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## Rights of underage patients

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## Rights of underage patients

Derechos de las pacientes menores de edad

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**ABSTRACT:**

The right of Russian citizens to their health protection is enshrined in the Constitution of the Russian Federation. However, there are peculiarities of the exercise of this right by a category of patients. The article analyzes the legal status of a minor patient, considers his social and individual rights in medical care. The peculiarities of the exercise of the child's right to information about the state of his health are revealed, the aspects of making a decision on consent or refusal from medical care are considered. Given the fact that minor patients do not have full civil legal capacity, i.e. they cannot be responsible for their health and are not able to protect themselves, the article examines the relationship between the child's right to give his consent to medical intervention with the volume of civil legal capacity, as well as the conditions for the participation of a minor in contractual relations in the field of health care. The authors analyzed peculiarities of the exercise of rights by certain categories of minor patients: those who suffer from mental disorders, orphans and children left without parental care, minors, drug addicts, etc.

**KEYWORDS:** child rights, legal capacity, legal representatives, minor patient, medical care, medical intervention, psychiatric care, consent to medical intervention, refusal of medical care, medical secrecy, contract for the provision of paid medical services, medicines, euthanasia, clinical trials.

**RESUMEN:**

El derecho de los ciudadanos rusos a la protección de su salud está consagrado en la Constitución de la Federación de Rusia. Sin embargo, existen peculiaridades en el ejercicio de este derecho por parte de una categoría menor de pacientes. El artículo analiza la situación jurídica de un paciente menor, considera sus derechos sociales e individuales en la atención médica. Se revelan las peculiaridades del ejercicio del derecho del niño a la información sobre el estado de su salud, se consideran los aspectos de la toma de una decisión sobre el consentimiento o rechazo de la atención médica. Dado que los pacientes menores de edad no tienen plena capacidad jurídica civil, es decir, no pueden ser responsables de su salud y no pueden protegerse, el artículo examina la relación

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entre el derecho del niño a dar su consentimiento a la intervención médica con el volumen de capacidad jurídica civil, así como las condiciones para la participación de un menor en las relaciones contractuales en el ámbito de la asistencia sanitaria. Los autores analizaron las peculiaridades del ejercicio de derechos por parte de determinadas categorías de pacientes menores: los que sufren trastornos mentales, los huérfanos y los niños sin cuidado parental, los menores, los drogadictos, etc.

**PALABRAS CLAVE:** derechos del niño, capacidad jurídica, representantes legales, paciente menor, atención médica, intervención médica, atención psiquiátrica, consentimiento a la intervención médica, rechazo de la atención médica, secreto médico, contrato para la prestación de servicios médicos remunerados, medicamentos, eutanasia, clínica. ensayos.

## INTRODUCTION

The Civil Code of the Russian Federation enshrines the general legal capacity of citizens and identifies certain categories of minors depending on age and the corresponding scope of legal capacity<sup>1</sup>. Articles 26 and 28 of the Civil Code of the Russian Federation indicate the types of transactions and other actions that minors can perform by themselves. These articles do not provide for actions related to the exercise of the natural rights to life and health, and therefore difficulties arise in the application of the rules of civil, family legislation, and other regulatory legal acts regulating relations in health protection of minors.

## METHODS

The authors conducted the research using comparative legal and legal sociological methods, methods of legal modeling and forecasting, and legal interpretation.

## RESULTS AND DISCUSSION

The Constitution of the Russian Federation (part 1, Article 41) guarantees everyone the right to health protection and medical care. The Convention on the Rights of the Child<sup>1</sup> recognizes the right of the child to the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health, and the member states shall strive to ensure that no child is deprived of his or her right of access to such health-care services (Article 24).

Federal Law No. 323-FZ of November 21, 2011 "On the Fundamentals of Health Protection of Citizens in the Russian Federation" (Law No. 323-FZ), among the basic principles of health protection, calls the priority of the patient's interests in the provision of medical care and the priority of child health (Article 4). Article 2 of this law defines a patient as an individual who receives medical care or who has applied for medical care, regardless of his condition or whether he has a disease.

