At What Cost Will the Court Impose a Duty to Preserve the Life a Child

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I. INTRODUCTION

The purpose of this Note is to explore the issues surrounding parental consent for a surgical invasion of one child to save the life of a sibling. Historically, the courts have been hesitant to interfere with the parental duty to provide for a child's welfare.1 The right of parents to make medical decisions for their children is based in the common law and the constitutional right of privacy in child-rearing. It has long been assumed that parents will act in the best interest of their children with regard to medical care.2 However, due to the progress of medical science in the field

2 Id. at 58. See also Wisconsin v. Yoder, 406 U.S. 205 (1972). The Supreme Court held that the power of the parent, even when linked to a free exercise claim, may be subject to limitations if it appears that parental decisions will jeopardize the health or safety of the child. Family members are most likely to know the preferences of the patient and other family members. On the other hand, they are more likely than others to be emotionally and psychologically disturbed by a patient's impending death. Guilt or other emotions might lock them into a narrow perspective to inject improper considerations into their death control or organ donation decisions. See MICHAEL H. SHAPIRO & ROY G. SPECE, JR., CASES MATERIALS AND PROBLEMS ON BIOETICS AND LAW (1981). See, e.g., In re Philip B., 92 Cal. App.3d 796 (1979), cert. denied, 445 U.S. 949 (1980); Zoski v. Gaines, 260 N.W. 99 (1935); See also RESTATEMENT (SECOND) OF TORTS, § 892a, comment b (1979).
of organ transplantation, a new and complicated set of legal issues has been created. An examination of these issues will involve a historical review of organ donation by minors.

This Note focuses on the courts role in permitting organ transplantation. In addition, it will discuss the new developments in medical science regarding living donors and the concept of transplantation of regenerative organs and the possible impact on the court. Next, this Note analyzes the elements of duty to rescue, best interest and substituted judgment and the court's use of the various tests to justify invasion of a child's body. This Note examines a recent case in Illinois in which the court was presented with a unique and unprecedented issue: whether a state interest exists when parents cannot agree in determining if their child should undergo an invasive procedure to save the life of another. Finally, this Note concludes by considering the future implications in organ donation circumstances which may result in judicial interventions to save the life of another.

II. HISTORICAL DEVELOPMENT OF MINOR ORGAN DONATION

A. Organ Transplantation

From its earliest clinical application, the practice or development of organ transplantation has been particularly influenced by its social environment. Unlike other fields, in which a drug or device could be developed, perfected, and manufactured in an isolated laboratory and then applied to patient care, organ transplantation requires the breaking-down of deep-seated cultural, religious, mythic and ethnic barriers. Transplants require donors; donation requires public support.


4 The term "donation" used in organ transplantation has a different meaning than does a traditional definition of donation. Donation means "the action of making a gratuitous gift or free contribution especially to a charity, humanitarian cause, or public institution." WEBSTER 3RD NEW INTERNATIONAL DICTIONARY 672 (3rd ed. 1982). In the organ transplantation context an organ donor is defined as "an individual from whom blood, tissue, or an organ is taken for transplantation." STEDMAN'S MEDICAL DICTIONARY 463 (25th ed. 1982). See infra notes 18-23 and accompanying text.


6 Id.

7 During the last ten years, there have been controversial drugs that have been manufactured and developed which have also been affected by their social environment. RU 486 or the "abortion pill" developed in France has galvanized many groups in the United States to lobby against its introduction in this country. Dorothy Wickenden, Drug of Choice: the Side Effects of RU 486, The New Republic, 24 at 26.

The development of the drug AZT has also been dramatically affected by its social environment. Because AZT is used to treat AIDS, the drug was at the center of a social controversy. As the AIDS epidemic spread, the need for AZT
Organ transplantation is the procedure of removing an organ from the body of one human being and transferring it to the body of another.\textsuperscript{6} Organ and tissue transplantation is an ancient concept. Organ and tissue transplantation was initially performed in 3000 B.C. by the Egyptians and Hindus when they transplanted skin to restore noses destroyed by syphilis.\textsuperscript{7} At the start of the twentieth century, Dr. Charles Guthrie transplanted a dog's head onto another dog.\textsuperscript{10} Reports of the time indicated that a heart, lungs, kidneys, thyroid and ovaries of a dog had also been transplanted, although the dog did not survive for a long period of time.\textsuperscript{11}

The development of transplantation medicine was dependent on a series of scientific advances. They included: (1) the capability to connect blood vessels; (2) advances in blood banking and tissue typing;\textsuperscript{12} (3) the improved understanding of vital organ and immune system\textsuperscript{13} functions; (4) strides in controlling infectious disease; (5) development of radiologic

increased and the social pressure to release this drug to the infected population also increased. However, just as AZT was an experimental and controversial drug now accepted by society, RU 486 still has not been accepted by society in this country, despite the fact that abortion is legal. See Robert Steinbrook & Marlene Cimons, \textit{Scientists Poised To Test AIDS Vaccines on Humans}, L.A. TIMES, Mar. 29, 1987, § 1, at 1 and Larry Jacobs, \textit{Fighting AIDS All The Way}, N.Y. TIMES, Oct. 8, 1989, § 6, at 42.

\textsuperscript{6} Transportation is defined as: “grafting; implanting in one part a tissue or organ taken from another part or another person.” \textit{Stedman's Medical Dictionary} 1472 (4th Unabridged Lawyer's ed. 1976).


\textsuperscript{10} \textit{Id.} It was reported that the operation was successful but the dog remained alive only a few hours.

\textsuperscript{11} \textit{Id.} Dr. Guthrie published a complete report of his findings in 1912 which indicated the organ transplants were short-term.

\textsuperscript{12} Tissue typing refers to the identification of genetic expression of similarities and differences in tissues. Each of us has two genes on the 6th chromosome, one of which is inherited from each parent. The genes can define many different markers, making it unlikely that two unrelated persons will have identical antigenic markers.

The HLA (human leukocyte antigen) system describes markers present on body tissues other than red cells, and the capacity of the body to reject to those markers transplanted on it. HLA typing refers to the identification of HLA markers (antigens) on blood cells called lymphocytes. Charles H. Kirkpatrick, M.D., \textit{Chapter 22 Transplantation Immunology}, 258 J.A.M.A., 2993 (1987); James T. Barrett, Ph.D., \textit{Textbook of Immunology: An Introduction to Immunochernistry and Immunobiology}, 279-82, (5th ed. 1988); See also Christine Gorman, \textit{Matchmaker, Find Me A Match}, TIME, June 17, 1991, at 60; and Harold M. Schneek, Jr., \textit{Studies Unravel Role of Genetic Markers in Disease Risk}, N.Y. TIMES, Aug. 2, 1985, § C, at 1.

\textsuperscript{13} The immune system is composed of cells and chemicals contained in the blood which attack substances recognized as foreign, such as infectious organisms, some malignant tissues, and transplanted tissue. James T. Barrett, Ph.D., \textit{Textbook of Immunology: An Introduction to Immunochernistry and Immunobiology} (5th ed. 1988).
hardware and techniques; and (6) biological\textsuperscript{14} and chemical\textsuperscript{15} methods of altering immune system response in order to allow the body to accept the organ transplant.

The second half of the twentieth century has seen ardent study and extraordinary success in many areas of organ transplantation. Twentieth-century transplantation focused first on the kidney. The artificial kidney was developed to sustain life, while medical researchers demonstrated that live organ kidney transplants from identical twins worked. One twin could donate a kidney and live normally while giving the recipient twin a new lease on life. Since the donor and recipient were genetically identical, the immune system would not attack the transplanted kidney and rejection\textsuperscript{16} could not occur.

Transplants of organs like kidneys, skin, bones, blood vessels and corneas have become commonplace since the mid-sixties.\textsuperscript{17} Also, blood and its elements, as a form of tissue, have been transplanted from one human being to another for many years.\textsuperscript{18} Through the advent of new medical technology, more recent success has been seen in the transplantation of hearts, lungs, bone marrow, pancreas, intestine and livers.

In transplants, organs from living donors are seen to have the most success.\textsuperscript{19} This presents a series of complex issues in both the legal as

\textsuperscript{14} Biological response to allow body to alter immune system response included administration of antibodies. These are proteins which are capable of participating in, and affecting immune response. \textit{Id.}

\textsuperscript{15} With the advent of 6-mercaptopurine, azathioprine, and more recently cyclosporine the body's immune system could be altered to accept a human organ for transplantation. \textit{See} U.S. Department of Health & Human Services, Pub. Health Services, Health Resources & Services, Administration, Task Force on Organ Transplantation, \textit{Report to the Secretary and the Congress on Immunosuppressive Therapies} 10-14 (1985).

