311] The court concluded that the parent's beliefs could not override the child's right to life.[312]

The United States courts have revealed that the limitation of parental rights are justified where the child is in need of medical care. Medical care was granted in the following cases irrespective of the parents religious rights, in *State v Pericone*[313] where a baby had a heart defect; in *Brooklyn Hospital v Torres*[314] where a child was severely burnt; in *Re Ivey*[315] where a premature baby whose chances of survival where slim. *M v S*[316] has also illustrated how the child's best interest to be given medical care should override the right to religion of the parents. In *Prince V Massachusetts*[317] it was submitted that neither the right to religion nor the rights of parents, in

[308] Section 36 of the Constitution (note 8 above).
[309]Supra *Prince v Massachusetts* (note 40 above) at 165-166.
[310] Supra *Wisconsin v Yoder* (note 276 above)at 208.
[311] Supra, *Hay v B* (note 44 above) at 495.
[312] Ibid at 495.
[313] *State v Pericone* 37 NJ 463, 181 A 2d 751 (1962).
[314] *Brooklyn Hospital v Torres* 475 Misc. 2d 914 258 NY (1965).
[315] *Re Ivey* 319 So. 2d 53 1975.
[316] Supra *M v S* (note 248 above) at 1352.
[317] Supra *Prince v Massachusetts* (note 40 above).

and control over their child, were beyond limitation. The court state that 'the right to practice religion freely does not include liberty to expose … the child to … ill-health or death'[318].

In *Christian Education South Africa v Minister of Education* the courts looked at whether the limitation on the parents' rights to request corporal punishment as a form of religious practice was in fact reasonable and justifiable in an open democratic society.[319] The court analyzed that it was not so much the general sanction against corporal punishment that was of concern but rather the impact that these religious rights have on children.[320] From this we can determine that the courts indirectly indicate that the right to religious practice by persons are not absolute and the right of practicing religion and inflicting corporal punishment by parents are not immune to limitation.

Thus it can be concluded that the right to religion should be limited when the child requires medical care. The parents should not be allowed to make decisions that are detrimental to their child's health. Therefore the limitation of parental rights should be regarded as reasonable and justifiable for the health of the child.

3.10 RELIGIOUS EXEMPTION LAWS, NEGLECT AND LIABILITY OF PARENTS

Parents do not realize that their refusal cannot be said to be acting in the best interests of the child, as it may amount to neglect, maltreatment and degradation of the child. All of which the child is protected against under the South African Constitution[321]. The Constitution explicitly states that 'children are to be protected from maltreatment, neglect, abuse and degradation.'[322] Neglect 'in relation to a child means a failure in the exercise of parental responsibilities to provide for the child's basic physical, intellectual, emotional and social needs.'[323] Neglect

[318] Ibid at 166.
[319] Supra *Christian Education South Africa v Minister of Education* (note 227 above) *at* 777.
[320] Ibid at 777.
[321] Section 28 (2) (d) of the Constitution (note 8 above).
[322] Section 28(1) (d) of the Constitution (note 8 above).
[323] Section 1of the Children's Act (note 2 above).

referred to in this dissertation relates to both intentional neglect and negligent neglect. It does not take the same meaning as deliberate neglect[324] although neglect encompasses in part, thmeaning of deliberate neglect. It can be seen that one of the parental responsibilities is to provide medical care to the child to ensure the wellbeing of the child. Further the Idaho statute[325] defined neglect as 'a situation where the child lacks parental care necessary for his health…'[326]Thus a failure to provide medical consent may result in neglect.

Further, Florida has developed a child neglect statute.[327] Three aspects have been illustrated in this statute. Firstly, harm to a child's health or welfare can occur when the parent… fails to supply the child with adequate… health care. Secondly, a parent… legitimately practicing their religious beliefs, does not provide medical care for the child, may not be regarded as neglectful on its own. Thirdly, such an exception does not… prevent a court from granting the medical care of a physician, to the child where it is required.[328] Texas Statutes[329] defines medical neglect as occurring whenever a child faced a significant risk of death, harm or bodily injury or where neglect results in a noticeable impairment to the development and functioning of the child.[330]

South African law does not have religious exemption laws. However the Constitution allows for the right to practice freedom of religion which is a right granted to all persons, but this right does not serve as a defence for parents for neglectful treatment of their child. The liability of parents extend to whether or not, they have neglected their child or simply followed their religion, further whether such practice of religious beliefs would be regarded as neglect. South African law has not pronounced on whether or not a parent will be held criminally liable for neglect. However this issue will be briefly discussed in the context of international law.

[324] Section 305 (3) of the Children's Act (note 2 above) – 'a parent, guardian or other person who has parental responsibilities and rights in respect of a child, a caregiver or person who has no rights in respect of the child but who voluntarily cares for the child either indefinitely, temporarily or partially is guilty of an offence if that parent, guardian or caregiver or other person, abuses or deliberately neglects the child'
[325] Idaho Statute Ann. (1969)
[326] Idaho Statute Ann. (1969) s16-1626
[327] Florida Neglect Statute Fla. Stat. Ann 415.503 (8) (f) (3).
[328] Ibid.
[329] Tex.Fam.Code Ann. 34.012 (2) (B) (ii).
[330] Ibid.

In *State v Mckown*[331] the Minnesota Supreme Court restricted the application of spiritual healing exemption laws but did not criminally charge the parents. The court did not hold the parents criminally liable for refusing necessary medical treatment for the child. However they were civilly charged for compensatory damages of 1.5million dollars.

