

# ***Parens patriae* jurisdiction and religious beliefs of parents in medical treatment of a minor: Examining the Supreme Court's decision in Tega Esabunor v Faweya & Ors (2019) LPELR 46961 (SC) in light of international practice**

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Recently, the Supreme Court of Nigeria in *Tega Esabunor v Faweya & Ors* (2019) LPELR 46961 (SC) dismissed an appeal seeking to quash the order of a magistrate court for the transfusion of blood to a baby. The appellants contended that the court had no jurisdiction to make the order. The crux of the case was whether the parents' right to consent to the child's treatment based on religious beliefs supersedes the child's right to live, thus reflecting the tension between a parent's right to give consent to the choice of treatment for their child, and the court's power to override such rights through the inherent *parens patriae* jurisdiction of the state. The case also reflects the tension between the freedom of a parent to practise their religion and the right of a child to live, in the medical context. This article examines the findings of the Supreme Court in *Tega Esabunor's* case, considering whether the court's decision is in line with the generally accepted practice on when the state can intervene if persons with parental responsibility refuse medical treatment for an incompetent child because of religious beliefs. Cases from other jurisdictions are analysed to ascertain the position of foreign courts. It is submitted that the Supreme Court's judgment reflects accepted international practice regarding parental refusal of consent for medical treatment of a child.

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Usually, parents are responsible for making medical decisions on behalf of their children. An exception occurs where it is demonstrated that the minor is mature enough to understand the consequences of his/her action.<sup>[1]</sup> Where a child does not have the capacity to consent to treatment, guardians or those with parental responsibility can provide such consent. In *Tega Esabunor v Faweya*,<sup>[2]</sup> the case under review in this article, the child in question was a minor – merely 1 month old, and therefore dependent on his parents' consent for blood transfusion. His parents withheld their consent.

Ethical considerations can arise in such situations where parents refuse to give consent for their children's medical treatment, especially where such treatment is vital to save the child's life. It may be the case that parents refuse to give consent because of their religious beliefs or personal convictions. Such beliefs may be valid and recognised, but they will not as a matter of principle and precedent, established in Nigeria and other jurisdictions, override what is in the best interest of the child – usually in such cases, the right to life of the child.

The state, through the courts, will ensure that the child's best interests are preserved using the inherent *parens patriae* jurisdiction of the state. Such intervention will usually prevent loss of life of the child.

The Supreme Court of Nigeria, bearing this in mind, dismissed the appeal brought by the second appellant, *Tega Esabunor* (first appellant)'s mother, seeking to review the decision of the magistrate court in Lagos, where the transfusion of blood to a child who would otherwise die was ordered.

## **Parental responsibility**

The common position for minors who lack capacity is that consent for treatment can be provided by anyone with parental responsibility. The Supreme Court, recognising a minor's incapacity to decide, stated in *Tega Esabunor's* case, that all adults have the inalienable right to make any choice they may decide to make, and to assume the consequences.<sup>[3]</sup> However, there are different considerations applicable to children who are unable to make decisions for themselves. Accordingly, the law is guaranteed to protect such a person from abuse of his/her rights, because in maturity (s)he may reject such religious beliefs.<sup>[4]</sup>

In Nigeria, section 300 of the Criminal Code obliges parents to provide their children with necessities, including medical treatment. Failure to do so renders them liable for consequences such as loss of life and health. Ultimately, except in cases of emergency, hospital authorities must not treat a minor without the consent of the parents.<sup>[5]</sup> This statement implies that parents have significant influence in a child's treatment, and are usually best placed to judge their children's interests and make decisions regarding serious treatment.

## **Limits of parental responsibility in medical consent**

In certain situations, medical doctors may suggest treatment, but parents and guardians will not consent to the medical procedure. The court can in such cases still proceed to treat the patient,

provided the courts have ordered or permitted the treatment or, in an emergency, under the doctrine of necessity.<sup>[6]</sup> These are the limits of parental consent. The doctrine of necessity arises in emergencies where children may need urgent medical treatment to avoid death or serious injury. In such cases, the doctor will treat the child as long as such treatment is in the child's best interest and is considered necessary. In the context of Tega Esabunor's case, there was no need for the medical doctor, the fifth respondent, to employ the doctrine of necessity because the police applied to the court for an order authorising the doctor to transfuse the blood.

