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MINOR DONOR CONSENT TO TRANSPLANT SURGERY: A REVIEW OF THE LAW

THOMAS H. MURPHY, JR.*

INTRODUCTION

During the last twenty years, biomedical knowledge and technological sophistication have reached the point where the prolongation of human life by organ transplantation has become almost commonplace. Because society affords the highest priority to the values of human dignity and integrity, the complexity of the ethical and legal issues that accompany the utilization of this rapidly expanding body of knowledge must of necessity be explored. Traditionally, the device which intermediates between our present state of knowledge and our operative ethical systems has been the legal concept of consent. The knowing and intelligent consent by a competent adult appears prima facie to satisfy the requirement of respect for human dignity. However, at present, a minor, who is generally held to be incapable of giving legally effective consent, is frequently

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1. Dunphy, The Story of Organ Transplantation, 21 Hastings L.J. 67, 70-75 (1969). Transplants of human organs and tissues are accomplished through one of two procedures. Autografting entails the transfer of an organ or tissue from one part of the human body to another. Homografting involves the transfer of an organ or tissue from one human body — either a cadaver or a living donor — to the recipient body. Curran, A Problem of Consent: Kidney Transplantation in Minors, 34 N.Y.U.L. Rev. 891, 891 (1959) [hereinafter cited as Curran]. Isografting, a type of homograft, entails the transfer of an organ or tissue from one identical twin to another.


the most acceptable donor in transplant procedures where, for instance, a sibling needs a new organ or tissue. Consequently, few areas of biomedical knowledge have produced more ethical or legal debate than the issue of effectuating the consent of a minor donor in transplant surgery. In those jurisdictions where this issue of the effectiveness of a minor donor's consent has arisen, it has generally been held that its resolution tail some degree of judicial review. It is the basic premise of this article that this judicial review must involve three considerations: first, a determination of the precise function to be performed by the court in its role of judicial oversight; second, an articulation of the legal standards of review to be applied to the consent issue; and third, a delineation of the means by which that standard of review will actually be applied. Accordingly, this article will explore these considerations in three sections. First, a discussion of traditional tort law as it relates to minors and their consent to medical treatment will outline the specific difficulties which arise when effective consent is sought from a minor transplant donor. Next, recent case law will be critically examined in order to discover the various functional roles courts have assumed, and the standards of review they have utilized, in addressing the efficacy of such consent. Finally,

4. Baron, Botsford & Cole, Live Organ and Tissue Transplants from Minor Donors in Massachusetts, 55 B.U.L. Rev. 159, 159 (1975) [hereinafter cited as Baron]. This situation results because the high degree of genetic similarity between siblings facilitates the success of any transplant procedure by minimizing the body's tendency to reject foreign tissue. Id. See text accompanying notes 20-29 infra.

5. See, e.g., Hart v. Brown, 29 Conn. Supp. 368, 289 A.2d 386 (1972) (7 yr. old identical twin — consent granted); Strunk v. Strunk, 445 S.W.2d 145 (Ky. 1969) (27 yr. old incompetent — consent granted); In re Richardson, 284 So. 2d 185 (La. Ct. App. 1973) (17 yr. old with mentality of 3 yr. old — consent denied); Masden v. Harrison, Eq. No. 68651 (Mass. June 12, 1957); Lausier v. Pescinski, 67 Wis. 2d 4, 226 N.W.2d 180 (1975) (39 yr. old mentally incompetent — consent denied). In general, any court addressing the issue of a minor donor's consent to transplant surgery is confronted with four alternatives: it could bar all transplant surgery involving minor donors on the grounds that effective consent is impossible; it could redefine the common law principles governing parents' power to consent to such operations and treat that consent as effective; it could lower the age of majority and treat some children's willingness to serve as donors as effective consent; or it could devise new procedures and standards to evaluate and authorize minor donor consent in individual transplant situations. Baron, supra note 4, at 160.