\textsuperscript{16} Rejection is the process by which the recipient's body recognizes transplanted tissue as foreign and tries to destroy it. \textit{Id.}

\textsuperscript{17} \textit{See supra} note 9, at 74.


The current survival rate for kidneys from cadaver donors is 91\% and for kidney from living related donors is 96\%. Lauerman, \textit{supra} at 10. Heart transplants have an average one-year survival rate of 80\% - 83\%. \textit{Id.} For liver recipients the average survival rate is 65\% - 70\% and for pancreas recipients 80\%. \textit{Id.}

If the patient can survive the critical first year then the records for heart transplant have shown that the recipients have survived more than 16 years, liver transplants 18 years and some kidney transplants have been living more than 20 years. \textit{Id.}
well as the ethical fields of medicine. Perhaps one of the controversial areas of this new success in medical technology is the transplantation of organs and tissue from one sibling to save the life of another sibling and the possible duty imposed upon a parent to donate an organ or regenerative section to their dying child.20

B. Organ Donation from a Minor

Organ donation from one minor child to another has serious implications for the courts and society in general. Although society has an interest in the preservation of life for all children, it has an equal interest in protecting the sanctity of the human body from nonconsensual intrusions.21 In the past, courts have been reluctant to order an organ donation to save the life of another. Their reasoning has been grounded in the Constitution by utilizing the concepts of "liberty" and "privacy" rights. The Supreme Court has noted that "[c]onstitutional rights do not mature and come into being magically only when one attains the state defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."22 Informed consent is frequently the key to the prevention of liability in transplant operations involving minors.23

Certainly, public policy dictates that the court should uphold values that preserve the lives of all children. But to what extent can judicial intervention overcome the sanctity and privacy of one child for the life of another? Courts have shown they cannot balance the scale in such a way as to say that when one child is dying, and another is healthy or incompetent, the healthy or incompetent child should be forced to act to

20 Roni Rabin, No Wait With Live Donor Transplants, NEWSDAY, May 17, 1990, at 23. The seventh experimental live donor liver transplant performed on a child was successful. The child received a section of her father's liver.
21 Union Pac. Ry. Co. v. Botsford, 141 U.S. 250 (1891). The company applied for a court order to compel the defendant to submit to a surgical examination. The court refused to allow the company to order the defendant to submit to the examination. "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restrain or interference of others, unless by clear and unquestionable authority of law." Id. at 251. See also Winston v. Lee, 470 U.S. 573 (1985); Schmerber v. California, 384 U.S. 757 (1966); Prince v. Massachusetts, 321 U.S. 158 (1944).
23 Bonner v. Moran, 125 F.2d 121 (D.C. Cir. 1941). In this case, an assault and battery action was filed against a surgeon for damage resulting from the skin grafting of a 15 year old boy. His aunt, who was not the child's legal guardian, gave the consent to the operation. The court held the surgeon had no right to operate on a child without the consent of the child and his guardian or parent. The operation was not for the benefit of the donor child, but for the donee, his cousin. Id.
save the life of the dying child. Such analysis would render one's own constitutional rights, including the right to privacy, virtually meaningless. It has been held that children enjoy the protection of other constitutional rights including the right of privacy.

C. Incompetent Minor Donors

Courts have generally held that a patient is competent to make his or her own medical choices when that patient is capable of the informed exercise of a choice, which entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each. Thus, competency turns on the patient's ability to function as a decision-maker acting in accordance with her preferences and values. When an incom-

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24 Strunk v. Strunk, 445 S.W.2d 145 (Ky. 1969). The court found the kidney transplant operation from a mentally incompetent brother was necessary to save the life of a healthy sibling who was suffering from fatal kidney disease. The court reasoned that with the consent of the mother, the donation of the kidney from one brother to the other brother was beneficial not only to the transplant recipient, but to the organ donor because the incompetent brother was emotionally and psychologically dependant upon his dying brother and the death of the brother would have a profound negative effect on the incompetent brother. Id. See also infra notes 32-36 and accompanying text.

25 Before the Supreme Court used the right to "privacy" to protect individuals from bodily invasions, the Court used the definition of "liberty" included in the 14th Amendment to the United States Constitution to include freedom from bodily restraint. See, e.g., Meyer v. Nebraska, 262 U.S. 390, 399 (1923). See supra note 21.

26 See Roe v. Wade, 410 U.S. 113 (1973) (where a right of personal privacy exists). See also Thornburgh v. Am. College of Obstetricians, 476 U.S. 747 (1986) (where the right to privacy is a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government) and Whalen v. Roe, 429 U.S. 589 (1977) (the interest in independence in making certain kinds of important decisions). See, e.g., In re Quinlan, 355 A.2d 647 (N.J.), cert. denied, 429 U.S. 922 (1976). The court recognized that the right of privacy was not absolute, and may be balanced against asserted state interests. Noting that the state's interest "weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims", the court concluded that the state interests had to give way in that case. 355 A.2d at 664.

27 Carey v. Population Services Int'l., 431 U.S. 678 (1977). The Court held that: "minors, as well as adults, are protected by the Constitution and possess constitutional rights." Id. at 692 (quoting Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976)).


petent individual\textsuperscript{30} is considered a donor for a transplant procedure, it must be determined whether the parent or guardian has the power for consent to the donation of the incompetent’s organs, fluids, or tissues for the transplantation. Courts have found the authority for consent to be present in some situations and absent in others.\textsuperscript{31} The issue has centered around the court allowing the transplant of organs from one incompetent sibling to save the life of another dying sibling.

The most frequently quoted case is \textit{Strunk v. Strunk}.\textsuperscript{32} \textit{Strunk} involved a mentally incompetent ward of the state and his brother who was suffering from a fatal kidney disease. A guardian petitioned the court for authority to remove a kidney from the incompetent and transplant it into his ailing brother. The circuit court found the operation necessary and authorized the donation.\textsuperscript{33} The appellate court held that the circuit court, as a court of equity, had the power to permit the kidney transplant, and affirmed.\textsuperscript{34} The appellate court relied on the English law doctrine of sub-

\footnotesize
\textsuperscript{30} The word “incompetency” is used to describe the legal status of an individual who is unable or not fit to manage his own affairs by reason of insanity, imbecility, or feeble-mindedness and therefore has a guardian or committee to care for him. See, e.g., Conservatorship of Valerie, N., 707 P.2d 760 (Cal. 1985). Black’s Law Dictionary defines “incompetency” as “[a] relative term which may be employed as meaning disqualification, inability or incapacity and it can refer to lack of legal qualifications or fitness to discharge the required duty and to show want of physical or intellectual or moral fitness.” BLACK’S LAW DICTIONARY 688 (5th ed. 1979).

\textsuperscript{31} See cases cited infra note 37.

\textsuperscript{32} 445 S.W.2d 145 (Ky. 1969). See also supra note 24.

\textsuperscript{33} \textit{Strunk}, 445 S.W.2d at 145-46.

\textsuperscript{34} Id. at 146. It is important to note that three of the seven judges dissented. The dissent’s opinion is illustrative of the legal, ethical and moral quandary that faced the court when they attempted to resolve the predicament in \textit{Strunk}. Judge Steinfield stated:

Apparent because of my indelible recollection of a government which, to the everlasting shame of its citizens, embarked on a program of genocide and experimentation with human bodies I have been more troubled in reaching a decision in this case than in any other. My sympathies and emotions are torn between a compassion to aid an ailing young man and a duty to fully protect unfortunate members of society . . . I am unwilling to hold that the gates should be open to permit the removal of an organ from an incompetent for transplant, at least until such time as it is conclusively demonstrated that it will be of significant benefit to the incompetent. The evidence here does not rise to that pinnacle. To hold that committees, guardians or courts have such awesome power even in the persuasive case before us, could establish legal precedent, the dire result of which we cannot fathom. Regretfully, I must say no.