The United States has a free exercise clause to which they invoke their freedom to follow or practice their right to religion. In *Walker v Superior Courts*[332] the court had to determine whether the parents would be exempt from criminal liability in respect of the free exercise clause. The California Neglect Statute required parents to provide necessary medical care to their children, parents who refuse, commits an offence. The court held that the statute did not exclude liability for "involuntary manslaughter". The court also stated that the lives of children fell within the protection of the state's interest.[333]

In *State v Miskiens*[334] the court looked at *Walker* and invalidated their child endangerment statute that allowed for religious exemptions.[335] The Ohio child endangerment statute states that 'no person who is a parent, guardian, custodian, person having custody or control … shall create a substantial risk to the health or safety of the child by violating a duty of care, protection or support and treating the physical or mental illness or defect of the child by spiritual means, through prayer alone, in accordance with the tenets of a religious body.'[336]

Since religious exemption laws have not been proposed in South Africa, the legislature and judiciary should use international law as a basis for recommending that liability of parents, who fail to provide medical care for their child, should be imposed. Such imposition is justified if the consequences of failure to provide medical care are death, severe disability, impairment, or harm to the child's physical or mental health. These recommendations will be discussed further in Chapter 4.

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[331] *State v Mckown* 475 N.W. 2d 63 where Mr. Lundman, the child's father sued the Mckowns because they were negligent in failing to provide medical care for the child. (*Lundman v Mckown* 530 N.W. 2d 807)
[332] *Walker v Superior Courts* 47 Cal. 3d 112 763 (1988) – the child was suffering from flu-like symptoms. The mother refused medical care and opted for faith healing in exchange. The child subsequently died and the mother was charged for manslaughter.
[333] Ibid at 869.
[334] *State v Miskiens* 22 Ohio Misc. 2d 43 490 NE 2d 293 (1984.)
[335] Ibid at 293.
[336] Ibid at 293.

3.11 THIRD PARTY INTERVENTION AS A SOLUTION

Third party intervention has not been expressly recognized under South African law, allowing the third party to make decisions that override that of the parents, if such decision is in the best interests of the child. Section 32[337] indicates care of child by a person not holding parental responsibilities and rights. This section allows for the third party intervention to ensure the safety and health and wellbeing of the child when such child is under their custody at the time. What this dissertation aims to recommend is that a third party should be awarded parental rights and responsibilities and be able to override any parental decision should the parent's decision be detrimental to the child's health. Such allowance should not solely relate to when the child is in the care of the third party but should rather extend to apply at all times. This ensures that the well -being of the child and the bests interests of the child is always safeguarded and promoted. This concept will be discussed further in Chapter 4.

[337] Section 32 of Children's Act (note 2 above).
(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.

(3) A court may limit or restrict the parental responsibilities and rights which a person may exercise in terms of subsection (2).

(4) A person referred to in subsection (1) may not-
(a) hold himself or herself out as the biological or adoptive parent of the child; or
(b) Deceive the child or any other person into believing that that person is the biological or adoptive parent of the child.

CHAPTER 4: CRITICAL EVALUATION OF THE REFUSAL OF MEDICAL CARE FOR THE CHILD, BY PARENTS, BASED ON RELIGIOUS OBJECTIONS.

4.1 INTRODUCTION

This chapter analyses and interprets the topic for the protection of the child. In this chapter I will discuss the arguments relating to all aspects of medical health care of the child and make submissions that will provide added protection for the child.

'The Constitution is the supreme law of the land.'[338] This indicates that any other law, practice or customs inconsistent with the Constitution is invalid. The Constitution has provided every human being with protection against invasion of their basic human rights. These rights have been granted to all persons by virtue of being human beings. Every "human being" includes a child and therefore all Constitutional rights will apply to the child under the appropriate provisions.

4.2 ANALYSIS & RECOMMENDATIONS

One of the core human rights affecting the child, is the right to life[339]. This right has been granted extensive protection under the Constitution. The child has an unsolicited 'right to life'[340] and should be protected against all odds. The 'right to life'[341] is reliant on the 'right to adequate health care.'[342] Section 28 of the Constitution is vital in ensuring the wellbeing of the child. It targets the protection of essential specific rights of the child, apart from the general protection afforded by the Constitution. The child is given the general 'right to access to health care'[343], under the Constitution and the specific 'right to be given adequate health care.'[344] If the child is refused health care, resulting in death or permanent injury, this may very well be an invasion of the child's Constitutional right to life. Within the ambit of s28, its provisions have delivered that

[338] Section 2 of the Constitution (note 8 above).
[339] Section 11 of the Constitution (note 8 above).
[340] Section 15 of the Constitution (note 8 above).
[341] Ibid.
[342] Section 27 of the Constitution (note 8 above).
[343] Ibid.
[344] Section 28 of the Children's Act (note 2 above)

any decisions made for or on behalf of the child must not be contrary to the child's right to life. Further that any decision made must be done in order to preserve and sustain the life of the child.

The child, a person below the age of 12 in terms of the consent provisions under the Children's Act, is presumed to lack sufficient competence to make decisions and provide autonomous consent for medical treatment or surgical operations. Thus, children fall under the authority and control of their parents. This would indicate that parents are persons who are placed in a position of control, in which they should provide care and love to the child. The Children's Act provides the meaning of parent and what entails parental responsibilities and rights. 'A parent is a person who has the rights and responsibilities over the child.'[345] The parent occupies the position to grant the child with all essential needs as enshrined in the Children's Act.