7. See text accompanying notes 10-29 infra.

8. See text accompanying notes 30-107 infra.
the article will attempt to reconcile the inconsistencies of these various roles and standards by outlining a suggested model for the resolution of the issue of effectuating a minor donor's consent in transplant surgery.9

I. MINORS, CONSENT, AND TRANSPLANT SURGERY: THE PROBLEM DEFINED

Traditionally, the law has recognized the overwhelming interest of individuals in preserving the inviolability of their bodily integrity.10 In general, this interest in being free from intentional and unpermitted bodily invasions is of course protected by the tort action commonly known as battery.11 Essentially, the gist of an action for battery is the unconsenting nature of the bodily contact rather than the hostile intent or motive on the part of the tortfeasor.12 As such, the consent of the person damaged will ordinarily prevent liability for an intentional interference entailed by a battery; a fundamental principle of the common law being volenti non fit injuria — "to one who is willing, no wrong is done."13 Thus, a surgical operation may technically be a battery14 if the surgeon who performs the operation does not have his patient's consent.15

To be effective, this consent must be made by one who has the capacity to consent.16 Consequently, consent by minors or mental incompetents, who are said to be incapable of appreciating the nature and consequences of a tortious invasion, is generally held to be ineffective.17 The consent of a parent or guardian, on the other hand, is considered to be effective and thus prevents any potentially harmful invasion of the minor's or incompetent's interests from later being held to be tortious.18

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11. PROSSER, supra note 3, § 9, at 34.
12. Id. at 36. To quote Mr. Justice Holmes, "[T]he absence of lawful consent is part of the definition of an assault . . . ." Ford v. Ford, 143 Mass. 577, 578, 10 N.E. 474, 475 (1887).
16. RESTATEMENT (SECOND) OF TORTS § 892A(2)(a), Comment b at 22 (Tent. Draft No. 18, 1972); RESTATEMENT OF TORTS § 59(1), at 111 (1934).
17. RESTATEMENT (SECOND) OF TORTS § 892A(2)(a), Comment b at 22 (Tent. Draft No. 18, 1972); RESTATEMENT OF TORTS § 59(1), at 111 (1934).
18. RESTATEMENT (SECOND) OF TORTS § 892A(2)(a), Comment b at 22 (Tent. Draft
Therefore, in the case of any medical procedure on a minor, the general rule is that parental assent is necessary to fulfill the requirement of effective consent.  

While parents have naturally assumed the primary role in the care and protection of their minor children, modern legal requirements have gone beyond the traditional moral duty of good faith to require that parents also act in their children's best interests. In view of this requirement, a conflict of interests can clearly arise under the general parental consent rule whenever parents are confronted with a situation where an organ or tissue transplant from one child is needed to save the life of another. For example, parents may have a desperately ill child who faces death if no transplant surgery is performed and although they wish to do whatever is necessary to save his or her life, presumably they would not want to do so at the expense of their healthy child, the prospective donor. Indeed, it may be seriously questioned whether an operation to remove any healthy organ or tissue can ever be in the interests of a prospective donor, or whether the parents can be motivated...
solely by that child's best interests.\textsuperscript{24}

In view of this parental conflict of interests, the situation presented by a proposed sibling transplant offers compelling justification for restricting the parental power of choice and for subjecting the consent decision to a review by some delegated community representative.\textsuperscript{25} Naturally, the burden of this review must of necessity fall upon the courts, as it is this office which has traditionally been charged with the community's \textit{parens patriae} responsibility of protecting those persons who labor under legal disabilities.\textsuperscript{26} In effect, judicial review offers the only potential means of ensuring that the substantive interests of a prospective minor donor will be considered before he or she participates in a transplant operation.\textsuperscript{27} However, the fulfillment of this obligation clearly depends upon the ability of the courts to define and implement their role as arbitrators of the parent's conflict of interests.\textsuperscript{28} Specifically, any court addressing the issue of a minor donor's consent to transplant surgery must first determine what its precise role is to be in protecting the interests of the minor donor. In addition, it must define the legal standards which will ultimately apply in adjudicating the issue of consent.\textsuperscript{29} In short, the court must determine the judicial grounds upon which it will base its efforts to eliminate the effects of the parental conflict of interests and to

\textsuperscript{24} Baron, \textit{supra} note 4, at 167.


\textsuperscript{27} Baron, \textit{supra} note 4, at 168.

\textsuperscript{28} See \textit{id}.

ensure that the interests of the minor donor are strictly observed. It has been this predicament which recent courts have had to confront.