Refusing treatment on religious grounds is distinctive to the Jehovah's Witness sect. This belief is anchored on certain biblical scriptures, including Genesis 9:3-4, Leviticus 17:11 and Acts 15:20, 29. A cumulative interpretation of these verses is that blood transfusion involves using blood as a nutrient or food, which is comparable to eating blood.

The court's position when parental religious beliefs preclude specific treatment is well captured in the US case of *Prince v Massachusetts*, where the court enunciated the legal principle: 'Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children.'<sup>[7]</sup>

Courts in other jurisdictions maintain a similar position, often finding that the state is authorised to intervene to save a child's life through the *parens patriae* doctrine. The courts continue to order blood transfusion when a child is about to lose his/her life.

### **Parens patriae jurisdiction of the court**

The legal doctrine *parens patriae* is to the effect that the state has the authority, in appropriate circumstances, to intervene in the typical parent-child relationship for the protection of the child. Over 100 years ago, Lord Esher MR, in *R v Gyngall*, described the *parens patriae* jurisdiction exercised over children as a paternal jurisdiction, administrative in nature where the Chancery Court could act on behalf of the Crown in place of parents, 'superseding the natural guardianship of the parent.'<sup>[8]</sup>

*Parens patriae* is also a practical jurisdiction that is wider than the parents' jurisdiction, and is composed of common law rather than provisions in the child protection statutes.<sup>[9]</sup> While parents and guardians have the right and duty to decide for their young children, the state's interests in protecting the health and welfare of the minor, in life-saving or therapeutic treatments, can surpass those of parents and guardians.

In circumstances where the courts must adjudicate a parent's refusal of consent, the court will consider and make an order based on what will promote the child's welfare. Thus, while the courts will place a premium on the wishes of the parents, ultimately, the court's final decision is based on the best interest of the child. Legal instruments adopted in Nigeria recognise this principle. An example is the United Nations Convention on the Rights of Child (1989), which recognises the principle of best interest in Article 3.<sup>[10]</sup> Article 4(1) of the 1990 Charter in the Rights and Welfare of the African Child also recognises best interest of a child in any decision.<sup>[11]</sup>

The interest of the child is also recognised in other African countries. South Africa (SA)'s Constitutional Court has laid the foundational principle of the best interests of the child and confirmed the paramountcy of this principle. Thus, both inferior

and superior courts apply this principle in several situations and particularly in decisions pertaining to the medical treatment of a child, even where parents refuse such medical treatment. This was established in the case of *Hay v B*,<sup>[12]</sup> where the court held that the best interest of the child was not only paramount but the most crucial factor when considering competing rights and interests concerning children, and notably, the court stated that the parents' private beliefs could not override their child's right to life. In SA, section 129 of the Children's Act No. 38 of 2005<sup>[13]</sup> now applies to medical treatment and surgical operations regarding children. Subsection 10 states that no parent, guardian or caregiver of a child may refuse to assist a child 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.

### **Parens patriae jurisdiction and religious beliefs in the UK**

The courts in England and Wales recognise that parents are in the best position to decide for a child, as in *Re Z (A Minor)*.<sup>[14]</sup> However, in the face of a conflict between treatment for the child and the opinion of the parents, the British Medical Association recommends that the courts rule in the child's best interest. This decision found voice in *Re C*,<sup>[15]</sup> where orthodox Jewish parents preferred that their daughter's life be prolonged because of their religious beliefs, contrary to the doctor's opinion. The court ordered that the treatment be discontinued.

In some cases, courts have been willing to support the parents' decision over the medical doctors provided the decision is equally in the child's best interest. In *Re MB*,<sup>[16]</sup> parents, in a similar situation to that in *Re C*, tendered evidence showing that withdrawing treatment was not in the child's best interest. Evidence showed that despite his pain and discomfort, the child still felt pleasure being around his family. The English courts found this to be true. In *Re W*,<sup>[17]</sup> the courts were clear about their ability to override parents, children and doctors in performing their protective duties. However, the courts also noted that certain limits applied to this overriding power. Such powers could only be exercised if the child's welfare was threatened by a serious and impending risk that the child would suffer grave and irreversible mental or physical harm.