Parents have been given the responsibility over their children. These rights encompass that children be given basic health care but this does not mean that they be provided with the bare minimal medical treatment but rather that they be given adequate medical care to sustain the child's life. This responsibility by the parents further include the responsibility to make decisions for the child, as their primary caregiver. This places parents in a position of control over the child to make such decisions. However this decision making power does not authorize parents to freely make choices which are to the detriment of their child's health. Therefore, when deciding matters for the child, the parents should act in a manner that respects the child's best interests and which does not violate the rights of the child. One such decision includes the provision of medical care of the child.

Parents have the duty to provide their child with adequate medical care when the need arises. Further they should safeguard the safety and wellbeing of the child as indicated under s28 of the Constitution. The best interests of the child plays a crucial role in the decision making process in respect of the child. This standard has been widely recognized under South African law and International law.

International law has been increasingly influential in the protection of the child. The South African Constitution makes provision for the consideration of international law as a feature which requires an obligation on the courts. Section 39 of the Constitution provides that

[345] Section 1 of the Children's Act (note 2 above).

international law must be considered. This indicates that when interpreting any aspect relating to the child, especially the medical care of the child, international law must be taken into consideration by the courts.

South African legislation has specifically endorsed that 'the best interests of the child is of paramount importance.'[346] Case law has also been extensive on this standard. The courts have always pronounced on decisions that cater for the child's interests should be considered in every matter. The judges will look at all the facts , evidence and circumstances surrounding each case and then make a decision that best suits the child's needs. Thus the courts must look at the decisions of the parent to determine whether such decision is in the best interests of the child and whether the child will benefit or be harmed by such decision.

This concept has been criticized and has been dissected in order to determine what happens in a situation of conflict between the child and the parents' rights. 'The Convention (CRC) states that the interests of a child are of "*a primary consideration*".' [347] 'The African Charter states that the child's interests should be "*the primary consideration*".'[348] Whereas the Constitution indicates that the interests of the child are of "paramount importance".'[349]

In analysis the words "of a primary consideration", Ferreira (2010) refers to various meanings given by authors. It is indicated that the words create a discretion given to the court when considering matters of the child's interest and allows the courts to consider the interests of the child and then make a decision. This approach somehow leaves the principle open for abuse and allowed for the child to be considered rather than being treated ass most important.[350] The African Charter is analyzed in the sense that the word "*the*" indicates a more stringent application of standard. The African Charter having been written in this manner offers a wider protection to the child in such a situation opposed to the Convention.[351]

[346] Section 28(2) of the Constitution (note 8 above); section 7 of the Children's Act (note 2 above); Article 20 of the African Charter (note 71 above).
[347] CRC (note 70 above).
[348] African Charter (note 71 above).
[349] Ferreira (note 65 above) at 205.
[350] Ferreira (note 65 above) at 205-206.
[351] Ferreira (note 65 above) at 206.

In terms of the Constitutional provision the words 'of paramount importance' emphasizes a strict approach when analyzing the child's best interests and takes a stronger stance that the interests of the child must be above all other interest. The word 'paramount means something that is more important than anything else'[352]. Having these words in such a provision indicates that the child's interest will triumph above any other interest or right and will be take into account above all other factors.[353] Ferreira (2010) states that this is in fact the best approach that should be taken especially when one is dealing with delicate individuals such as children. The courts are bound to follow such an interpretation in the Constitution and all other laws inconsistent with this interpretation will no longer apply.

The best interest of the child standard has faced the court on many occasions and have been established in South African courts since 1948. The courts have deliberated on this matter and have almost always turned to the constitution as the guiding principle for their final decision. The principles of the best interest of the child were first discussed in the case of *McCall v McCall*[354]. Thereafter which the legislature has been influence by those factors and promulgated them into legislation under section 7 of the Children's Act. Each of the factors will be analyzed under this chapter.

The relationship between the child and the parent, guardian or caregiver is one which courts must be given attention. The need to assess the relationship is important to allow courts to make the best decision for the child. For example, if the parent-child relationship is one of hostility and conflict then it is likely that medical care will not be adequate and would certainly not be in the child's best interests. The attitude of the parent influences the relationship between the parent and the child. Further the parent is expected to have a loving, caring, compassionate appearance, which also portrays the correct attitude to continue to conduct their necessary duties and responsibilities and, if they are incapable of doing so then this would negatively influence the child's best interests. The courts are in a position to competently determine whether the parents have the ability to provide for the 'child's physical, mental, emotional, and financial needs and to provide a stable secure environment.'[355]

[352] Ferreira (note 65 above) at 206.
[353] Ferreira (note 65 above) at206.
[354] Supra (note 68 above) at 204, 205.
[355] Section 28 of the Children's Act (note 2 above)

When the courts are determining whether the parents have the ability to cater for the child's medical needs, they also need to take heed of whether the parents would be sufficiently capable to ensure that the child's wellbeing is secured and that medical care is administered when necessary; that adequate care is provided timeously; and to convey to the child with sufficient comfort, love and needs required to guarantee the best interests and quality of life of the child. The effect of any change in circumstances, could significantly affect the child's health and wellbeing. Thus the court must be attentive when granting medical care orders to determine if this would result in any change in the child's circumstances which may disrupt their current lifestyle and could in fact be more detrimental than beneficial to the child. [356]

The practicality of providing medical care to a child, who require, such care timeously and the finances involved could be a factor which may affect the decision by the courts. The court will need to assess the ability of the parents to determine if they are able to offer such medical care to their child to stimulate the child's welfare. A further point which raises much concern is that, apart from the practicality of providing for the child, the court needs to determine if the parents are providing an adequately warm environment, with sufficient contact and interaction with family members, for the child. This aids in the child's progression in his or her condition and assists the child to cope better.