II. RECENT CASE LAW

A. "Substituted Judgment" and "Best Interests"

The first reported appellate decision to address the issue of the effectiveness of an incompetent donor's consent to transplant surgery, and to speak of the judiciary's role in its resolution, was Strunk v. Strunk. Strunk presented a situation wherein a 27 year old mentally incompetent ward of the state was found to be the most medically acceptable kidney donor for his 28 year old brother. Prompted by hospital concern over the issue of the effectiveness of the incompetent's consent, the brothers' mother, acting as committee for her retarded son, successfully petitioned a county court for authority to proceed with the transplant operation. On appeal, the Franklin County Circuit Court, a court of equity, adopted the findings of the county court and affirmed the authorization for the transplant surgery. In reviewing the decisions of the lower courts, the Kentucky Court of Appeals framed the issue in terms of the equity court's power to permit the donation of a kidney by an incompetent donor upon petition of a guardian. Drawing upon the equitable doctrine of "substituted judgment," the court of appeals held that the chancery court, as

30. 445 S.W.2d 145 (Ky. 1969).
31. Id. at 145-46.
33. Under the Kentucky law, the "committee" is the guardian of an incompetent. See Ky. Rev. Stat. §§ 387.210-.220 (1972).
34. 445 S.W.2d at 146.
35. Id. See text accompanying notes 51-53 infra.
36. 445 S.W.2d at 145.
37. As first enunciated in England, the doctrine of "substituted judgment" empowers a court of equity to invade the estate of an incompetent, for the purpose of providing a gift to a person, to whom the incompetent owes no duty of support, on the grounds that the incompetent would choose to do so if he were still competent. Ex parte Whitbread, 35 Eng. Rep. 878, 879 (Ch. 1816). Subsequently, "substituted judgment" was adopted and utilized in a number of American jurisdictions. E.g., In re Brice's Guardianship, 233 Iowa 183, 186-87, 8 N.W.2d 576, 578-79 (1943); Strange v. Powers, 358 Mass. 126, 130-33, 260 N.E.2d 704, 708-10 (1970); In re Buckley's Estate, 330 Mich. 102, 105-08, 47 N.W.2d 33, 36-37 (1951). Application of the doctrine requires a court to "don the mental mantle of the incompetent," In re Carson, 39 Misc. 2d 544, 545, 241 N.Y.S.2d 288, 289 (1962), and "to substitute itself as nearly as may be for the
a court of equity, did possess the inherent power to authorize a transplant operation involving an incompetent donor.\textsuperscript{38} Specifically, the court noted that the statutory power given a committee would not of itself be sufficient to encompass consent for surgery unless the life of the ward was in the balance. Nor did the court believe the powers delegated to the county court were of sufficient reach to allow the contemplated procedure. However, because the lower courts' findings were supported by substantial evidence, the authorization of the transplant surgery was affirmed.\textsuperscript{39}

In its decision, the court of appeals initially relied upon the doctrine of "substituted judgment" and the inherent power of courts of equity to establish the authority of the Kentucky courts to adjudicate the legal issues involved in the controversy presented by Tommy Strunk's need for a kidney transplant.\textsuperscript{40} This reliance was unnecessary however, as statutory authority for such a decision already existed under the provisions of Kentucky's declaratory judgment statute.\textsuperscript{41} Although it is unclear from the Strunk decision whether Mrs. Strunk's petition to the county court was formally made under the declaratory judgment statute, it is clear that the petition sought a declaration of legal rights in the controversy between the Strunk family and the hospital officials, which was in the nature of a declaratory judgment under the terms of the statute.\textsuperscript{42} In essence, a controversy appeared to exist concerning the issue of Jerry's consent for the donation of his kidney, and Mrs. Strunk attempted to resolve that controversy by seeking authority from the court to give consent for the operation.\textsuperscript{43} Thus, considering

\textsuperscript{38} 445 S.W.2d at 149.

\textsuperscript{39} Id.

\textsuperscript{40} Id. at 147-48.

\textsuperscript{41} Ky. Rev. Stat. § 418.040 (1977):

In any action in a court of record of this Commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked.

This declaratory judgment statute is to be liberally construed and administered. Continental Ins. Co. v. Riggs, 277 Ky. 361, 363, 126 S.W.2d 853, 855 (1939).

\textsuperscript{42} See 445 S.W.2d at 146.

\textsuperscript{43} Such an approach has been taken under the Massachusetts declaratory judg-
the clear authority of the declaratory judgment statute, the court of appeals' initial reliance upon the doctrine of "substituted judgment" and the inherent common-law powers of equity courts was largely unnecessary.