A minor patient is a special category, first of all, due to age criteria, depending on which the legislator determines the option of independent participation of such a subject in various kinds of social relations, including medicine and healthcare.

According to the Convention on the Rights of the Child, every child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth. The child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.

Russian legislation defines the onset of majority by reaching the age of eighteen (Article 21 of the Civil Code of the Russian Federation). As for the extent of the legal capacity of a minor, the Civil Code of the Russian Federation associates it with reaching the age of 6 and 14 years, distinguishing, respectively, between minors under the age of 6 (completely incapacitated) and between the ages of 6 and 14, and minors between the ages of 14 and 18 years.

The main law in public health care approaches the issue of consent to medical care in a slightly different way, distinguishing between minors under 15 and minors between the ages of 15 and 18 (part 2, Article 54, Law No. 323-FZ), therefore, the issue of consent to medical intervention in relation to minors is one of the most controversial. Minors over 15 usually have the right to informed voluntary consent to medical intervention or to refuse it, except for cases when the provision of medical care to them in accordance with Part 9, Article 20 of the said law is possible without their consent.

There are exceptions to the general rule. If a minor is drug addict, then the right to consent to medical intervention or to refuse it arises from the age of 16; and in case of providing him with drug addiction treatment or during a medical examination in order to establish the state of a drug or other intoxication – only from the age of 18, if he has not acquired full legal capacity earlier.

If a minor is recognized in the prescribed manner as incompetent and, due to his condition, is not capable of giving consent to medical intervention, then it is necessary to obtain the consent of the minor's legal representative. The consent of the legal representative is also required for the transplantation of human organs and tissues in relation to a minor recipient (part 5, Article 47, Law No. 323-FZ).

The issue of voluntary consent is similarly addressed in the provision of psychiatric care. In accordance with Article 4 of the Law of the Russian Federation of July 2, 1992, No. 3185-I "On Psychiatric Care and Guarantees of the Rights of Citizens in its Provision" to a minor under 15 or to a minor with drug addiction under 16, psychiatric care is provided with informed voluntary consent to medical intervention of one of the parents or other legal representative, and to a person recognized as legally incompetent, if such a person, due to his condition, is not able to give informed voluntary consent to medical intervention, – in the presence of informed voluntary consent to medical intervention by his legal representative.

In practice, many questions arise in connection with the refusal of legal representatives from medical intervention in relation to a minor, which in most cases cannot be contested. However, if medical assistance is necessary to save life, then the medical institution has the right to go to court to protect the interests of the minor, and the court decision must be made as soon as possible<sup>3</sup>. Law No. 323-FZ in certain cases allows for the provision of medical care without the consent of a legal representative, if there is a need for emergency medical intervention to eliminate the threat to human life or if the child has no legal representatives.

For comparison, if an adult patient is in a so-called vegetative state and he has no legal representatives, that refusal of medical assistance by another person is impossible, while theoretically representatives of a minor may refuse medical assistance in such a case<sup>4</sup>. Although the current Russian legislation does not contain a rule allowing the use of active or passive euthanasia, refusal of medical intervention is often considered as passive euthanasia. Euthanasia of minors is prohibited in all states, with the exception of Belgium, where the euthanasia of children has been legalized since 2014<sup>5</sup>.

According to Russian legislation, minor patients have the same rights as adults, but are subject to special protection and have priority rights in the provision of medical care of any kind: primary medical sanitary care; specialized medical therapy (in treatment, prevention, diagnosis); ambulance; palliative care.

During the provision of medical services, the patient exercises both his personal non-property rights from birth (to life, health, health care), and property rights (in particular, to sign a contract for paid medical services). The literature also provides a classification of patients' rights to existential (for examination and treatment), information and communication, and organizational and support services (to choose a doctor and a medical institution, to receive medical services)<sup>6</sup>.

