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ATTORNEY GENERAL OPINION NO. 91- 43

The Honorable Bruce Larkin
State Representative, 63rd District
State Capitol, Room 180-W
Topeka, Kansas 66612

Re: Public Health -- Healing Arts; Kansas Healing Arts
Act -- Consent of Unemancipated Immature Minor

Minors -- General Provisions -- Consent of
Unemancipated Minor

Synopsis: An unemancipated, immature minor is not
considered legally capable of understanding the
nature and consequences of medical or surgical
treatment or procedures and therefore is not
legally capable of providing an informed consent to
any medical or surgical services. Cited herein:
K.S.A. 38-123; 38-123a; 38-123b; K.S.A. 1990
Supp. 65-2891; K.S.A. 65-2892; 65-2892a.

* * *

Dear Representative Larkin:

As Representative from the 63rd District you pose a number
of questions relating to the legal capacity of an
unemancipated, immature minor to consent to various medical
and surgical procedures without the consent of a parent or
guardian. Specifically you ask whether such a minor may
consent to the following services:

- "(1) Receiving a nonprescription drug from a school nurse or other health care provider.
- "(2) Receive a prescription drug from a physician.
- "(3) Receive a prescription drug from a nurse or other health care provider.
- "(4) Receive minor surgery.
- "(5) Receive major surgery in a non-emergency situation.
- "(6) Receive surgery for implanting of the new drug, Norplant."

The legal constraints against medical or surgical treatment of a minor without parental/guardian consent derive from principles of liability applicable to health care providers. In other words, neither statutory nor common law per se prohibit a health care provider from treating a minor without parental/guardian consent; however, common law doctrines of liability for unauthorized treatment of minors have the effect of deterring health care professionals from providing medical/surgical services to minors without the consent of a parent or guardian. See 61 Am.Jur.2d Physicians and Surgeons, § 178 (1981); "Minor's Right to Medical Care", 31 Medical Trial Technique Quarterly 286 (Winter 1985). It is within this legal framework that your questions regarding an unemancipated, immature minor must be addressed. The general principles relating to consent to medical/surgical treatment are well stated in Younts v. St. Francis Hospital and School of Nursing, 205 Kan. 292 (1970):

"It is the settled general rule that in the absence of an emergency or unanticipated conditions arising during surgery a physician or surgeon before treating or operating must obtain the consent of the patient, or if the patient is incompetent the consent must be obtained from someone legally authorized to give it for him. A surgical operation on the body of a person is a technical battery or trespass, regardless of its result, unless the person or some authorized person consents to it.

Generally the surgeon is liable for damages if the operation is unauthorized.

. . . .

"The consent of a patient to be sufficient for the purpose of authorizing a particular surgical procedure must be an informed consent. The patient must have reasonable knowledge of the nature of the surgery and some understanding of the risks involved and the possible results to be anticipated." Pages 298-299.

In other words, mere consent to medical or surgical treatment is not adequate to protect the provider from liability. The consent must be informed which implies both a reasonable explanation of the contemplated treatment or procedure by the provider and the capacity of the patient to appreciate potential dangers and benefits. 61 Am.Jur., Physicians and Surgeons § 187 (1981).

The issue thus is not whether an unemancipated, immature minor may consent, but whether a health care provider risks liability for treatment of a minor in the absence of informed consent by the parent or guardian. Put another way, the issue is whether an unemancipated, immature minor is considered capable of giving consent sufficient to protect a health care provider from claims of unauthorized treatment as well as claims that the consent was not informed.

In Younts, supra, the Kansas Supreme Court was faced with the question of whether a 17-year old girl's consent to a minor surgical procedure without the knowledge or consent of her parents was sufficient to shield a hospital from liability for unauthorized medical treatment. The court acknowledged that the sufficiency of a minor's consent, as with an adult's consent, depended upon his ability to understand and comprehend the nature of the surgical procedure, the risks involved and the probability of attaining the desired results in the light of the attendant circumstances. The court acknowledged that while generally the consent of a parent to a surgical procedure is necessary, an exception is recognized when the child is close to maturity and knowingly gives an informed consent to the procedure.

This exception has come to be known as the "mature minor" exception and is applicable under circumstances when a minor is mature enough to understand the nature and consequences and

to knowingly consent to beneficial medical or surgical treatment. See Annot., Medical Practitioner's Liability for Treatment Given Child Without Parent's Consent, 67 A.L.R. 4th 511, § 7 (1989). By definition an immature minor does not fall within the exception relating to mature minors and therefore does not have the legal capacity to give an informed consent to medical or surgical treatment. A medical care provider would risk liability by providing medical or surgical treatment to an unemancipated, immature minor without parental or guardian consent for even the most minor affliction. This risk is one we assume a medical care provider would not be willing undertake in light of the almost certain liability to follow.

We note various Kansas statutes which address the issue of a minor's consent in specific circumstances, i.e. K.S.A. 38-123 (unmarried pregnant minor may consent to furnishing hospital, medical and surgical care relating to her pregnancy where no parent or guardian is available), K.S.A. 38-123a (minor 17 years and older may donate blood without parental consent), K.S.A. 38-123b (minor 16 years or older may consent to performance and furnishing of hospital, medical or surgical treatment or procedures where no parent or guardian is immediately available), K.S.A. 65-2892 (minor may consent to diagnostic examination and treatment for venereal disease), and K.S.A. 65-2892a (minor may consent to examination and treatment for drug abuse, misuse or addiction). As we stated in Attorney General Opinion No. 83-39:

"Generally, those statutes do nothing more than protect a hospital, physician or other health care provider from being held liable for civil damages, if the hospital, physician or other health care provider competently furnishes medical treatment to minors, when certain circumstances, such as an emergency, exist or when a particular treatment is provided. All of these statutes, however, merely recognize, and waive, the general rule that medical treatment cannot be provided to a minor without the consent of the minor's parent or legal guardian, without the person rendering the treatment being subject to civil damages for unauthorized treatment. See Younts v. St. Francis Hospital and School of Nursing, supra, at Syl. 6 and 7. Thus, these statutes merely provide a legal defense to a hospital,

physician or other health care provider in the event it is sued for providing medical services to persons who have not attained the statutorily-prescribed age of majority."

Those statutes protect health care providers against claims of unauthorized treatment. However, as noted, for a minor's consent to be a full shield against liability, the consent must be informed. The patient must have reasonable knowledge of the nature of the procedure and some understanding of the risks involved and the possible results to be anticipated. Younts, Supra. Absent such an informed consent a health care provider risks liability even if a minor falls within one of the statutory exceptions to the parental consent requirement. While those statutes in effect lower the age of majority and permit minors to consent to specified treatment and procedures, a minor must still be mature enough to give an informed consent. In other words, those statutes shield health care providers from liability for unauthorized treatment if the consenting minor is sufficiently mature to give a knowing and meaningful consent.

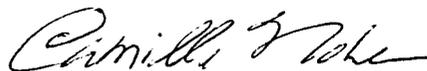
Those statutes, therefore, do not authorize an unemancipated, immature minor to give an informed consent to any of the specified medical or surgical treatments or procedures.

We therefore conclude that if in fact a minor is immature all of your questions must be answered in the negative. An unemancipated, immature minor is not considered legally capable of understanding the nature and consequences of any medical or surgical treatment or procedures and therefore is not legally capable of providing an informed consent for any medical or surgical services.

Very truly yours,



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Camille Nohe
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