Moreover, even if some reference to the principles of "substituted judgment" was, by analogy, appropriate to clarify the court's basis of judicial authority, the analysis that the court of appeals ultimately pursued in *Strunk* was not itself an application of "substituted judgment." In the case of an individual suffering from congenital mental retardation, such as Jerry Strunk, or of a minor, there is no period of prior competency upon which to evaluate his values, desires or preferences in terms of the "judgment" to be substituted. Thus, any meaningful effort to ensure respect for the dignity and integrity of the incompetent individual or minor is necessarily undertaken without satisfactory guidelines or safeguards. Consequently, while a traditional application of "substituted judgment" involves the determination of the subjective question of what an incompetent individual would desire or prefer if he were still competent, an application of the doctrine to a congenitally retarded individual, such as Jerry Strunk, or to a minor, is transformed into a determination of the objective question of what, in fact, a court deems best for the individual involved. Accordingly, in the case of Jerry Strunk, because a subjective evaluation was impossible due to his severe and lifelong retardation, the court of appeals was forced to focus upon the testimony of third parties as to the nature of Jerry's relationship with his brother and to make an objective evaluation of what was best for Jerry under the circumstances. Therefore, the court of appeals did not in fact apply the substantive analy-
sis of "substituted judgment." Indeed, the reference to "substituted judgment" is in essence, little more than the Strunk court's convenient, but misplaced, semantic tag for its unfamiliar judicial role in effectuating the incompetent's consent. It may be more logical, as a conceptual matter, to view the decision in terms of the court's review of the committee's consent decision with the objective determination of Jerry Strunk's best interests forming the standard of review for the court's approval and authorization of the transplant. Simply stated, the court did consider evidence of the adverse psychological effect Tommy Strunk's death would have on his retarded brother, Jerry, and concluded that the donation of a kidney for the purpose of saving his brother's life would benefit Jerry. Thus, the court in effect found that the transplant surgery would be in the donor's best interests and, on this basis, approved the operation.

While the Kentucky court may have poorly focused upon its proper judicial function in determining this issue, its decision nonetheless was in accordance with the prevailing concepts of minor donor consent. In short, courts ordinarily authorize the medical treatment of minors or incompetents only if it can be shown that the procedure is likely to result in a net benefit to the individual. In the Strunk case, evidence of the psychological benefit provided just such proof.

Although a "best interests" standard may be derived, in part, from a traditional application of the "substituted judgment" doctrine, the desirability of severing the two concepts of "substituted judgment" and "best interests," when confronting the issue of a minor donor's consent to transplant surgery, is demonstrated by two appellate decisions which followed Strunk. In Lausier v. Pescinski, the Wisconsin Supreme Court held that the committee's approval of the transplant was in Jerry Strunk's best interests.

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50. See text accompanying notes 93-100 infra.
51. 445 S.W.2d at 146-47.
52. Id. at 149.
54. See note 37 supra.
55. 67 Wis. 2d 4, 226 N.W.2d 180 (1975).
Court expressly held that it would not adopt the doctrine of "substituted judgment" in deciding the consent issue involved in a proposed kidney transplant from a thirty-nine year old mental incompetent to his thirty-eight year old sister. Although the court ultimately refused to authorize the operation, it implied that had some donor benefit been established its decision would have been different. Thus, the court unknowingly applied a best interests test. Similarly, in *In re Richardson*, the court of appeals of Louisiana carefully distinguished the *Strunk* court's use of the "substituted judgment" analysis as a source of judicial authority to authorize an incompetent's consent. In this case the consent issue involved a proposed kidney transplant from a seventeen year old mental incompetent to a thirty-two year old sister. The court here expressly held that the operation would not be in the best interests of the incompetent minor donor. Thus, the courts of both Wisconsin and Louisiana rejected the "substituted judgment" test as the basis of the judicial function involved in the review of an incompetent or minor donor's consent to transplant surgery, while implicitly or explicitly recognized the propriety, and probable necessity, of some application of the "best interests" analysis.