\textit{Strunk}, 445 S.W.2d at 149-51.
substituted judgment and the court’s inherent power to act. The Kentucky Court of Appeals believed that the doctrine of substituted judgment could be extended from the property of an incompetent to his body, thus equating the human body with property. The court relied on this basis as the legal basis for ordering the removal of the incompetent’s kidney. The court, while using the doctrine of substituted judgment, also stated that this procedure was in the best interest of the incompetent and therefore was justified. The doctrines of substituted judgment and best interest are interrelated in these circumstances and will be discussed more fully below. The number of cases that have followed since Strunk have been a mix of decisions regarding removal of an organ from the incompetent to save the life of another sibling.

D. Substituted Judgment

The substituted judgment doctrine requires the court or guardian to “[s]ubstitute itself as nearly as may be for the incompetent, and to act

35 The court relied upon the English case of Re Earl of Carysfort, 41 Eng. Rep. 418 (184), which concerned a lunatic earl. A servant of the earl had been obliged to retire by reason of age and infirmity. He did not have the means to support himself, and the earl was incapable of helping him. On an application to the Lord Chancellor’s court, an order was made for the provision of an annuity out of the income of the estate of the lunatic earl as a retiring pension to the latter’s aged servant. The court was satisfied that the earl would have approved the gift if he had been capable of acting himself. Id.

36 Strunk, 445 S.W.2d at 148. Although Strunk contains the most detailed discussion of the doctrine of substituted judgment in incompetent organ donation cases, the court seems to fall back upon a benefits rule, basing its approval of the transplant on the benefit that the incompetent donor was likely to derive and not on the fact that he would have consented to the transplant if competent. Id. See, e.g., Hart v. Brown, 289 A.2d 386 (Conn. Super. Ct. 1972).

37 See In re Guardianship of Pescinski, 226 N.W.2d 180 (Wis. 1975). No consent had been given to the removal by either the incompetent or his guardian ad litem. The court held that it did not have the power to order the removal of the kidney from the incompetent. See also In re Richardson, 284 So. 2d 185 (La. Ct. App. 1973). The father of a child sought to compel the mother of the child to consent to surgical removal and transplantation of their minor child’s kidney for donation to the minor’s older sister. The court refused to authorize surgical intrusion on the minor for the purpose of donation of one of his kidneys to his older sister. Compare Hart v. Brown, 289 A.2d 386 (Conn. Super. Ct. 1972) (the court allowed the kidney from one twin to be removed and transplanted into the body of the other twin); In re John Doe, 481 N.Y.S.2d 932 (N.Y. 1984) (the evidence showed that a bone marrow transplant from an incompetent to his brother, would be of minimal risk to the incompetent and was the only reasonable alternative to save his brother’s life and that the incompetent’s brother was sole family member to have become involved in the placement and treatment decisions for the incompetent, the trial court exercised its parens patriae authority to authorize the transplant).
upon the same motives and consideration as would have moved her.\textsuperscript{38} Under the doctrine of substituted judgment, a guardian of an incompetent person may look to a person's life history, in all of its complexity, to ascertain the intentions and attitudes which the incompetent person once had.

The theory of substituted judgment, which has its origin in English law,\textsuperscript{39} was intended to allow courts to make dispositions from the estates of incompetents to those that the incompetents would have made dispositions to if competent.\textsuperscript{40} The right to act for an incompetent, which has been recognized as the doctrine of substituted judgment, is seen by some courts to be broad enough to cover all matters touching on the well-being of a legally incapacitated person. This doctrine has been recognized in American courts since 1844.\textsuperscript{41} Most recent cases pertaining to substituted judgment, nevertheless, have risen in the "right to die" framework, and the courts have usually concluded that giving effect to the perceived decision of the incompetent is the proper direction, even though doing so will result in the incompetent's death.\textsuperscript{42}

In contemporary times the substituted judgment doctrine has been used to permit organ donations\textsuperscript{43} by incompetents.\textsuperscript{44} Faced with the issue of whether to allow the invasion of the incompetent's body and transplant an organ from the incompetent to save the life of another, courts have stated that in some instances their equity powers do permit the parents

\textsuperscript{38} City Bank v. McGowan, 323 U.S. 594, 599 (1944).

\textsuperscript{39} Ex parte Whitebread, 35 Eng. Rep. 878 (1816). This doctrine empowers a court of equity to authorize gifts from an incompetent's estate on the sole ground that the incompetent would choose to do so if he were competent. Courts have generally used this test in contexts of real or personal property.

\textsuperscript{40} See Strunk v. Strunk, 445 S.W.2d 145, 147-48 (Ky. 1969). The court explained the inherent equity power of courts in dealing with the affairs of incompetents.

\textsuperscript{41} Re Willoughby, 11 Paige Ch. 257 (N.Y.Ch. 1844). The court stated that a chancellor has the power to deal with the estate of an incompetent in the same manner as the incompetent if he had his faculties.


\textsuperscript{43} The word "donation" in this context is misleading. Donation implies a freely given gift and someone who is able to make the gift. In the situation involving an incompetent, this person is not choosing to make a gift; someone is deciding for him that the gift is to be made. Donation is the proper term used in this circumstance, however, it should be understood that the incompetent person is not donating his or her organ in the literal sense, but allowing another person to make a judgment on his behalf to permit an organ to be removed and transplanted. See supra note 4.

to consent to organ donations from one sibling to another. When an incompetent person is involved, the issue becomes one of whether the incompetent could understand the concept of organ donation. In other words, would the person wish to donate or not wish to donate. When the court has been faced with this issue, they have used the substituted judgment test, which in a simplified context asked what the incompetent would most likely want if he were competent.

In the case of a minor donor, there is no period of competency upon which to base a determination of the donor's altruism. Therefore, in applying the substituted judgment doctrine in a case involving a minor, a court is simply applying a form of the best interest test. The court is making a decision based upon its perception of what a reasonable person would do if he were in the minor's position. When courts have permitted donation, they have stressed the incompetent's probable anguish at the sibling's death. Other courts have rejected the claim that the proper test is whether the incompetent would consent to donate if he could do so, and have simply refused to authorize the transplant on the grounds it is not in the best interest of the incompetent.

One court discussed the substituted judgment doctrine in the context of the incompetent's interest and stated:

The 'best interest' of an incompetent person is not necessarily served by imposing on such persons results not mandated as to competent persons similarly situated. It does not advance the interest of the State or the ward to treat the ward as a person of lesser status or dignity than others . . . Nor do statistical factors indicating that a majority of competent persons


46 Strunk, 445 S.W.2d at 146-47; Hart J. Brown, 289 A.2d 386, 389 (Conn. Super. Ct. 1972); Little v. Little, 576 S.W.2d 493, 498-99 (Tex. Ct. App. 1979). In Strunk the court stated:

under the peculiar circumstances of this case it would not only be beneficial to Tommy but also beneficial to Jerry [Jerry was the incompetent who was to donate the kidney to his ill brother] because Jerry was greatly dependent upon Tommy, emotionally and psychologically, and that his well-being would be jeopardized more severely by the loss of his brother than by the removal of a kidney . . . A psychiatrist, in attendance to Jerry, who testified in the case, stated in his opinion the death of Tommy under these circumstances would have 'an extremely traumatic effect upon him.'

Strunk, 445 S.W.2d at 146.

47 See, e.g., In re Richardson, 284 So.2d 185 (La. Ct. App. 1973) (a minor has the right to be free from bodily intrusion unless it is in his best interest); In re Pescinski, 226 N.W.2d 180 (Wis. 1975) (the court rejected the substituted judgment test and refused to allow the transplant).
similarly situated choose treatment resolve the issue . . . Individual choice is determined not by vote of the majority but by the complexities of the singular situation viewed from the unique perspective of the person called on to make the decision.  

One commentator, speaking in the context of organ donations by incompetents, explained the rationale behind the substituted judgment approach as follows:

[M]aintaining the integrity of the person that we act toward him 'as we have reason to believe [he] would choose for [himself] if [he] were [capable] of reason and deciding rationally.' It does not provide a license to impute to him preferences he never had or to ignore previous preferences . . . If preferences are unknown, we must act with respect to the preferences a reasonable, competent person in the incompetent's situation would have . . . For such an attempt would continue to regard him, even during his incapacity, as an individual with free choice and moral dignity, and not as someone whose preferences no longer mattered. Even if we were mistaken in ascertaining his preferences, the person [if he later became competent, as in the case of some children] could still agree that he had been fairly treated if we had a good reason for thinking he would have made the choices imputed to him.