The 'child's age, maturity and stage of development'[357] is one of the most important factors to determine the granting of medical care. The court must be able to conclude that the child is incapable of providing consent or refusing consent and thus the court will take on its role as upper guardian, and make the decision on behalf of the child. Assuming that the child is of sufficient age and maturity to provide autonomous consent and does so or refuses to do so, the courts are in no position to override the decision of the child unless in an emergency situation, and should therefore respect the decision of the child.

The 'child's physical and emotional security as well as his or her intellectual, emotional, social and cultural development'[358] are all factors that will be affected by the lack of providing medical care for the child. The courts must look at the circumstances of each case and determine whether the medical care , if granted, will be able to support the child's condition and contribute in the

[356] This was illustrated in the case *Re T* (note 254 above).
[357] Section 7 of the Children's Act (note 2 above)
[358] Ibid

development of the child, positively. Any existing disability or illness may heed the current provision of medical care. Courts need to be aware of existing medical conditions in order to provide accurate medical care for the child in the current situation to ensure that there is no conflict in the medical treatments, which in turn will not be in the best interests of the child.

The most important of all the factors under the best interest standard, is the need to 'protect the child from any physical or psychological harm that may be as a result of abuse, neglect, or maltreatment.'[359] The courts thus, look at the refusal of medical care to be classed under the deprivation of physical needs which results in neglect of the child. This empowers the courts to then act to prevent such sections by parents and to ensure that refusals of medical care is not practiced. Courts must ensure that parents do not neglect the medical health care of their child and that by doing so, they are not fulfilling the duties of a parent to act in the best interests of the child.

Thus we can see that by analyzing just a few of the factors under the standard, it can be denoted that the standard is one that is crucial in the decision making of the parents. Special consideration must be given to each of these factors alone and conjunctively, by the courts to govern what is in the child's best interests. There has been much influence by both international instruments and South African law which indicate that the 'best interests of the child is of paramount importance.'[360]

Conjoined to these factors the Convention on the Rights of the Child[361] and the Children's Act[362] as indicated above have been explicit that no religious practice, custom or tradition be followed and that no refusal of medical care be allowed, respectively, if done so on the basis of religious objections alone, and which jeopardizes the health and life of the child. These provision advice parents and the courts that no religious practice may be conducted if the result of which is detrimental or prejudicial to the child's health, wellbeing and safety.

As indicated above, the child is often unable to make decisions for him/herself regarding medical care. Thus they require the consent of parents for such decisions. The legislature has formulated a hierarchical basis for the child to receive consent regarding medical care when parents refuse to

[359] Section 7 of the Children's Act (note 2 above)
[360] Section 28(2) of the Constitution (note 8 above)
[361] Article 24.3 (note 71 above).
[362] Section 129(10) of the Children's Act (note 2 above).

provide such consent.[363] It is the inherent duty of the medical practitioner to provide sufficient information to the child and the parents to enable them to make an informed choice. However it is trite that in respecting the decisions of the parent, the doctor should ensure that no harm or neglect comes to the child and that the child receives the best medical care necessary.

The need to protect the child from the unnecessary refusal of medical care, that is, a form of neglect, does not impinge on the parents right to practice their religious beliefs. Parents often rely on the defence of religion to refuse medical care for their children. Parents often believe that due to their position of responsibility over the child they are free to make choices for their child, regardless of the consequences. Indeed, they have this right, however the exercise of such right should not be to the detriment of the child. The choices made on behalf of the child must still adhere to the best interests of the child. Parental decisions in respect of medical care, but that which is unreasonably and unjustifiably based on religious objections, will not find support in the judicial system. This does not entirely prevent parents from making decisions based on their religion nor does it stop the practice of one's religion, but rather one needs to ensure that no harm occurs as a result of such practice. International case law has pronounced that persons are free to practice their religion as long as the decision to do so does not unduly impact on the child's right to health.[364]

Parents use their decision making power to refuse or prevent medical treatment or care during necessary and emergency situations due to the practice of a form of prayer, faith healing. They inherently believe that by having immense faith in God their child will be healed and recover from any calamity, thus, requiring no need for medical intervention. "Faith healing" as a belief practiced by many parents, has been regarded as a mechanism which draws one closer to God and reduces the fear of punishment by the "supreme being". The parents then place the lives of their child in the hands of God, surrendering all illness, disease or pain to that of God, who will grant them the health and recovery that they have asked for. Such decisions are blurred by the reality of the situation. By relying on God, they refuse medical care for the child. However this is not done with the intention of harming the child but rather with the intention of following a particular denomination. From previous examples, it is clear that the outcome will not always be one of success. It is the serious unfortunate results that create cause for concern in our law.

[363] Section 129 of the Children's Act (note 2 above).
[364] *Prince v Massachusetts* (note 40 above).

Section 129 (10)[365] indicated above, introduces the provision that refusal of medical care is prohibited. It is submitted that this section not only prohibits the refusal of medical care by parents, based on religious objections, but also expects the parents accept an alternate medical intervention. This provision places an obligation upon parents to choose a medical alternative to the initial suggested treatment, indicating that the reliance on faith healing practice alone will not suffice as a form of medical cure.