In the specific context of effectuating a consent decision, the development of the "best interests" doctrine is best illustrated by a series of unreported declaratory judgment decrees entered by the Massachusetts Supreme Judicial Court, in which the "best interests" standard of review was first applied to the minor donor transplant situation. The leading case in

56. Id. at 7-8, 226 N.W.2d at 181.
57. Id. at 8-9, 226 N.W.2d at 182.
59. Id. at 187.
60. Id.
61. The Massachusetts courts are authorized to make declaratory judgments under MASS. GEN. LAWS ANN. ch. 231A, § 1 (West 1974). When appropriate, actions for declaratory relief may be heard by a justice of the Massachusetts Supreme Judicial Court sitting in single session. MASS. GEN. LAWS ANN. ch. 214, § 8 (West Supp. 1979).
this series of decisions is *Masden v. Harrison.*\(^6\) *Masden* presented a situation wherein one twin, who was suffering from a chronic kidney ailment, was in need of a kidney transplant from his nineteen year old brother.\(^4\) Explicitly relying upon a "best interests" standard of review, the court held that the operation was necessary for the continued well-being of both the donee and the donor and that the proposed surgery could go forward.\(^5\)

In its findings, the supreme judicial court established that both the parents and the donor, Leonard, had rendered informed and voluntary consents to the operation.\(^6\) Relating the case to an emergency situation where surgery could be performed upon a minor — even without the consent of the minor or his parents — the court turned to the difficult question of finding a "benefit" to be enjoyed by a minor who was about to lose one of his vital organs.\(^7\) On this question, the court admitted testimony from a psychiatrist who had interviewed the twins and who had found that the death of the recipient, Leon, would inflict a "grave emotional impact" upon the donor.\(^8\) Explicitly relying upon this testimony, the court held that the "operation is necessary for the continued good health and future well-being of Leonard and that in performing the operation the defendants are conferring a benefit upon Leonard as well as Leon."\(^9\) Accordingly, the supreme judicial court approved the donor's consent to the transplant and allowed the surgeons to proceed without risking civil or criminal liability.\(^10\)

Undeniably, the use of a "best interests" standard with its requisite finding of some benefit to the donor conceptually guarantees to a high degree meaningful respect and protection of the dignity and integrity of the individual minor donor.\(^11\) Consequently, several jurisdictions have adopted the "best interests" standard as announced in *Masden.*\(^12\) Indeed, it was

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\(^7\) Curran, *supra* note 1, at 892-93.

\(^8\) Eq. No. 68651, at 4; see Baron, *supra* note 4, at 161 n.14.

\(^9\) Eq. No. 68651, at 3; see Baron, *supra* note 4, at 161 n.14.

\(^10\) Eq. No. 68651, at 4. See note 19 *supra*.

\(^11\) Eq. No. 68651, at 2.

\(^12\) Id. at 4.

\(^13\) Curran, *supra* note 1, at 893.

\(^14\) See Baron, *supra* note 4, at 168; Robertson, *supra* note 2, at 64.

\(^15\) E.g., Howard v. Fulton-Dekalb Memorial Hosp. Auth., Civil No. B-90430 (Super. Ct., Fulton County, Ga., Nov. 29, 1973); Children's Memorial Hosp. v. Lewis, No. 73CH6936 (Cir. Ct., Cook County, Ill., Nov. 21, 1973).
precisely the type of psychiatric evidence produced in *Masden* which the Kentucky court relied upon to support its finding that it was in the best interest of Jerry Strunk to donate a kidney to his brother.\textsuperscript{73}

The "best interests" standard, however, has been subjected to substantial criticism for its one glaring flaw: \textit{i.e.}, that of the often speculative and generally questionable nature of the psychological evidence used to establish donor benefit.\textsuperscript{74} Any acceptable evaluation of the preferences and emotional state of a minor or an incompetent has been argued to be extremely difficult to establish due to the limited mental capacity of the individual being evaluated.\textsuperscript{75} Simply, prediction of future emotional effect or a definite determination of an individual's capacity to withstand emotional trauma is often impossible, especially in reference to minors or severely retarded individuals. Furthermore, even when a facially acceptable evaluation can be made, its results can often be attacked as contrived\textsuperscript{76} or merely restatements of "common sense" in professional jargon.\textsuperscript{77} In short, medical witnesses often consciously provide courts with the necessary words to satisfy a finding of psychological benefit and often those words amount to nothing more than a psychiatrist's common sense opinion of the family ties he has observed.\textsuperscript{78} Therefore, some courts have been forced to conclude that any psychiatric evaluation presented as evidence of donor benefit must be viewed at best as highly speculative and at worst as unreliable.