In the UK, parents' refusal of treatment on religious grounds is a criminal offence.<sup>[18]</sup> Two cases bearing semblance to Tega Esabunor's case are relevant here. In *Re S (A Minor) (Medical Treatment)*,<sup>[19]</sup> the English High Court of Justice ordered the doctors to give a 4-year-old blood transfusions to treat leukaemia despite parental objections on religious grounds. The court considered that the child's welfare should take precedent over all other concerns. Going further, the courts absolved the parents of any guilt about flouting their religious beliefs, holding that they were not responsible for the decision.<sup>[20]</sup> Similarly, in *Re R (A Minor)*,<sup>[21]</sup> the parents were Jehovah's Witnesses and refused consent for blood transfusion. The court held that it was in the best interest of the child to receive the blood transfusion. This need overrode her parent's beliefs.

From all the cases examined, the UK courts, in exercising their *parens patriae* jurisdiction in religious cases, have done so bearing the child's interest in mind.

## **Parens patriae jurisdiction and religious beliefs in the USA**

In the USA, parents often want to rely on the Free Exercise Clause of the First Amendment, which allows free exercise of religious beliefs in order to refuse treatment for their child, without success.<sup>[22]</sup> While it is accepted that the freedom to believe is absolute, the right to act on that belief is not. The dictum in *Prince v Massachusetts* supports this position: 'the family itself is not beyond regulation in the public interest.'<sup>[23]</sup> Civil government may act to guard the general interest in a youth's wellbeing, and the state as *parens patriae* may restrict the parent's control.

Several other US cases illustrate this position. In *People ex rel. Wallace et al. v Labrenz et al.*,<sup>[24]</sup> the parents of a child rejected blood transfusion for the child, asserting that God's laws prohibited blood. The court, while recognising the parents' freedom of religion and their right to care for and train their children, superseded those rights in the circumstance of necessary medical treatment for the child.

In *Morrison v State*,<sup>[25]</sup> a child's parents refused blood transfusion because of their religious beliefs. The court acknowledged the parents' religious beliefs but rejected their argument, finding that since the parents were not expected or ordered to consume blood, they could not be affected by the child's need for blood. Additionally, in *State v Perricone*,<sup>[26]</sup> the court stated that they could appoint a guardian for medical treatment decisions of a child where the parents refused such treatments on the grounds of religious freedom. The court ordered the blood transfusion. Refusing to give consent for blood transfusion can amount to neglect, as stated by the court in *Santos v Goldstein*.<sup>[27]</sup>

Essentially, these US cases show that where there is a collision between a child's welfare and a parent's religious belief, the former is paramount.<sup>[28]</sup>

## **Parens patriae and religious beliefs in Nigeria: Analysing the Supreme Court judgment in Tega Esabunor**

In Tega Esabunor's case, the second appellant gave birth to the first appellant at the first respondent's hospital. Within 1 month of birth, the first appellant became critically ill. The second appellant returned to the clinic for treatment. The first respondent began treating the first appellant, and during the treatment, found that the first appellant needed a blood transfusion urgently. The second appellant and her husband refused the blood transfusion, arguing that such transfusion was hazardous and that their religion forbade blood transfusion. By virtue of sections 27(1) and (30) of the Children and Young Person's Law (CYPL)<sup>[29]</sup> and Policy, the police sought to protect the life of the child via a court order. The court granted the order, and the first appellant was treated and discharged.<sup>[30]</sup>

The second appellant appealed to the High Court for an order of *certiorari* quashing the entire proceedings at the Chief Magistrate Court, and sought damages against the first and second respondents for unlawful blood transfusion to the first appellant without their consent. The second appellant's argument was rejected by the court, which reasoned that such an order had no real effect given that the blood cannot be retrieved. On further appeal, both the court of appeal and the Supreme Court rejected the argument and dismissed the case. The courts reasoned that it was paramount to save a child's life when a parent refuses blood transfusion or medical treatment for their child on religious grounds. This was in the best interest of the

child, and the life of the child must outweigh the religious beliefs of the parents.