In terms of a legal basis, it is evident that the refusal of medical care impacts the child's constitutional right to health care and adequate access to health[366]. Further if the unfortunate consequence is death or severe irreversible injury, then the child's right to life[367] has been affected due to the right to practice ones religion. Contributory to this there are other rights which are violated such as, 'the right to bodily integrity'[368]; 'freedom and security of a person'[369]; and the 'best interest of the child standard'[370] to 'prevent harm, neglect, abuse, and degradation.'[371]

It is submitted that the refusal by parents, for the medical care of their child is frowned upon by the *boni mores* or legal convictions of society. It is well established that the right to religion is one granted to every human being. However the right to religion is only a right to the extent to which it does not harm another right or person. The right is therefore not an unconditional right and thus can be limited in terms of the Constitution should it begin to conflict with any other right in the Constitution. As we have seen above there are many rights which are affected by the refusal of medical care due to the practice of the religion. This section[372] under the Constitution encompasses the limitation of one right if it is reasonable and justifiable to do so, in order to promote the application of another right.

In such a situation we are dealing with the limitation of the right to practice religion, but only in the context of severe harm to the child due to refusal of medical care, and the right to life, bodily integrity, and health care.

[365] Children's Act (note 2 above).
[366] Section 28 of the Constitution (note 8 above).
[367] Section 11 of the Constitution (note 8 above).
[368] Section 10 of the Constitution (note 8 above).
[369] Section 12 of the Constitution (note 8 above).
[370] Section 28 of the Constitution (note 8 above).
[371] Section 28 of the Constitution (note 8 above).
[372] Section 36 of the Constitution (note 8 above).

Section 36 limitation clause will be explained as follows; in relation to the health care and medical access of the child:

'The right to freedom of religion of the parents is a law of general application as it applies to all persons equally.'[373]

- 'The nature of the right'[374] is the right to r3eligion, conscience, thought, belief and opinion. This is not an absolute right but rather a relative right and can be limited in certain circumstances. The right to ones religions has been afforded to all persons under the Constitution and International Law. However it is the application of such right which becomes vital when it impinges on the rights of another. Therefore when such infringement occurs limitation will be warranted.
- 'The importance of the limitation'[375] is to ensure the well-being, health and safety of a child's right to health and to advance and protect the child's best interest. By ensuring such rights of the child are secured, protection of the child's right to life is further enhanced. It is without such limitation that the child will suffer harm, detriment to his health or well-being of even death. Promotion of such limitation indicates the intervention by the Courts in their protection of the rights of the child.
- 'The extent of the limitation'[376] is not the exclusion of the right under section 15 but rather the restriction of the right in a manner which ensures that the interests of the child is protected. By restricting the application of parental rights, the courts are promoting the child's best interests and thus no defence of religious exemption or rights will be justifiable. The courts in limiting parental rights shall restrict the application of parent's free choices regarding religious practices, in so far as the right to religion, in certain circumstances, infringes on the child. Such circumstances may only be determined through a thorough evaluation of the situation, the child's age, maturity, harms caused and resultant consequences.
- 'The relationship between the limitation and the purpose'[377] is to limit the exercise of religious beliefs of the parent in refusing to consent to medical treatment and choosing to

[373] Section 36 of the Constitution (note 8 above).
[374] Section 36 of the Constitution (note 8 above).
[375] Section 36 of the Constitution (note 8 above).
[376] Section 36 of the Constitution (note 8 above).
[377] Section 36 of the Constitution (note 8 above).

rely exclusively on faith healing. Further the reason for this limitation is to protect the child from harm caused by not receiving medical care and to protect the child's health and interests. Therefore by placing courts in the position of authority to restrict the application of a parent's decision, to opt for faith healing, the courts will be serving the purpose of the best interests of the child standard. Such standard was introduced in order to ensure that the child receives utmost importance and paramount attention when decisions are made affecting him or her.

- 'The limitation of the right to religion is a less restrictive means'[378] used to protect the child against maltreatment since the right to religion is not prohibited but rather restricted in an approach that ensures the best interests of the child. In MN *v Southern Baptist Hospital of Florida Inc.*[379] , the court held that it was necessary to forfeit the parent's refusal for the transfusion where the state has a commanding interest in looking at the least intrusive method in protecting the child. By choosing to limit the right to religion is in fact protecting parents from liability and criminal sanction. Although limitation is seen to be less intrusive, such adherence by parents, not to impose detrimental religious practices on children, is lacking.

There has been much debate in the courts regarding whether or not the right to practice their religion is part of a parent's upbringing and thus should not face the criticisms of the courts. However when analyzed one can view this aspect as a contribution to the rights of the child and thus will directly impact on the rights granted to the child. It is submitted that the right to life is one of the most significant rights under the constitution, so to would be the right to receive medical care when necessary. Thus in order to grant access to such rights, the right to religion will have to be limited.

Submission of a limitation, does not mean that the courts will remove the right entirely but will simply restrict the right to religion so far as it no longer infringes on the child's rights. Courts are placed in the position that requires them to balance the right to religion with the right to life, medical care etc. this balancing notion expects courts to give attention to all relevant

[378] Section 36 of the Constitution (note 8 above).
[379] *MN v Southern Baptist Hospital of Florida Inc.* 648 So. 2d 769. 1994 at 771.

considerations, the child's rights, which include the best interests of the child standard, and the need to be 'protected from maltreatment, neglect and abuse.'[380]

Courts have been given legislative recognition to act as the *parens patriae* or the upper guardian of all minors. Thus, South Africa presupposes that the intervention by the courts in matters that involve the child is crucial and insists on an application to the court for their representation as upper guardian of all children. The power of the courts places them in a position of authority to allow for the granting of decisions, in this context medical care decisions, to be made on behalf of the child. This grants courts the power to make decisions in emergency situations and when there has been unreasonable refusal of medical care. It is submitted that the provision be extended to include non-emergency but necessary circumstances.