Because of the inherent limitation of both the "substituted judgment" review and the "best interests" analysis, courts have been spurred to create still another standard of review, that of the "review of the parental decision." Like its predeces-

\textsuperscript{73} 445 S.W.2d at 146-47.


\textsuperscript{76} Baron, \textit{supra} note 4, at 171.


\textsuperscript{78} Baron, \textit{supra} note 4, at 171. In essence, this "common sense" amounts to the conclusion that all people, including children and retarded individuals, need love and caring and suffer a degree of loss when someone close to them dies. Note, 58 \textit{Calif. L. Rev.} 754, 761 (1970).
sors, however, it too cannot fully deal with the problems posed by minor donor consent.

B. "Review of the Parental Decision"

The two leading decisions utilizing the reasoning of the "review of the parental decision," are the cases of Hart v. Brown and Nathan v. Farinelli. In Hart, the parents of two seven year old identical twins sought judicial authorization for a kidney transplant when it was discovered that one twin, Katheleen, was suffering from a kidney disease. The prospective donor was to be Katheleen's sister, Margaret. The Connecticut court, after reviewing Strunk's use of "substituted judgment" and stating that it had authority to consider the controversy, concluded that it was confronted with a combination of the Strunk and Masden cases in that Masden involved minor identical twins while Strunk involved an incompetent adult with the mental capacity of an infant. The court stressed that its objective was to render an equitable result consistent with the decisions of the Kentucky and Massachusetts courts. Enunciating the means by which this objective would be accomplished, the court stated that the natural parents of a minor donor had the right to give their consent to a kidney transplant procedure "when their motivation and reasoning . . . [were] favorably reviewed by a community representation which includes a court of equity." Therefore, weighing the particular facts of the situation under review, including an express finding of donor benefit, the court approved the kidney transplant operation.

In Farinelli, the parents of two young children sought judicial authorization of a bone marrow transplant from their healthy six year old daughter to their ten year old son. The son was suffering from aplastic anemia. Unlike the Connecticut

81. 29 Conn. Supp. at 369, 289 A.2d at 387.
82. Id. at 370-71, 289 A.2d at 387-88. This discussion appears almost superfluous considering the availability of the Connecticut declaratory judgment statute, CONN. GEN. STAT. ANN. § 52-29 (West 1960), and the court's ultimate disposition of the case.
84. Id. at 378, 289 A.2d at 391.
85. Id.
86. Id.
87. Eq. No., 74-87, at 1.
court, however, the Massachusetts court was unable to make any finding of donor benefit due to its assessment that the psychological evidence presented to the court was unduly speculative. Accordingly, the court reasoned that if authorization of the transplant was to be given at all, it would have to be based on some ground other than donor benefit. Obviously pursuing an objective identical to that of the Hart court, the Farinelli court then concluded that a finding of donor benefit was not essential, and that the absence of such a finding was not fatal to allowance of the transplant surgery. Thus, the court, rejecting any reliance upon the doctrine of "substituted judgment" and also the necessity of donor benefit, recognized the parents' "primary right and responsibility for deciding the delicate question" presented by the consent decision, and the court's concomitant duty to review that decision. Weighing the particular facts of the situation under review, which as noted previously did not include any finding of donor benefit, the court approved the bone marrow transplant.

Considering this reasoning, the most pertinent aspect of the Hart and Farinelli decisions is their identification of the precise function to be performed by the courts in their review of authorizations given by parents for minor donors. In the plain language of both decisions, the function of the courts was to review the parents' decision giving consent to their minor child's donation of an organ or tissue. Simply put, the Hart and Farinelli decisions recognize the parents' essential right to consent to medical treatment for their children and the court's secondary role of reviewing the propriety of that decision as a means of protecting the minor donor from the parental conflict of interests. In so doing, the courts exercised their authority solely within the context of the traditional tort concept of consent as well as in deference to the parents' primary role in the medical care of their minor children. As such, the courts adopted a straightforward and familiar direction in exercising

88. Id. at 2, 4.
89. Id. at 3.
90. Id.
91. Id. at 4.
92. Id. at 5.
93. Id. at 4; 29 Conn. Supp. at 377-78, 289 A.2d at 391.
95. See text accompanying notes 16-21 supra.
their role as arbitrators of any parental conflict of interest and as protectors of the interests of the minor donor. Therefore, rather than manipulating the "substituted judgment" doctrine of property law, the Hart and Farinelli courts were able to define a clear, manageable and well-based functional role for their consideration of the issue of parental consent to minor donors undergoing transplant surgery.