The traditional approach to the substituted judgment doctrine has directed the judicial reaction to claims of needy relatives upon incompetents, and has allowed depletion of incompetents' estates with no direct benefit to the incompetents but done solely to help the relatives. As one commentator has suggested, "[i]f property can be invaded because of minimal risk to the incompetent's interest, then presumably the body could also be invaded if the risks are commensurate."

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49 John A. Robertson, Organ Donations By Incompetents and The Substituted Judgment Doctrine, 76 Colum. L. Rev. 48, 63 (1976).

50 See id. at 62.

51 Id. "The fact that the substituted judgment doctrine arose as jurisdiction for disposing the property of wealthy lunatics, does not render the doctrine inapplicable to the transplant situation. The risks to the incompetent from a transplant may be slight, depending on the precise nature of the physical intrusion." Id. at 62 n.83.
E. Best Interest Theory

Under the best interest theory, a court will authorize the donation if it determines that participation in the operation will promote the best interest of the prospective donor. Best interest is seen as an objective standard under which the surrogate must ask "what would most reasonable, competent patients choose under these medical circumstances?" Traditionally, courts use this test whenever they are called upon to make decisions for incompetent individuals. The best interest test has been used extensively in authorizing beneficial medical treatment for children whose parents refuse to consent for religious reasons.

It has been reasoned that the best interest test is a variation of the substituted judgment doctrine. In applying the best interest test, courts take into account whether or not the donation would have any benefit upon the donor by his donating an organ to another sibling. The best interest test usually applies when donors have made no prior probative statements regarding their attitudes towards the procedure because they are either too young or have never been competent. The court relies upon the guardian of the prospective donor to protect the best interest of either a young child donor or an incompetent.

III. DOES A PARENT HAVE A DUTY TO RESCUE IN ORGAN DONATION SITUATIONS?

A. The Rescue Doctrine in Organ Donation Circumstances

In analyzing the duty of parents to their children in organ donation situations, the traditional tort doctrine of rescue has been suggested by legal scholars as a possibility for the courts to justify the removal of an organ from either a healthy parent or sibling to be transplanted into the ill sibling. However, courts have been reluctant to use the rescue doctrine,

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54 The courts use the best interest test or the closely related substituted judgment test. See supra notes 35-51 and accompanying text.
55 See supra note 35.
57 The courts seem to prefer to use the substituted judgment doctrine, but in the case of small children or people who have been incompetent since birth, it is impossible to ascertain what the donor would do in the situation. Therefore, the court leans toward what would seem to be in the best interest of the donor at the time the organ donation is requested. See Curran v. Bosze, 566 N.E.2d 1319 (Ill. 1990).
58 In re Guardianship of Pescinski, 226 N.W.2d 180 (Wis. 1975). See supra note 37.
characterized in traditional legal analysis, to justify organ donations. The legal principle of rescue recognizes the social duty of a citizen to act positively to attempt to rescue another who is in personal danger. American laws have not favored the rescue concept in organ donation cases and have been reluctant to equate moral obligation with legal obligation. Courts have generally refused to justify the invasion of one's body to save the life of another. One court stated:

The common law has consistently held to a rule which provides that one human being is under no legal compulsion to give aid or to take action to save another human being or to rescue. A great deal has been written regarding this rule which, on the surface, appears to be revolting in a moral sense ... In this case, the chancellor is being asked to force one member of society to undergo a medical procedure which would provide that part of that individual's body would be removed from him and given to another so that the other could live. Morally, this decision rests with the defendant, and, in the view of the court, the refusal of defendant is morally indefensible. For our law to compel the defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded.

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57 Siriani v. Anna, 285 N.Y.S.2d 709 (N.Y. Sup. Ct. 1967). The court held that the mother, who voluntarily donated one of her kidneys to her son who was dying of a kidney ailment, had no cause of action against defendant physician.


59 Moore v. Shah, 458 N.Y.S.2d 33 (N.Y. App. Div. 1982). "A wrong perpetuated upon a victim is also a wrong to his rescuer and so long as the rescue is not a rash or wanton act, the rescue doctrine extends a defendant's liability to the rescuer." Id. at 33. In this case the plaintiff attempted to use the rescue doctrine to establish the requisite foreseeability between the doctor's negligence in treatment of the father and the injury to himself as the rescuer. The plaintiff argued that the defendant doctor, knew or should have known, that the plaintiff would logically be the first person to donate a kidney to his father. See also Wagner v. Int'l Ry. Co., 133 N.E. 437 (N.Y. 1921). "The risk of rescue, if only it be not wanton, is born of the occasion." Id. at 438.

60 Wagner 133 N.E. at 438. European nations, with a civil law tradition stemming from ancient Rome, have found it much easier to accept the rescue principle. Id.

In traditional rescue cases, the rescuer generally acts without "knowing his fate". Generally, in order to state a claim for relief under the rescue doctrine, four criteria must be present: (1) there was someone in peril; (2) the situation was such as to clearly convince a person that human life or limb was in peril; (3) the rescuer acted for "humanity sake" to rescue the person from peril; and (4) a person's conduct was that of an ordinary prudent person under the circumstances. The few states that have statutorily created a duty to rescue require only such assistance as can be rendered without danger to the rescuer.

In the organ donation circumstance, the rescuer acts with full knowledge of the consequences of his action. The donor has already been identified as the one capable of giving the necessary aid. The proposed donor knows his position and knows that without consent, the transplant cannot take place. By this reasoning, the donor is not just a bystander whose refusal to consent would be unintentional. However, a prospective donor cannot know, except as statistical probability, whether a donee will live or die with a new organ. Despite the consent of a donor, there is no certainty that the donation will save the life of the donee.

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65 In traditional rescue cases, the rescuer acts to save the life of another without a complete understanding of the peril to the rescuer himself. Despite the fact that the peril of rescue has not been contemplated by the rescuer, he proceeds with the rescue.

66 McConnell v. Pic-Walsh Freight Co., 432 S.W.2d 292, 299-300 (Mo. 1968).

67 See MINN. STAT. § 604.05.01 (1990); VT. STAT. ANN. tit. 12, § 519(a) (1990). European countries that require rescue generally exempt physically hazardous rescues. See, e.g., C. Pen. art. 63 (Fr.).

68 Sirianni v. Anna, 285 N.Y.S. 709, 712 (N.Y. Sup. Ct. 1967). A mother had the complete knowledge that she was donating her kidney to save the life of her child. This is in opposition to traditional rescue cases where the rescuer may not know to what extent he may have to sacrifice himself to save the life of another.

69 Courts use public policy rationales in deciding organ transplant cases with the rescue doctrine. See, e.g., Sirianni v. Anna, 285 N.Y.S.2d 709, 709. The court reasoned the mother's donation of her kidney was "willful, intentional, voluntary, free from accident and with full knowledge of its consequence[s]," and that the rescue doctrine excludes recovery for a willful act. Id. at 712. See also Moore v. Shah, 458 N.Y.S.2d 33 (N.Y. App. Div. 1982). The court based its decision on the defendant-physician's lack of duty to the kidney donor. The court reasoned a physician does not have the "responsibility to foresee each and every person other than his patient who might conceivably be affected by his negligence." Moore, 458 N.Y.S.2d at 34-35. See also Peterson v. Farberman, 736 S.W.2d 441 (Mo. App. 1987). The Peterson court agreed with Moore and Sirianni in reasoning that the "[m]other's decision to donate a kidney to [save the life of] her son was certainly laudable, but it does not fall within the purpose of the rescue doctrine." 736 S.W.2d at 443.