The authority of the courts empowers it to override any decision by the parent, including the refusal of medical care, thus granting the child medical care. However the only obstacle to this theory is that the turnaround time. The process of application to the courts causes much delay which may place the child in grave danger. Further the court can only grant medical care through application by a medical practitioner or in an emergency situation, as they have no other way of being adequately informed of the matter. The role of the court is not to exclude the parents from the decision making process but rather to override any decisions that are not in the best interest of the child.

This inherent jurisdiction of the courts extends beyond the limitation of the right to religion and allows for the protections of all rights of the child. Thus intervention by the courts is very much needed in South Africa and has already reserved its place under South African Legislation and common law quite comfortably.

In addition to the duties which parents hold, is the need to protect the child from harm, degradation, maltreatment and abuse. This has been explicitly stated in the Constitution, the Children's Act and other international instruments. South African law has stated the prevention of neglect and defines it to include failure to provide medical care for the child. However it would be recommended that South African law urgently requires the introduction of legislation where refusal to allow medical care for the child, amounts to neglect of parental responsibility

[380] Section 28 of the Constitution (note 8 above)

because one of the primary responsibility of parents is to provide medical care for the child in order to preserve the child's physical well-being.

The definition of neglect should be extended to make provision for the sustenance of the child's life. Failure to fulfil needs of the child in order to sustain or contribute to the enhancement of the right to life of the child should be regarded as neglect on the part of the parents. South African Law as opposed to international law does not allow for the justification of religiously motivated beliefs as a basis for the refusal of medical care. However this provision is not sufficient to enable protection for the child against neglect. Thus, there is a need to promulgate new amendments, to South African law which can be used to enhance the protection of children against refusal, by parents, of medical care. South African courts have not dealt, in much depth, with matters of neglect in the form of withholding medical care for the child. Therefore, parents are under the impression that their actions of refusal do not amount to neglect and child abuse but, simply obeying the word of God.

South African law needs to incorporate some of the international influences discussed, such as the Texas Statutes which caters for specific medical neglect and which defines medical neglect to include serious risks posed to a child or even death. South African law requires the incorporation, of the meaning of medical neglect to indicate to parents that neglect can arise as a result of refusal to provide medical care for the child, into its current definition of neglect in the Children's Act

This then comprehensively informs parents allowing no excuses for their incompetence or lack of knowledge of the provisions that lead to neglect of the child. Related to lack of knowledge by parents is the concept of liability. Parents often lack insight into the liability of their actions, using their ignorance as a defence from liability for neglect.

However South African law does not provide a basis for liability for parents who refuse medical treatment for their child. The consequence of such refusal maybe harmful or even fatal to the child. Californian laws interpret the refusal of medical care to be an offence. South African legislature need to emulate this and create legislation which deems it an offence for parents who unreasonably refuse medical care. Introducing a statute, specifically for neglect, not only offers protection for the child but also provides information to parents to be aware of their

responsibilities and to know the extent to which their responsibilities apply and in so doing this, the parents will not be able to escape liability on the basis of ignorance or incompetence.

Liability is a concept which requires grave attention. Parents should be held accountable for their actions as do other persons, for offences committed. Thus, if parents make decisions that impact their child's health which resulting in harm, neglect or death then the parent should be liable for such harsh consequences. It is recommended that the legislature enacts child neglect laws and incorporate into its statutes the offence of child neglect, which then creates liability on the part of the parents. Such punishment will also serve as a deterrent for parents who wish to refuse medical care for their children. These provisions will further, provide knowledge and insight of the particular acts performed by parents, that which will be classified as an offence, these choices of which may have detrimental consequences. Sanctions on parents should be harsh enough to render decisions made by them, null and void, however precautions should be taken not to act against the best interests of the child when sanctions are imposed on parents. Courts are placed in the position of attaching liability to parents, and should therefore compare the advantages and disadvantages to the child should his or her parent be held liable.

Liability can be either civil or criminal. For the attachment of criminal liability the courts will have to prove beyond a reasonable doubt that the harm caused to the child was solely due neglect and refusal of medical care, by parents. If courts had to award civil liability the standard of proof would be on a balance of probabilities as to whether the probable cause of the harm or injury to the child, is the refusal of parental consent for medical care.

As stated above in the Canadian Medical Association in Oregon[381] the liability for parents who refuse medical care for their child would be the offence of criminal mistreatment. Parents can be criminally charged for the neglect of their child's health as well, should the result of such refusal be death or irreparable harm to the child. Canada has also provided for the criminal sanction for neglect of the child. South Africa should take heed of these international laws, and develop criminal sanctions for those parents who refuse medical care. Sanctions should range from payment of a fine or imprisonment with a limited period of jail time.

[381] Glauser (note 106 above) at 709.

The United States have invoked the sanction of involuntary manslaughter as the liability for those parents who refuse medical care for their child. The courts[382] have adjudicated that parents can be held criminally liable for actions which are detrimental to their child. Exemption clauses or even provisions in the Constitution such as the right to freedom of religion, shall not exclude liability for actions of harm against or death of the child. Such provisions do not have overriding status over those of the child.