The implementation of this functional role, however, presents some definite difficulties. In both the Hart and Farinelli decisions, the courts adopted a standard of review which entailed a balancing of the values of the particular situation to determine whether the parental consent was untainted by a conflict of interests. In the Hart case the interest of the minor donor was only one of several factors to be considered by the court. More importantly, each factor was apparently given equal weight. Thus, the balancing test tended to recreate the no-win situation presented to parents of sacrificing the interest of one child to advance the interests of another. Furthermore, the junior position in which the interests of the minor donor were placed under the Hart balancing test, in contrast to its senior position under the "best interests" standard of review, threatened to undermine the very justification for judicial review of the parents' consent — the maximum protection of the minor donor's interests. Indeed, this threat saw fruition in Farinelli where the court expressly determined that it could not find sufficient evidence to substantiate a finding of donor benefit. Thus, considering the fundamental role that the concept of benefit has played in court authorization of medical treatment of minors, the less than primary consideration of the minor donor's best interests, which is necessarily found in any

96. Eq. No. 74-87, at 4. See note 37 supra.
98. 29 Conn. Supp. at 377-78, 289 A.2d at 391. Among the factors considered were the donee's need for the transplant, the risks to the donee and the donor, the parents' consent and the benefits to the donor.
99. See Baron, supra note 4, at 172. See text accompanying notes 20-24 supra.
100. See text accompanying notes 51-53, 68-75 supra.
101. See notes 23, 26 supra; text accompanying notes 20-29 supra.
102. Eq. No. 74-87, at 2.
balancing standard, potentially defeats the purpose of judicial review.104

Because of this analysis of the rationale underlying the "review of parental decision" cases, the state of the law on the minor donor consent issue becomes somewhat unclear and uncertain. On the one hand, the Hart and Farinelli courts succeed in plainly describing the precise judicial function to be performed in reviewing substituted consent for minors. Indeed, the simplicity and familiarity of this function readily commends itself to implementation by the judiciary.105 However, the Hart and Farinelli decisions were initially dictated, to a large extent, by the weaknesses which inhered in the application of the "best interests" standard. On the other hand, these decisions also succeeded in debasing the fundamental and well-reasoned underpinnings of the "best interests" test.106 As such, the development of the judicial role in the resolution of a family’s transplant consent dilemma107 remains essentially an incomplete and unperfected process. As a suggested solution, the combination of the "best interest" test with the "review of parental decision" seems appropriate, for each offers advantages the other lacks; review of the parental decision could define the functional role while the "best interest" test could provide the standard of review. Thus, the reconciliation of the "best interests of the donor" test with the "review of parental decision" should be the overriding goal on any court confronted with the issue of parental consent to transplant surgery involving minor donors.

III. "BEST INTERESTS" AND "REVIEW OF PARENTAL DECISION" RECONCILED

In any attempted reconciliation of the "best interests" standard with the functional role of the "review of parental decision," the basic issue is how the "best interests" standard can be applied within the process of reviewing the parental consent. By way of resolution of this issue, it is important to note that whenever a "best interests" analysis has been undertaken, whether as an explicit standard of review or as a factor in a balancing process, its application has been accompanied by

104. See Baron, supra note 4, at 172-74.
105. See text accompanying notes 93-96 supra.
106. See text accompanying notes 51-53, 66-73 supra.
107. See text accompanying notes 25-29 supra.
specific findings concerning other relevant facts in the transplant controversy. For example, most courts have noted that the donor's parents or guardian have consented to the transplant surgery. Courts also have considered whether the donor had given consent to the surgery, at least to the extent possible within his or her limited mental capabilities. Related to this consideration, most courts have also noted the age and mental development of a minor donor or the mental age and "I.Q." of an incompetent donor. Similarly, most courts have discussed whether a transplant is medically essential to the preservation of the donee's health and life and whether the minor or incompetent is the most acceptable donor. Related to this discussion, courts have also considered the probable success of the transplant and the probability of long-term benefit to the donee. In sum, what emerges from these discussions and considerations is a list of facts which influence the courts' disposition of the issue of the effectiveness of a minor donor's consent to transplant surgery by that minor donor.