70 See supra note 19.
B. Duty to Act by the Parent or Another Sibling

With respect to whether there is a duty to act,71 "[g]enerally, one has no legal duty to aid another person in peril,72 even when that aid can be rendered without danger or inconvenience."73 While the common law recognizes that one has no duty to come to the aid of one in peril,74 an exception exists75 if there is a special relationship between the parties.76 One commentator has suggested four criteria to consider in the organ transplantation context.77 In order for a plaintiff to prevail in a court-ordered forced organ donation situation, a plaintiff must show:

(1) that he is in imminent danger of dying from a disease that can be treated by transplantation of an organ, tissue or fluid from another; (2) that he stands to experience substantial benefit from such transplant from the defendant serving as donor; (3) that transplantation from the defendant is the exclusive mode of treatment that offers the prospect of substantial benefit

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71 Lloyd v. S.S. Kresge Co., 270 N.W.2d 423 (Wis. Ct. App. 1978); Cole v. Sears Roebuck & Co., 177 N.W.2d 866 (Wis. 1970). When a special relationship exists between the parties, social policy may impose a duty to act. Because a parent has a legal duty to protect a child, breach of this duty may give rise to criminal liability. See, e.g., State v. Walden, 293 S.E.2d 780, 785 (N.C. 1982).
72 McFall v. Shimp, 10 Pa. D. & C.3d 90 (Pa. 1978). "The common law has consistently held to a rule which provides that one human being is under no legal compulsion to give aid or to take action to save another human being or to rescue." Id. at 91.
74 W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 375 (5th ed. 1984). The rescue doctrine with its premise of the "no duty to rescue" rule is often illustrated with highly disturbing examples. For example: "The expert swimmer, with a boat and a rope at hand, who sees another drowning before his eyes, is not required to do anything at all about it, but may sit on the dock, smoke his cigarette, and watch the man drown." Id. (citing Osterlind v. Hill, 263 Mass. 73 (1928)).
75 W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 377 (5th ed. 1984). One exception provides that one who injures or imperils another has a duty to render aid. Another exception requires that a person who begins a rescue attempt to perform it with reasonable care and that they not abandon the effort if doing so will leave the imperiled person in a worse position than before. See also WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW 282 (1986).
76 RESTATEMENT (SECOND) OF TORTS, § 314 (1965).
77 Fordham E. Huffman, Comment, Coerced Donation of Body Tissues: Can We Live With McFall v. Shimp?, 40 OHIO ST. L.J. 409, 414 (1979). The author developed criteria based on the court's decision in McFall. Courts will not force an organ donation to save the life of another. However, the author was hoping the courts would adopt his criteria and his analytical process of ascertaining the possibility of organ donation to save the life of another.
to the plaintiff; and (4) the organ tissue, or fluid sought is expendable by the donor—given the quality of tissue or fluid to be removed and its regenerative capacity—and that the removal of the organ, tissue, or fluid will not result in disfigurement. 78

It must be noted however, that the courts have not chosen to follow the above suggested criteria and there is no indication that these suggestions will be adopted in the near future. In fact, the courts have resolutely turned their backs to this reasoning. 79

The common law, nevertheless, does impose affirmative duties upon a person standing in certain relationships to another. 80 For example, parents have a duty to aid their children. 81 Given the history of the rescue doctrine and the courts historical reluctance to use it, it is doubtful that parents would be ordered to donate organs to their child even if the refusal would mean the child’s certain death. However, if medical science advances to the point where an organ donation is not considered a risk 82 to the donor, the courts might entertain a legal argument attempting to justify the donation under the rescue doctrine.

78 See id. at 415-16. See also In re Guardianship of Pescinski, 226 N.W.2d 180 (Wis. 1975). In this case the dissent proposed a test for organ transplantation from minor or incompetent donors: (1) the donee would die without it; (2) there have been reasonable steps to obtain a transplant from other sources and these have failed; (3) the minor and recipient are related so as to infer that if the minor were competent he would consent to the transplant; (4) the donor is in good health; and (5) there is “minimal” risk to the donor and a finding that he could function without the donated organ, fluid or tissue. Pescinski, 226 N.W.2d at 183.

79 See supra notes 36 and 47.


81 Commonwealth v. Konz, 450 A.2d 638 (Pa. 1982). The inherent dependency of a child upon his parent to obtain medical aid, i.e., the incapacity of a child to evaluate his condition and summon aid by himself supports imposition of such a duty upon the parent. Id. at 641. See also Robey v. State, 456 A.2d 953 (Md. 1983); State v. Crawford, 196 N.W.2d 915 (Neb. 1972); People v. Henson, 304 N.E.2d 358 (N.Y. 1973) and Commonwealth v. Breth, 44 Pa. C. 56 (Pa. 1915). In all four cases the parents, believing in prayer rather than in medicine, failed to call the doctor. See Regina v. Downes, 13 Cox Crim. Cas. 111 (England 1875).

82 Risk in organ donation would be defined as the donor not suffering any long-term effects from the donation, and living a "normal life" despite the fact that he has donated a part of his body to save the life of another. Kidney donations may be considered in this category because while people normally have two kidneys, they can function and live a normal life with one kidney. The new medical advances in organ regeneration also could be considered less risky, as the part of the organ that is removed from the healthy donor will eventually regenerate to become whole again.
IV. WILL THE COURT ORDER AN INVASION OF ONE PERSON’S BODY TO SAVE ANOTHER?

A. Forced Organ Donations

To analyze the courts' possible reasoning in contemplating an order to allow forced organ donations to save the life of another, and to predict what length the court may proceed in this area, one must consider the courts' history in allowing bodily invasions. In considering the concept of invading a person's body with the justification to save the life of another, the courts looking to the Constitution, generally oppose such an invasion. It has long been held that a competent adult's right to be free of unwanted bodily invasion is firmly grounded in the constitutional right to privacy. First Amendment rights to religious freedom also support this view. In recent cases however, a woman's constitutional rights have explicitly been made to yield to the interests of a viable fetus. Forced medical procedures authorized by the courts for the good of the patient are not uncommon in American law. In most instances, these procedures have been requested on behalf of incompetents. Courts have ordered as part of their inherent power of *parens patriae* authority the sterilization of an incompetent patient, shock treatment, chemotherapy treatment, amputation, medication and the removal of artificial life support mechanisms.

The Pennsylvania case of *McFall v. Shimp* raised the question of a

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83 In re Farrell, 529 A.2d 404 (N.J. 1987). A party is free to decline life-sustaining medical treatment when they are a competent adult. The court balances patient's common law and constitutional rights against state interests in preserving life, preventing suicide, safeguarding the integrity of the medical profession and protecting innocent third parties; Bouvia v. Superior Court of L.A. County, 225 Cal. Rptr. 297 (Cal. Ct. App. 1986).

84 Application of President and Director of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir. 1964), reh'g en banc denied, 331 F.2d 1010, cert. denied, 377 U.S. 978 (1964).


86 See infra note 109.

87 See, e.g., Jacobson v. Mass., 197 U.S. 11 (1905) (compulsory vaccination is constitutionally permitted, although it is certainly an infringement of an individual's bodily integrity, privacy and autonomy).

88 *Parens patriae* means literally: "parent of the country' ... refers traditionally to the role of the state as sovereign and guardian of persons under legal disability." *Black's Law Dictionary* 1003 (5th ed. 1979).


90 Price v. Sheppard, 239 N.W.2d 905 (Minn. 1976).


93 In re Boyd, 403 A.2d 744 (D.C. 1979).


compelled donation of bone marrow from one adult to another. Bone marrow is a regenerative tissue, but its removal requires a surgical procedure under general anesthetic. The plaintiff was suffering from aplastic anemia and would die without transfer of compatible tissue. Shimp was a cousin and the indications were that his tissue might be compatible.

After one encouraging, test Shimp declined to submit to any further procedures and McFall took action to compel him to submit to further tests and to the removal of tissue for transfer of bone marrow. The court assumed jurisdiction but declined to impose the obligation on Shimp, though it was critical of his refusal because it meant sure death for McFall. In an impassioned opinion the court stated:

For a society which respects the rights of one individual, to sink its teeth into the jugular vein or neck of one of its members and suck from it sustenance for another member, is revolting to our hard-wrought concepts of jurisprudence. Forcible extraction of living body tissue causes revulsion to the judicial mind. Such would raise the specter of the swastika and the Inquisition, reminiscent of the horrors of this portends.

The principle stated was that to compel Shimp to submit to bodily intrusion "[w]ould defeat the sanctity of the individual and would impose a rule which would know no limits and one could not imagine where the line would be drawn." Furthermore, as a commentator on the case stated:

the individual is not primarily some kind of social debtor whose obligations to the community outweigh, or do no more than balance his rights, powers, and privileges. Society and its laws should aim to promote personal autonomy and individual liberty. Accordingly my law in relation to tissue removal from living persons would be expressed positively, not negatively, and would allow donations of body parts of adults of sound mind, provided that it is done on the basis of free and informed consent.