As a general rule, patients have the right to health protection, to medical care, which includes the right to choose a doctor and a medical organization, to prevention, diagnosis, treatment, and medical rehabilitation in these organizations; to information about one's rights and obligations, about the state of health, protection of information constituting medical secrets, refusal of medical intervention, etc. (Article 19, Law No. 323-FZ). However, the legal status of minor patients has its own specifics in comparison with the legal status

of adults, since in view of the lack of full legal capacity, minors cannot independently exercise their right to medical care, as well as conclude contracts for the provision of medical services.

As for the participation of minors in contractual legal relations in health care, minors have the right to conclude contracts for the provision of paid medical services with the written consent of their legal representatives, starting from the age of 14 (part 1, Article 26 of the Civil Code of the Russian Federation). However, as the right to informed consent arises for a minor later – from 15, 16, and in some cases from 18 years old, the agreement must contain a mark on the consent of the legal representative for the child to make this transaction.

As previously mentioned, the Russian legislator has enshrined a reduced age for minors to exercise their natural rights to life and health – as a general rule, from the age of 15 – through the right to consent or refuse medical intervention, while the refusal can be either complete (refusal from hospitalization), and partial (refusal of a specific type of treatment). However, the positions of scientists regarding the possibility of a minor who has reached the age of 15 years, to give consent or refuse medical intervention are ambiguous<sup>7</sup>. Many authors believe that this does not meet the requirements of Russian legislation. Thus, the constitutional right and duty of parents to take care of children is disclosed in the Family Code of the Russian Federation through their duty to take care of the health and moral development of their children. It means that a minor patient who has reached the age of 15 independently gives consent or refuses medical assistance, and the parents of the minor bear responsibility for the deterioration of his physical and mental state. In many states, a person only has the right to agree to medical intervention or refuse it upon reaching the age of majority<sup>8</sup>, which seems more feasible.

The capacity of a minor patient to independently decide on his health extends, for example, to pregnant women who have reached the age of 15, who, among other things, have the right to independently decide the issue of termination of pregnancy. Moreover, the announcement of pregnancy to the girl's parents will be considered as divulging medical secrets, consent to which the person who has reached the age of 15 gives independently, while before the child reaches the specified age, permission to divulge the secrets is signed by her legal representatives<sup>9</sup>.

A number of countries (France, Italy, Great Britain, etc.) allow for artificial termination of pregnancy only with the consent of the legal representatives of the pregnant minor<sup>8</sup>. In Russia, back in 2014, a draft law was developed<sup>10</sup> providing for the possibility of termination of pregnancy by an incapacitated person only by a court decision.

Law No. 323-FZ also enshrines such rights of minors to their health protection as undergoing medical examinations, providing medical care during the period of recovery and organized recreation, sanitary and hygienic education, training and labor, medical consultation in determining professional suitability.

According to the law, minors have the right to receive information about the state of health in a form accessible to them, but most often the doctor informs not the child about the state of health but his legal representatives, even if the child has reached the age of 15. Since the legislator has not fixed the lower limits of the age from which the child should be informed about the state of his health, with reference to Article 57 of the Family Code of the Russian Federation, it can be assumed that since from the age of 10 a child has the right to express his opinion on any issue in the family that affects his interests, then since this age the child has the right to receive information about the state of his health<sup>11</sup>.

In relation to certain categories of minor patients in need of special protection, the law provides for special rules.

Thus, orphans, children left without parental care, and children in difficult life situations, up to the age of four years inclusive, can stay in medical organizations of the state or municipal health care systems, the so-called "infant orphanages". At the same time, during the stay of children in these institutions, they receive

not only with medical, but also pedagogical, as well as social assistance, including comprehensive medical, psychological and pedagogical rehabilitation assistance using modern technologies.

Orphans and children left without parental care, as well as persons from among orphans and children left without parental care, are provided with free medical care in medical organizations of the state and municipal health systems, including high-tech medical care, clinical examination, health improvement, regular medical examinations, and their referral for treatment outside the territory of the Russian Federation is carried out at the expense of budgetary allocations from the federal budget. In case of medical indications, these children are provided with vouchers to sanatorium-resort organizations, as well as travel to the place of treatment (rest) and vice versa (Article 7 of the Federal Law of December 21, 1996 No. 159-FZ "On Additional Guarantees for Social Support of Orphans and Children Left Without Parental Care").