Involuntary manslaughter[383] in the US is an equivalent charge of Negligent killing under South African law. If this is true, then invoking the charge of murder[384] onto parents whose child has died as a result of neglect from not receiving medical care, would be imposing a too large a burden on parents. However this would not be a complete hinder to the liability process. Thus, the charge of negligence that is culpable homicide[385], on the part of parents will be one of similar reprimand and will receive similar imprisonment or imposition of fine provisions. Defining laws simply, would be most effective to impose a statute within limits but one that would be stringent enough to prevent future refusals of medical care and to hold those parents accountable for already refusing medical care for children.

Civil liability has also been imposed on parents in other countries. As stated in international judicial decisions[386], courts have civilly charged parents for the neglect of their child's medical health by imposing compensatory damages of large amounts, which will dig deep in to parent's pockets. This also acts as a deterrent from refusing medical care. Civil liability may not be as harsh as criminal liability; however it may significantly impact a parent's financial status which for them may be harsh enough.

Liability is one of the crucial factors to which courts must apply extensive attention. The main charge for the harm or death of a child due to refusal of medical care should be that of neglect or culpable homicide respectively. Alternatively, civil liability may be imposed with the addition of

[382] *Walker v Superior Courts* 47 Cal. 3d 112 763 1988.
[383] Defined as the unintentional killing that results from recklessness or criminal negligence or from an unlawful act that is a misdemeanour or low-level felony .Available at *http://criminal.findlaw.com/criminal-charges/involuntary-manslaughter-overview.html*, accessed on 29 October 2014.
[384] Defined as the intentional killing of a human being –Available at *http://www.legalcity.net* , accessed on 29 October 2014.
[385] Defined as the unintentional but negligent killing of a human being – Available at *http://www.legalcity.net,* accessed on 29 October 2014.
[386] *State v Mckown* 475 N.W.2d 63.

protective measures to ensure the child's health and well-being. Such additional measures may include house monitoring, regular visits to a physician, unexpected visits by a medical practitioner inter alia. All these recommendations must be put into practice to ensure the well-being of the child and to cater for the best interests of the child.

Apart from attaching liability to parents for the refusal of medical care, South African law must extend the definition of caregiver. The new definition should be extended to include third parties or persons who have blood relations or any other interested person, to make decisions regarding the child's best interest. Whilst, this may sound far too wide to be allowing any person to make a decision for the child, it would be a decision serving the necessary needs of the child. The current definition of caregiver under the Children's Act[387] grants caregivers extended responsibilities over the child, which is appropriate in the circumstances, as the child requires adequate protection from the law as the State's primary obligation.

Section 32[388] indicates a comprehensive provision allowing for the inclusion of third parties. Third party intervention is a core to the protection of the health and wellbeing of the child. Parents often believe that they themselves or that of the court are the only decision makers in the child's life. However this section includes any person who makes decisions including the decision to provide medical care for the child, should the parents unreasonably refuse to do so, on the basis of religion. However this provision indicates that the court must make this judgment call.

Some practical examples of unreasonable refusal to provide medical care would include situations where the child's health is not in danger per se, but discomfort and inconvenience to the child can be eliminated through medical care, for instance should the child have a runny nose or a terrible cough which can be treated by medical care but the parents refuse; or in more severe cases where the child appears to be weak and faints for reasons undetermined by parents, medical attention is required. Other practical examples may include if the child shows systems of prolonged ill health and the parents, being aware of such symptoms, refuse medical care, but instead rely on their faith to cure the child.

[387] Section 1 of the Children's Act (note 2 above).
[388] Section 32 of the children's Act (note 2 above).

The third party should be provided with parental rights and responsibilities to make a decision regarding the child's health and wellbeing. An intermediary should be provided by the legislature to ensure that the third party is acting in the best interest of the child. In most instances the courts act as the intermediary between the parent and the child. However by including the courts in almost every issue surrounding the child may result in a tedious effort to secure immediate health care for the child. Applications to the courts can be timeous causing delays in administering medical care which may further result in the deterioration of the child's health.

It is submitted that the need for third party decisions to override parental decisions is vital. By introducing this concept into South African law we are not only ensuring safety and well being of the child but we also place the burden on the parents to ensure that they will not refuse medical attention for their child should the need be. The third party involved in the decision making process is one who is obviously in close connection with the child, as mentioned above, and is able to make a valued judgment that the child is in need of medical attention. Further in terms of the best interest of the child standard, as indicated above, the main aim of the third party would be to do exactly that, to act in the child's best interests. It is evident that for a third party to be adamant in securing medical treatment for the child that the parent is not acting in the child's best interest. It is once again submitted that the child be favoured in such instances and be allowed to receive the medical care irrespective of the parents refusal.

Thus, it is evident, from McQuoid- Mason's discussion on the *Hay v B* judgment, that apart from the strenuous process of court application, the Minister of Social development may also be hard to reach in order to obtain consent. Thus McQuoid-Mason's submission that, it shall no longer be 'necessary for doctors to obtain a court order to overturn an unlawful refusal of consent by parents in cases where children require [necessary] medical treatment' is supported. Based on this indication it is submitted that medical practitioners be granted the power to overrule decisions made by parents which harm the child and result in the deterioration of the child's health. The arena of medical practitioners allowed to intervene in such a manner should be limited to those practitioners who; have possibly examined the child on previous occasions, are aware of any pre-existing conditions which has lead to the current situation, has been advised of the child's conditions by the interested third party or those who have the child in their facility

and it is evident that their conditions require medical attention. Doctors are experts in their field and are capable of making such a judgment call.