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96 See also In re George, 630 S.W.2d 614 (Mo. Ct. App. 1982). A thirty-three-year-old adoptee suffering from chronic myelocytic leukemia sought a court order to open his adoption records so that he could locate a compatible bone marrow donor. The judge consulted the man's natural mother, who was tested but found not compatible. The judge then contacted the alleged natural father, whose name was obtained from the adoption records. The man denied paternity and was unwilling to be tested for compatibility. The matter stopped there; the court refused to give the dying man his natural father's name. See also Curran v. Bosze, 566 N.E.2d 1319 (Ill. 1990). Bosze asked the court to order Curran, the mother of Bosze's three-year-old twin children who were born after Bosze and Curran's relationship ended, to have the twins tested to determine if their bone marrow was compatible with their half brother's bone marrow. The court refused to compel the twins to be tested.

97 10 Pa. D. & C.3d 90 (Pa. 1978). Nothing in the opinion indicates that the degree of relationship was significant. The holding was based on the sanctity of the individual. Id. at 91.

98 Id. at 92.

99 See id. at 91.

However, courts have started to confront the issue of forcing caesarean-sections to save the life of a fetus. One commentator, who favors forced caesareans also supports compulsory parental donations of blood, bone marrow and depending on the degree of risk even organs. Another commentator suggested, based on past court decisions, that "[t]here is a rather stringent duty to prevent or remove harm, or both, to a member of one's immediate family, a duty that involves significant risk to oneself and is shared even by members of the family who are incompetent to shoulder other types of obligations." She concludes that cases authorizing donation by incompetents can constitute a legal precedent, including organ donation, for the sake of their children, and of course, for analogous forms of prenatal compulsion. In furtherance of this view she stated:

It can thus be argued that Strunk provides a legal precedent for compelling parents to undergo invasive medical procedures, including organ donation and fetal surgery, for the sake of their children. This would make the court decisions compelling pregnant women to undergo blood transfusions and caesarean sections for the sake of their future children less anomalous.

In another related case, a district court authorized termination of a pregnancy of a woman who had been involuntarily retained at the hospital for treatment of a mental disorder. To ascertain the future of forced organ donations, a recent court decision may map out a future course. In In re A.C., a District of Columbia court ordered the caesarean delivery of a 26-week old fetus from its terminally ill mother. The mother, Angela Calder, developed leukemia when she was 13 years old. When she was 27, with her disease in remission, she married and later became pregnant. When she was 25 weeks pregnant, her phy-

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102 See John Robertson, The Right to Procreate and In Utero Fetal Therapy, 3 J. LEGAL MED. 333, 354-55 (1982). The author supports mandatory caesareans in certain circumstances and accepts equivalency in the organ donation context. This would include mandatory parental donation of blood, bone marrow and organs.
105 Id. at 44. Mathieu claims that one of the deciding factors in Strunk was the obligation of one family member to undergo risks for another, though she notes that this factor was not stated in the case.
106 Id.
108 Id. at 568. The appellate court reversed based on statutory grounds but indicated that the court had the power to terminate the pregnancy as requested by the hospital if the proper procedures were followed.
sicians discovered a tumor mass in Angela’s lung, and she was admitted to the hospital in a terminal condition. At the point Angela was admitted to the hospital, her unborn child was considered to be just barely “viable” as the term is used in Roe v. Wade.\footnote{See Roe v. Wade, 410 U.S. 113, 162 (1973). The holding in Roe, that a “viable” fetus’ interest may be as compelling as the mother’s in elective abortion, may have been misconstrued and improperly applied in the context of court-ordered interventions to benefit children not being aborted. (The United States Supreme Court recently accepted certiorari of Planned Parenthood v. Carey, 947 F.2d 682 (3d Cir. 1991), cert. granted, 117 L.E.2d 104 (1992). This decision may have an effect on Roe. This Note will be published before the Supreme Court decision in Casey can be evaluated in the context of this Note.) See, e.g., Dawn E. Johnsen, The Creation of Fetal Rights: Conflicts With Women’s Constitutional Rights to Liberty, Privacy, and Equal Protection, 95 YALE L.J. 599 (1986). Courts have not, however, ordered treatment for the mother when the fetus is clearly at the stage of pre-viability. See, e.g., Taft v. Taft, 446 N.E.2d 395 (Mass. 1983). The court refused to order ciclage, or “purse string” operation, for incompetent cervix. Taft at 395.} The trial court ordered that the child be delivered surgically. In its opinion, the District of Columbia Court of Appeals attempted to explain the reasons for its decision to deny a stay of the trial court’s order. First, the court recognized that, in most circumstances, an adult’s right to bodily integrity precludes the state’s intervening in health care decisions.\footnote{In re A.C., 533 A.2d 611 (D.C. 1988).} However, the interest in “protecting innocent third parties from the adverse consequences of an adult’s decision to refuse medical treatment” may override this right.\footnote{Id. at 617.} Next the court examined cases that have applied this doctrine where the “innocent third party” was as yet unborn.\footnote{Id.} The court recognized that court-ordered treatment of the mother to save the child does indeed “infringe on the mother’s right to bodily integrity.”\footnote{Id.} After applying these rationales to the dying Angela Calder’s situation, the court held that the trial judge had not erred in subordinating Angela’s right to privacy to the “interests of the unborn child and the state,” since she had, at best, two days left of sedated life.\footnote{In re Madyun, 114 Daily Wash. L. Rptr. 2233 (D.C. Superior Ct. 1986), aff’d, D.C. Court of Appeals in unreported order, cited in In re A.C., 533 A.2d at 613; In re Application of Jamaica Hosp., 491 N.Y.S.2d 898 (Sup. Ct. 1985).} The debate in A.C. and the related cases\footnote{In re A.C., 533 A.2d 611 (D.C. 1987).} seems to focus on the issue of benefit to the mother, either directly or indirectly, from treatment and instances where the mother is dying and will not benefit.\footnote{In re A.C., 573 A.2d 1235 (D.C. 1990).}

In 1990, two years after the death of Angela and her baby, the court of appeals, on remand, held that the patient should decide what will be done on behalf of herself and her child. The court stated that, “[i]f the patient is incompetent or otherwise unable to give an informed consent to a proposed course of medical treatment, then her decision must be ascertained through the procedure known as substituted judgment.”\footnote{See Roe v. Wade, 410 U.S. 113, 162 (1973). The holding in Roe, that a “viable” fetus’ interest may be as compelling as the mother’s in elective abortion, may have been misconstrued and improperly applied in the context of court-ordered interventions to benefit children not being aborted. (The United States Supreme Court recently accepted certiorari of Planned Parenthood v. Carey, 947 F.2d 682 (3d Cir. 1991), cert. granted, 117 L.E.2d 104 (1992). This decision may have an effect on Roe. This Note will be published before the Supreme Court decision in Casey can be evaluated in the context of this Note.) See, e.g., Dawn E. Johnsen, The Creation of Fetal Rights: Conflicts With Women’s Constitutional Rights to Liberty, Privacy, and Equal Protection, 95 YALE L.J. 599 (1986). Courts have not, however, ordered treatment for the mother when the fetus is clearly at the stage of pre-viability. See, e.g., Taft v. Taft, 446 N.E.2d 395 (Mass. 1983). The court refused to order ciclage, or “purse string” operation, for incompetent cervix. Taft at 395.}
The court reasoned that the trial court did not follow the doctrine of substituted judgment and therefore the order was vacated and remanded for further proceedings. However, the court of appeals stated, "[w]e do not quite foreclose the possibility that a conflicting state interest may be so compelling that the patient's wishes must yield, (footnote omitted) but we anticipate that such cases will be extremely rare and truly exceptional." "This is not such a case." The court of appeals again reiterated its position with respect to consent by a patient to either refuse or accept treatment, thereby leaving the door open for the possibility of cases that would allow the fetus to be taken without the consent of the mother.

One commentator has focused on the issues considered in A.C. and the analogy between organ/tissue donation cases. He states:

[i]nterpreting captivity is difficult, but if it means a lack of alternatives, and if dependence is interpreted as the necessity of surgical procedure on a person's body to sustain another person (rather than simply a matter of location necessitating particular bodily life support), then it is unclear why a mother (or father) shouldn't be ordered to provide bone marrow, or perhaps even a kidney, if a coerced cesarean section is justifiable. After all, a mother has brought the child into the world and even though the child now exists in physical independence, it may depend on the mother for survival in the absence of any other compatible donors for an organ (perhaps a portion of a liver) just as much as the unborn child.