Orphans and children left without parental care certainly have the right to drug provision. At the same time, with regard to this category of minors, Federal Law No. 61-FZ of April 12, 2010 "On Circulation of Medicines" establishes a ban on a clinical trial of a medicinal product for medical use with their participation as patients. This rule is assessed by experts ambiguously. On the one hand, clinical trials are associated with certain risks, and therefore the fundamental principle of participation is the principle of voluntariness. The voluntary participation of children without parents in this kind of research seems questionable to some experts<sup>12</sup>. On the other hand, there is an obvious inequality between children living in the family of origin or with his adoptive parent and children under guardianship and custody. The former are more likely to save lives and health (although perhaps more risk from the unforeseen drug effect) than the latter. Such a decision of the legislator is regarded as not always meeting the interests of minors. That is why quite reasonable proposals are put forward to provide an opportunity for orphans and children left without parental care in such studies<sup>13</sup>. The guarantee of the interests of children will be not only the consent of the legal representative but also the consent of the child protection services.

Legislation provides for certain guarantees of rights and legitimate interests in the hospitalization of minors under 15 or drug addicted minors under 16 in a medical organization that provides psychiatric care in inpatient conditions. Firstly, as a general rule, the hospitalization itself is carried out at the request or with the consent of legal representatives, which can subsequently be revoked. Secondly, in order to resolve the issue of the presence or absence of a mental disorder in a minor, and his need for psychiatric care, his psychiatric examination must be carried out within 48 hours after hospitalization. Thirdly, the frequency of further commission psychiatric examination is established to resolve the issue of prolongation of hospitalization. Finally, if a medical panel of psychiatrists or the head of a medical organization providing psychiatric care detects abuses committed during hospitalization by the legal representative of a minor, the head notifies the guardianship and guardianship authority at the place of residence of the ward (Article 31 of the Law of the Russian Federation "On Psychiatric Care and Guarantees of the Rights of Citizens During its Provision"). However, unlike situations where patients are hospitalized on an involuntary basis, judicial control over hospitalization of a minor is not expected.

Features of the legal status of a minor patient may also depend on other parameters: on the types of activities minors are engaged in (for example, children-athletes), their state of health (disabled children, drug addicted children), social status, etc.

## SUMMARY

The analysis made it possible to conclude that the legislation of the Russian Federation, which provides, as a general rule, the right of minor patients who have reached the age of 15 to independently decide the issues of giving consent or refusing to medical intervention, has a discrepancy with the general rules of civil legislation on the legal capacity of citizens. There is a contradiction in the civil legal status of a minor and in the status of a minor patient, which leads to difficulties in regulating relations in health care for minors. According



to family law, a 10-year-old child has the right to express his opinion when solving any issue in the family that affects his interests. However, this right is not provided in the rules of legislation on health protection when deciding the age of the child from which he has the right to receive information about his condition. Certain problems are also observed in resolving the issue of the participation of orphans and children without parental care (regardless of age) in clinical trials of a medicinal product for medical use.

## CONCLUSION

The analysis of the rights of minor patients and their exercise leads to the conclusion that the current Russian legislation, which does not consider in full the age characteristics of such patients, does not allow to properly resolve many issues with their participation in the healthcare sector. Some inconsistencies in the rules of civil and family legislation and legislation on the protection of citizens' health do not contribute to this either. All this testifies to the need to improve legislation in the field of child health protection. Thus, it seems necessary to address the issue of the discrepancy between the age of legal capacity, and the age that allows consent to or refuse medical intervention. In this part, foreign experience deserves attention, which allows a person to exercise his rights in health care, as well as to participate in contractual relations in this area, as a rule, only upon reaching the age of majority. It seems possible to apply to minors who have reached the age of 14, the rules of the Civil Code of the Russian Federation on transactions and other actions only with the consent of their legal representatives and with regard to the possibility of giving consent to medical intervention, since such a subject, due to his physical and mental immaturity, cannot independently make a decision regarding their life and health.

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