One of the issues raised before the Supreme Court was the validity of the lower court's decision, refusing to quash the orders and the proceedings for lack of jurisdiction. This raised the issue of the court's *parens patriae* jurisdiction. The appellants contended that the Chief Magistrate lacked the jurisdiction under sections 27(1) and (30) of the CYPL to entertain the case and order blood transfusion. However, the Supreme Court stated that section 18 of the Magistrate Courts Law 1997 gave the Chief Magistrate inherent jurisdiction to do so. The Supreme Court agreed with the Magistrate Court that preventing the child from having the transfusion could amount to a felony under sections 339 and 341 of the Nigerian Criminal Code.<sup>[31]</sup>

Citing section 33 of the Constitution, the Supreme Court emphasised that every person has a right to life, and no one shall be deprived intentionally of his/her life, apart from a convict. Following this review, the court further stated that the Chief Magistrate in such cases had the inherent jurisdiction to prevent the commission of a criminal offence. This is similar to the decisions of the UK and especially the US courts, where in the latter jurisdiction, for instance, the courts specifically opined in *Morrison v State* that one 'may not prevent another person, a citizen of our country, from receiving medical attention necessary to preserve her life.'<sup>[32]</sup>

Holding that the magistrate court has the inherent jurisdiction to make the order was one way to resolve the issue of jurisdiction raised by the appellants. It is submitted that the magistrate court could still have jurisdiction under section 27(1) of the CYPA. This submission is made based on the authority of *Santos v Goldstein*, where the Supreme Court of the USA found that parents' refusal to consent to medical treatment of their child based on their religious conviction was an issue of neglect.<sup>[33]</sup> Therefore, the first appellant could be found neglectful under section 27(1) of the CYPA Lagos State.<sup>[34]</sup> On this basis, the magistrate court would be within the wardship jurisdiction provided under the statute to make the order. Specifically, Section 27 states:

'Any local government council, any police officer or any authorised officer, having reasonable ground for believing that a child or young person comes within any of the descriptions hereinafter mentioned ... who has been neglected or ill-treated by the person having the care and custody of such child; or who has a parent or guardian who does not exercise proper guardianship ... may bring that child or young person before a juvenile court. The court, if satisfied that the child or young person comes within any of the paragraphs in subsection (1) may make a corrective order.'

This provision allows a police officer to bring a neglected or ill-treated child, as well as a child whose parents are not exercising proper guardianship, to the juvenile court (magistrate court). The court can then exercise its authority by making a corrective order. Refusing to give consent for a specific medical treatment of one's child when the child needs that treatment to live can be considered neglect or lack of proper guardianship by parents, because it constitutes risking a child's life on the altar of a parent's religious belief.

While the types of corrective order are provided in the statute, it is suggested that the order given by the magistrate court, which is not specifically provided in the CYPA, can be considered corrective. This order was to correct, and indeed corrected the situation in which the

child could have died. When an order is corrective, 'it is intended to correct'.<sup>[35]</sup>

Comparing the approach and reasoning of the Supreme Court of Nigeria with other jurisdictions, the Supreme Court followed established international practice by prioritising the best interest and life of the 1-month-old baby over his parent's religious beliefs.

## Conclusion

From cases examined in various jurisdictions, as well as Tega Esabunor's case, in Nigeria, courts are not willing to subordinate the life of a sick child lacking the capacity to consent to medical treatment to the religious beliefs of his/her parents. In spite of fundamental clauses enshrined in laws such as the First Amendment of the US law, which embraces two concepts – freedom to believe and freedom to act – the courts have recognised that while the first is absolute, the second cannot be.<sup>[36]</sup> Thus, while it is conceded that freedom of religion and right of parenthood are to be accorded the highest possible respect, neither of those rights are beyond limitation.

It is the author's opinion, based on the cases examined in this article, that the decision of the Supreme Court in Tega Esabunor represents the correct position when there is tension between a parent's religious beliefs and a child's right to life. This position, simply put, is that the child's best interest, usually the right to live, will be paramount.