Courts have shown that they will use their authority to order a variety of medical procedures against the wishes of parents, particularly when the life and health of children are involved. Parents and other legal guardians generally have not been given the authority to refuse medical care for their minor children if such care is necessary for life. This has been true, even if parental objections are made on religious grounds, provided there is both a strong medical consensus favoring treatment and a good prognosis. In general, these matters have been litigated and adjudicated when the need for a particular therapeutic measure was imminent. Recently, however, courts have shown a willingness to extend their preemption of parental authority to situations involving fairly long-term care and even prophylaxis.

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119 Id. at 1237.
120 Id. at 1252.
122 Id. See also In re A.C., 573 A.2d 1235, 1253-59 (D.C. 1990) (Belson, J., concurring in part and dissenting in part).
123 James F. Childress, Analogical Reasoning: Organ/Tissue Donation and Cesarean Section, 5 BioLaw § 443 (1990). See also Davis, supra note 121.
124 See Childress, supra note 123, at 445-446.
In re Eric B., 127 for example, involved a three-year-old who had originally been placed in protective custody under the California child protection laws when his parents refused post-operative chemotherapy and radiation therapy for Eric's cancer of the retina. 128 The court initially ordered a regimen of chemotherapy, radiation, and spinal taps.

About one year later, in a periodic review hearing, the attending physician testified there was no evidence of recurrence of the cancer. However, the physician nevertheless believed that Eric would be at risk unless procedures were ordered. The parents stated that, without court intervention, they would supply Eric with Christian Science care and treatment. The referee's order, which was upheld by the Circuit Court of Appeals, required the parents to submit to monitoring of Eric. Because substantial evidence supported a finding that the child faced an appreciable risk of harm from a potentially deadly disease, the appellate court held that the juvenile court was empowered to prevent the possibility of harm to the child. 129

Similarly, a Pennsylvania Superior Court recently upheld the appointment of a hospital as special guardian of a six-year-old with sickle cell anemia. 130 The special guardian was given continuing authority to consent to blood transfusion therapy as needed for one year. 131 The court noted that the minor need not be "at death's door" for court intervention to be justified, although there must be some "peril" of a fairly serious nature. 132

Because of the Supreme Court decision in Webster v. Reproductive Health Services, 133 a prediction has been made that this decision now allows state legislatures to assert that life begins at conception 134 which could support judicial activism along the lines of In re A.C. and, therefore, the implication could be drawn into the organ donation context. Until the Supreme Court is challenged by a situation using the principles in Webster to support a request for an organ donation in the context of In re A.C., we will not know Webster's implications as to the future of organ and tissue donation.

V. CURRAN V. BOSZE: A MODERN APPROACH TO ORGAN DONATION FOR THE BENEFIT OF ANOTHER

In the context of organ donation from parents, siblings and incompetents, the courts seem to follow the general rule of not ordering an invasion of one body to benefit another. 135 However, as seen in the previous

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128 Id.
129 Id.
131 Id.
132 Id.
134 Id.
135 See cases cited supra note 37.
discussion, courts may start to entertain the idea of coerced organ transplants in certain, but limited, situations. Curran v. Bosze was a tragic case and raised a new and unprecedented issue before the Illinois Supreme Court.

In 1987 Nancy Curran brought an action concerning paternity of twins against Tamas Bosze. A blood test confirmed that Mr. Bosze was the father of the three year-old twins and Nancy Curran was the mother. Mr. Bosze and Ms. Curran were never married. On February 16, 1989, Mr. Bosze and Ms. Curran entered into an agreed order establishing the parent and child relationship. The order stated that Ms. Curran would have sole care, custody, control and educational responsibility of the minor children.

Mr. Bosze has three other children including Jean Pierre Bosze. Jean Pierre was suffering from acute undifferentiated leukemia. Pierre’s physician recommended that he receive a bone marrow transplant in order to have any chance of survival. Without the bone marrow transplant, Pierre would die. Upon being informed of this, Mr. Bosze’s entire family was tested for bone marrow compatibility. None of the people tested proved to be a match for Pierre. Because Mr. Bosze was genetically linked to both the twins and Pierre, Mr. Bosze then asked Ms. Curran if she would allow the twins to have a blood test to determine if they were a suitable match. After consulting with the twin’s pediatrician, family members, parents of bone marrow donors, and bone marrow donors themselves, Ms. Curran refused to give consent to the twins undergoing either the blood test to determine compatibility or the bone marrow harvesting procedure. Mr. Bosze asked the court to compel the twins to have both the blood test and, if compatible, the bone marrow harvesting procedure.

This issue was one of first impression for the state of Illinois. The issue before the court was whether a state interest exists when parents cannot agree in determining if their children undergo a blood test and if compatibility is established, the harvesting of bone marrow, not for the children’s benefit, but for the benefit of another. The court considered two primary interests in evaluating and defining the state’s role. First,

137 Acute undifferentiated leukemia (AUL) also known as mixed lineage leukemia, is a rare form of leukemia which is difficult to treat. Id. at 1321.
138 Several experts in the field of pediatric bone marrow transplantation were called to testify. One expert stated that given Jean Pierre’s present condition and medical history, success for the transplant procedure was estimated at 25% - 30% provided the bone marrow donation was from a relative. Curran, 566 N.E.2d at 1338.
139 Dr. Frank Leonard Johnson, a specialist in treating cancer in children, stated that Jean Pierre’s chance of survival would be approximately 5% assuming the twins were compatible. He also opined that Jean Pierre did not have a chance to survive the transplant. Id. at 1333.
141 Id. In discussing this issue, the court also considered the relationship between the twins and Jean Pierre. This relationship was a key factor in the court’s determining whether the procedure would be in the best interest considering the family situation.
the court considered the interest of the three-year old children who were requested to act as donors. Second, the court considered the interest of the twelve-year-old child who was in need of the bone marrow transplant. Since neither twin was competent and did not have the ability to consent, the state's interest in not allowing bodily intrusion was compelling, and the twins' rights were to be protected. The circuit court would not allow a coerced blood test or bone marrow harvesting procedure.\(^{142}\)

In reaching its decision, the Illinois Supreme Court considered the two doctrines associated with the donation of organs: the substituted judgment doctrine and the best interest test.\(^{143}\) The court reasoned that the age of the twins precluded the court from using the substituted judgment doctrine\(^{144}\) as the doctrine of substituted judgment requires clear and convincing proof of the incompetent person's intent before a court may authorize a surrogate to substitute his or her judgment for that of the incompetent.\(^{146}\) The court further stated that:

[n]either justice nor reality is served by ordering a 3 1/2-year-old child to submit to a bone marrow harvesting procedure for the benefit of another by a purported application of the doctrine of substituted judgment. Since it is not possible to discover that which does not exist, specifically, whether the 3 1/2-year-old twins would consent or refuse to consent to the proposed bone marrow harvesting procedure if they were competent, the doctrine of substituted judgment is not relevant and may not be applied in this case.\(^{146}\)

The cases cited in the court's opinion\(^{147}\) were distinguished by using the specific facts involved in each situation from Curran.\(^{148}\) In each of the previous cases\(^{149}\) when the court allowed the donation of an organ from an incompetent child to their other sibling, there was an established relationship between the children so that the death of the ill sibling would have a severe effect upon the incompetent child both emotionally and


\(^{143}\) Curran v. Bosze, 566 N.E.2d 1319, 1345 (Ill. 1990). The court stated that "it is not in the best interest of either Allison or James to undergo the proposed bone marrow harvesting procedure in the absence of an existing, close relationship with the recipient, Jean Pierre, and over the objection of their primary caretaker, Ms. Curran." \textit{Id.}

\(^{144}\) \textit{Id.} at 1326. \textit{See supra} notes 38-51 and accompanying text for a discussion on the doctrine of substituted judgment.

\(^{145}\) Curran v. Bosze, 566 N.E.2d at 1322-1326.

\(^{146}\) \textit{Id.} at 1326.

\(^{147}\) Bonner v. Moran, 126 F.2d 121 (D.C. Cir. 1941); Hart v. Brown, 289 A.2d 286 (Conn. 1972); Strunk v. Strunk, 445 S.W.2d 145 (Ky. 1969); \textit{In re} Richardson, 284 So. 2d 185 (La. Ct. App. 1973); Little v. Little, 576 S.W.2d 493 (Tex. Ct. App. 1979); \textit{In re} Guardianship of Ebehardy, 307 N.W.2d 881 (Wis. 1981); \textit{In re} Guardianship of Pescinski, 226 N.W.2d 184 (Wis. 1975).