Thus the Doctor is an effective third party, especially due to the close involvement of the situation. However in the event of a lack of such a situation, the child's relatives or other interested parties, those interested in the child's health, safety and well-being, shall be granted automatic exemption from liability by parents who may charge third parties for making decisions that are in the best interests of the child.

4.3 CONCLUSION

From the above discussion it can be concluded that the child's right to life and health care is one that requires extensive protection at the expense of any other rights. The best interests of the child has been placed at the center of all decisions regarding the child and no decision made on behalf of the child shall result in harm, abuse, neglect, maltreatment or even death. The child must always be protected by the courts. The child's rights should take priority since South Africa is a democratic society based upon human dignity, freedom and integrity under our Constitution.

CHAPTER 5:

CONCLUSION

This paper has conceptually discussed the relevant aspects surrounding the refusal of medical care for a child. South African law has not been precise in their application of some of the various principles relating to the refusal of medical care. As we know parents can consent to medical care for the child but does our law allowed them to refuse medical care? This question has been answered throughout the dissertation. The South African judiciary has not faced many of these challenges, thus our courts largely rely upon the international law framework to provide us with guidance on how to deal with such matters. With the influence of the international conventions, covenants, and case law, South Africa is slowly making its way into the children's sector.

The child is not always in the position to provide autonomous consent for medical care. The parents are regarded as the child's primary caregiver and the person responsible for the child. The parents are tasked with the duty to provide medical care for the child and in doing so should always take into account the child's best interests.

All actions of a parent or guardian should be consistent with all legislation and common law principles. As illustrated, the refusal of parental consent falls within the ambit of the parental rights and duties. South African law is indicative of the rights and duties by which parents are to strictly abide strictly by and no deviation shall be permitted unless it is reasonable and justifiable. South African law does not specify the extent to which parents are able to exercise their duties. However such decision lies with the courts. The courts will weigh up the exercise of parental autonomy and determine whether or not it is predominantly in the child's best interest.

One major provision which has been given great national and international recognition was the best interests of the child standard, which has provided the courts with a basis for their decisions. This standard has been criticized in all journals, writings, case law etc. The various conventions and Acts have provided us with different meanings of the term best interests of the child. It is the caregiver who will have to distinguish which of these definitions best suit the child's condition

and circumstances. The Constitution seems to provide the highest meaning of the standard and allows for persons to view children's rights as being of paramount importance.

Parent's refusal of medical care as a result of religious objections is a sensitive and critical topic. One must approach the matter delicately due to the beliefs of persons involved. This segment has been extensively dealt with by the courts in relation to the limitation of parental rights and responsibilities which are not in the best interests of the child. The limitation enquiry has proved that the exercise of the right to religion over and above the child's health care needs and the right to receive health care is unjustifiable and unreasonable. The right to religion is not an absolute right and thus will be trumped in order to respect the rights of the child when necessary. This limitation on the right to religion still allows the parents to practice their religion and bring up their children in terms of their religious denominations. However, such practice is restricted to the point at which it begins to impinge on the child's 'right to health care'[389] and 'right to life.'[390] Thus it can be concluded that the refusal of medical care, solely on religious grounds, is unreasonable and unjustifiable.

The main concern regarding the refusal of parental consent is that parents believe that they have the right to practice their religion and in doing so their autonomy ought to be respected. This raises concern because to a larger extent it negatively impacts the child's right to access health care and right to life. By exercising parental autonomy parents may be acting adversely towards the child's health care. Should the medical practitioner or any related person with medical authority, respect the decisions of the parents to refuse medical treatment , and in the medical opinion the child requires such treatment in order to sustain the life of the child, then such a medical practitioner will also be in violation of the child's 'right to health care.'[391]

Refusal of parental consent for medical care may have profound consequences, as discussed previously. Thus the courts, in playing an active role in the child life should enhance the provisions protecting the child to include third party intervention as a solution into South African law which has a double purpose. This provision may exempt parents from being liable for murder and assault for neglect of the child and it further protects the child by awarding the child

[389] Section 27 of the Constitution (note 8 above)
[390] Section 15 of the Constitution (note 8 above)
[391] Section 27 of the Constitution (note 8 above)

necessary medical care. In the event of failure to allow for third party intervention courts should be more vigilant and strict in imposing sanctions and liability onto parents who neglect their child and fail to provide medical care when necessary.

In conclusion, all the above submissions contribute to serving the best interests of the child. The primary concern in any acts of decision making is the best interests of the child to receive adequate and necessary medical care. All interested parties, be it the parents, courts, or third parties, should ensure the child's wellbeing, and protect the child from any neglect maltreatment or harm. Parents who fail to do so shall be held liable for an offence and be charged in a court of law. The law should be effective enough to account for all the child's needs. South African law should become more stringent in its application of the law and emulate some of the international provisions which provide added protection for the child. The child should be one of utmost importance and should be the first and foremost consideration in every matter. A child is not an object but a person, and just like all other persons, should be protected from harm and danger. Dr. Seuss, a famous children's author, once wrote that 'a person's a person no matter how small'[392] this would include that the duty of the child falls upon everyone and not only a few.

[392] Available at *http://www.compassion.com/child-advocacy*, accessed on 29 October 2014.

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