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1. Skeels JF. In re E.G.: The right of mature minors in Illinois to refuse lifesaving medical treatment, 21 Loy. U. Chi. L. J. 1199 (1990). <http://lawcommons.luc.edu/lucij/vol21/iss4/8> (accessed 6 April 2023).
2. Tega Esabunor & Anor. v. Faweya & Ors (2019) LPELR 46961 (SC).
3. Legalnaija. Power of court to override a parent's decision not to allow blood transfusion on their child. 7 August 2020. <https://legalnaija.com/power-of-court-to-override-parents/02900951941647681314/> (accessed 6 April 2023).
4. Tega Esabunor and Anor v. Faweya and Others 3PLR/2019/7 (SC). <https://judgements.lawnigeria.com/2019/04/24/tega-esabunor-and-anor-v-faweya-and-others/> (accessed 6 April 2023).
5. Banks v Medical University of South Carolina (S.G. 1994) 444SE 2d 519.
6. Glass v UK (2004) 1 FCR 553.
7. Prince v. Massachusetts 321 US 158 (1944).
8. R v Gyngall (1893) 2 QB 232 at 239.
9. Medical Discrimination Against Children with Disabilities: A Report of the United States Commission on Civil Rights. (September 1989).
10. Convention on the Rights of the Child (1989) Treaty no. 2753.
11. Oti-Onyema LA. Parental responsibility over child's health: Dispensing with court proceedings in emergency situations. NAUJILJ 2020;11(1):170-180.
12. Hay v B and others 2003 (3) SA 492 (W) 494I-495A.
13. South Africa: Act No. 38 of 2005, Children's Act [South Africa], 19 June 2006.
14. Re Z (A Minor) (Identification: Restrictions on Publication) (1997) Fam. 1, 32.
15. Re C (A Minor) (Medical Treatment), sub nom Re C (A Minor) (Withdrawal of Lifesaving Treatment) (1998) 1 FLR 384:389.
16. An NHS Trust v MB (2006) 2 FLR 319.
17. (A Minor) (Medical Treatment: Court's Jurisdiction) (1993) Fam. 64.
18. The Queen v Robert Downes (1875–1876) LR 1 QBD 25 Crown Cases Reserved.
19. Re S (A Minor) (Medical Treatment) (1993) 1 FLR 376.
20. Division, Family. Re S (A Minor) (Medical Treatment). Family law (1993 April) 23 (1992):215-216.
21. Re R (A Minor) (Medical Treatment) (1993) 2 FCR 544.
22. Lingle EA. Treating children by faith: Colliding constitutional issues. J Legal Med 1996;17:301-306.
23. Prince v. Massachusetts 321 U.S. 158 (1944).
24. People Ex Rel. Wallace v Labrenz, 104 N.E.2d 769 (IL 1952).
25. Morrison v. State 252 S.W.2d 97 (MO C. of A.1952).
26. State v Perricone 181 A.2d 751 (NJ 1962).
27. Santos v Goldstein 227 N.Y.S.2d 450 (NY 1962).
28. Woolley S. Children of Jehovah's Witnesses and adolescent Jehovah's Witnesses: What are their rights. Arch Dis Childhood 2005;90:715-719. <https://adc.bmj.com/content/90/7/715#xref-ref-28-1> (accessed 6 April 2023).
29. Children and Young Person's Law (CYPL) Cap 1 Laws of Lagos State 1973.
30. Tega Esabunor and Anor v. Faweya and Others 3PLR/2019/7 (SC) <https://judgements.lawnigeria.com/2019/04/24/tega-esabunor-and-anor-v-faweya-and-others/> (accessed 6 April 2023).
31. Criminal Code Act (1916) (Cap C. 38 LFN 2004).
32. Great Britain. High Court of Justice, Family Division. Re S (A Minor) (Medical Treatment). Family Law 1993;23:215-216.
33. Santos v Goldstein 227 N.Y.S.2d 450 (NY 1962).
34. Note that the Children and Young Person's Law (CYPL) Cap 1 Laws of Lagos State 1973 was updated to the Children and Young Persons Act 1993.
35. Corrective. In Merriam-Webster's Collegiate Dictionary 11th edition (n.d). <https://www.merriam-webster.com/dictionary/corrective> (accessed 6 April 2023).
36. Davis v Beason (1890) 133 U.S. 333 342, 10 S.Ct 299 33 L.Ed. 637 640.

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