\(^{148}\) \textit{Curran}, 566 N.E.2d at 1326-1331.

\(^{149}\) \textit{Id.}
psychologically. In Curran, the twins did not know their half-brother or their biological father, Mr. Bosze. The court reasoned that the blood test and the bone marrow harvesting procedure was not in the best interest of the twins because their biological mother did not consent and there was no family relationship between the twins and Jean Pierre.

The court in Curran recognized the rudimentary constitutional premise that all lives are equal and protected, whether one is healthy or diseased. To subject a healthy child to bodily intrusions against the will of the custodial parent in order to attempt to save a diseased child, however admirable the motivation, is not a duty the courts seem willing to impose. For the court to order tissue, blood or organ extraction from one child for the benefit of another would seriously infringe upon and forsake the constitutional rights of the child and in a sense render him a victim.

The fact that the custodial parent did not consent contributed heavily to the court’s refusal to permit the blood test and eventual bone marrow extraction. The court found the decision of the custodial parent to be an important and persuasive factor. The tribunal agonized with the plight of the terminally ill child but emphatically stated:

[t]his court shares the opinion of the circuit court that Jean Pierre's situation “evokes sympathy from all who’ve heard it.” No matter how small the hope that a bone marrow transplant will cure Jean Pierre, the fact remains that without the transplant Jean Pierre will almost certainly die. The sympathy felt by this court, the circuit court, and all those who have learned of Jean Pierre’s tragic situation cannot, however, obscure the fact that, under the circumstances presented in the case at bar, it neither would be proper under existing law nor in the best interests of the 3 1/2-year-old twins for the twins to participate in the bone marrow harvesting procedure.

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150 See supra note 37.
151 Curran, 566 N.E.2d at 1344.
152 Id. at 1319.
153 Although the child does not have a direct voice in the decision, society would deem this sacrifice to save the life of another sibling as admirable.
154 The court stated: Allison and James would need the emotional support of their primary caregiver if they were to donate bone marrow. The evidence establishes that it would not be in a 3 & 1/2 year old child’s best interest if he or she were required to go to a hospital and undergo all that is involved with the bone marrow harvesting procedure without the consent reassurance and support by a familiar adult known and trusted by the child . . . . Ms. Curran has refused to consent to the twins' participation in donating bone marrow to Jean Pierre. It appears that Mr. Bosze would be unable to substitute his support for the procedure for that of Ms. Curran because his involvement in the lives of Allison and James has, to this point, been a limited one.
155 Curran, 566 N.E.2d at 1344.
156 Id. at 1345.
The court used the traditional legal reasoning employed by other jurisdictions in holding that an order to force the twins to submit to a blood test and possible bone marrow harvesting at a later date would be an invasion of their rights of privacy.

VI. FUTURE OF FORCED ORGAN DONATIONS BY PARENTS AND SIBLINGS: WHO IS RESPONSIBLE TO SAVE THE LIFE OF ANOTHER AND AT WHAT COSTS?

Medical research will continue to present new and precedent-setting challenges for the courts and society. One commentator so poignantly stated:

[w]hen a court is called upon to resolve a conflict among family members, it must, in essence, make the final medical decision for the patient. There is widespread recognition that a courtroom is not the proper forum for making treatment choices . . . . judicial process [is] an unresponsive and cumbersome mechanism for decisions of this nature. This fact is borne out by a number of the leading cases in which arguments were heard and opinions written long after the patient had died.156

For most parents, submitting their healthy child to an organ donation to save the life of their diseased child is probably one of the most difficult decisions any parent would have to consider. As seen in Curran, when the biological parents are separated and the relationship between the children may only be genetic, such issues are brought to the courts for resolution. As the courts have stated many times, this is a "no win" situation involving as it does the lives of children or incompetents.

Recently, a couple in California conceived a baby with the expressed intention of utilizing the baby, if compatible, to be a bone marrow donor to her ailing sister.157 This situation raises serious legal and ethical questions. For example: Is it ethical to conceive children expressly so that they can be donors? Who will guard the rights of the infant donor: the parents or a court appointed guardian? Since the child is specifically conceived as a bone marrow donor, if fetal tests show that the baby's marrow is not compatible can the parents choose abortion?

A question presented in the discussion of organ donation cases between one child and another is: can the parents really be objective in balancing one child's needs against another? Should we expect family members to care so much about each other that they are willing to sacrifice themselves to some extent? As medical science provides safer and less risky possibilities in the organ donation context, parents and children may feel an


obligation to donate organs to save the life of another sibling if the risk to their own life is minimal. The fact that the risk to the donee is less, due to the advancement of medical science, will not make the decision for a healthy sibling or parent to donate an organ easier. At best, the decision to donate an organ will contemplate a possibility that the ill sibling will survive with the newly donated organ.

Another case recently reported involves a small child and her father.\textsuperscript{158} A small section of the father’s lung was transplanted into the body of his daughter.\textsuperscript{159} Physicians believe that the lung is regenerative and will allow the little girl to live without harming the health of her father.

Another topic that has become an area of concern is the issue of fetal tissue transplants.\textsuperscript{160} If parents can conceive a child specifically to become a bone marrow donor, why can’t they conceive a child to use fetal tissue to be transplanted into a loved one?

This technique of using regenerative tissue in transplants appears to be achieving higher success rates.\textsuperscript{161} However, in light of past cases, will the courts impose a duty upon a parent to allow physicians to take regenerative tissue from the parent’s body to transplant into the body of their dying child? Or perhaps from a sibling? When the parent consents for himself or herself, the courts are more likely to take into consideration the removal of regenerative tissue, or even kidneys. The problem arises when the parents are consenting for an incompetent — either a small child or a mentally defective person. Using the analysis of court decisions,\textsuperscript{162} it would seem that the courts would allow it in some situations and would not allow it in others.\textsuperscript{163}

VII. Conclusion

The gift of organs and tissues to another person is not a rare occurrence. While cadavers are the chief source of transplanted body parts, because of advances in medical science, living donors will frequently provide skin, blood, bone marrow, kidney, and sections of intestines to close relatives.\textsuperscript{164}

\textsuperscript{158} Transplant patient OK, CLEVELAND PLAIN DEALER, Jan. 16, 1991, at 6.

\textsuperscript{159} Id.

\textsuperscript{160} Fetal tissue transplantation has been attempted for a limited number of clinical disorders, including Parkinson’s disease, diabetes, immunodeficiency disorders, and several metabolic disorders. See R. Mark Evans, PhD and David Orentlicher, MD, JD, Medical Applications of Fetal Tissue Transplantation, 263 J.A.M.A. 565 (1990); Reiko Namikawa, MD, et. al., Long-term human hematopoiesis in the SCID-hu mouse, 172 J. EXP. MED. 4 (1990). See also Mark W. Danis, Fetal Tissue Transplants: Restricting Recipient Designation, 39 HAST. L.J. 1079 (1988).

\textsuperscript{161} See supra notes 3 and 19.

\textsuperscript{162} See cases cited supra note 37 and accompanying text.

\textsuperscript{163} See cases cited supra note 37 and accompanying text.

\textsuperscript{164} The regenerative transplant procedures of livers and lungs are still experimental. The procedures have been successful and in the future may become as routine as kidney transplantation. See, e.g., supra notes 3 and 19.
Indeed, cultural norms of obligation and gift-giving create strong pressures for intra-family body gifts, particularly from sibling to sibling or parent to child.\textsuperscript{165}

How far the courts will go to save the life of a child may depend on the interests at stake. Courts will consider the overriding state interest as opposed to the constitutional right to privacy. However, the courts are still hesitant to use the overriding state interest analysis and order organ donations. With the advent of a more conservative Supreme Court, it is conceivable that some rights may be subrogated to protect the rights of the unborn. Does this signal a change of attitude on the part of the Court to allow forced organ donation? A clear analogy could be made to the organ donation circumstance where the life of an ill child might be saved if the invasion of the healthy child was not so pervasive as to constitute a constitutional invasion of privacy. Medical science will also play a vital role in organ donation. As more of the medical procedures become routine, non-threatening and less risky, the courts will gain some basis for determining that the life of one child could be saved at a minimal risk to another sibling.

Presently, the courts will not compel another person to have an invasive procedure, such as an organ donation, even though death is undoubtedly the result of their decision. As contemplated in the discussion above only time will reveal whether the cost to save a life will be organ donation.

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