In view of this list, it appears reasonable that certain of these facts should constitute prerequisite findings to any application of the "best interests" standard within the context of the


functional rule presented by the "review of parental decision." For instance, to conform with the traditional theories of consent found in tort law, and to have in fact parental consent upon which a court can act, the parents or guardian of the minor donor should obviously consent to the transplant procedure. In addition, medical testimony should accompany that consent, objectively demonstrating that an organ or tissue transplant is essential for the preservation of the donee's life, and that, as a medical fact, the proposed minor is the most acceptable donor. Furthermore, it should be established that the proposed transplant has a medically reasonable probability of relieving the recipient's condition and that no other disease or ailment, independent of the condition necessitating the transplant, will unreasonably jeopardize the success of the transplant operation.\(^5\) Finally, there should be a showing that the operation has a reasonable chance of bettering the donee's condition rather than merely prolonging it or stabilizing it at a precarious level. Simply, these prerequisites would serve to define the nature of the parental decision the court would have to review and to establish the threshold issue of evaluating the minor donor's best interests.\(^6\)

Once these initial findings are made, the court should then focus upon the age and mental maturity of the minor donor. To whatever extent the donor's mental capacity permits, the court should make every effort to determine the willingness of the donor to participate in the surgery. Under this determination, if the minor donor is of sufficient age and mental development that the court finds that he or she is fully capable of understanding the ramifications of the transplant situation and of giving an informed consent, the court should end its review at this point and approve the surgery. Although resembling the "mature minor" consent rule,\(^117\) this resolution of the consent issue presents an aggregation of factual findings such

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115. In re Richardson, 284 So. 2d 185, 186 (La. Ct. App. 1973). In Richardson, the donee's multiple and severe medical disorders, which endangered the success of any surgery, weighed heavily in the court's refusal to authorize the kidney transplant.

116. While the absence of a positive finding concerning medical necessity and propriety will necessarily terminate the court's review and prohibit the proposed transplant surgery, the absence of a positive finding concerning parental or donor consent in some rare instances may not be fatal to further judicial inquiry and subsequent authorization of the transplant procedures. See notes 119, 120 infra.

as parental consent, medical necessity and propriety, as well as the mature, informed consent of the donor. In this fashion, the particular minor donor can be afforded both protection beyond his or her individual "mature" decision and respect, as a "near-adult," for choices made concerning his or her personal dignity and integrity. Thus, in a situation involving a "mature" minor donor, these factual findings would amount to clear and convincing evidence of what in fact the minor donor's best interests were. Therefore, the aggregation of these factual findings within a "mature minor" context could be said to constitute a benefit for the donor per se, using a "best interests" standard within the functional role provided by the "review of parental decision."

Under the aforementioned prerequisite findings, the actual and active application of the "best interests" standard of review would thus be limited to situations wherein the particular minor's understanding of the transplant operation would be limited and evaluated as less than the informed consent of a "mature minor." In such situations, the court's inquiry would proceed to an application of the "best interests" standard similar to that of the Strunk and Massachusetts' decisions, as a means of supplementing the factual findings provided for by the suggested "review of the consent" test. While the evidence needed to satisfy the "best interests" standard would still include testimony on the psychological benefits to the donor, other facts relevant to the "best interests" of the donor

118. See Baron, supra note 4, at 178-81.
119. Admittedly, this "mature minor" resolution will be available in only a minority of sibling transplant cases. This resolution could also be utilized to authorize transplant procedures in the rare situation where a "mature" minor donor expresses an informed consent to participate in a transplant procedure, but the parents refuse to do the same.
120. If the donor is demonstrably unwilling to participate in the surgery or if for some reason, such as the extreme infancy of the minor or the severe retardation of an incompetent individual, a finding of willingness to participate is simply impossible to make, then presumably the court would have to deny approval of the transplant surgery unless it was presented with overwhelming evidence of donor benefit. See Lausier v. Pescinski, 67 Wis. 2d 4, 5-8, 226 N.W.2d 180, 180-82 (1975); Baron, supra note 4, at 180-81.
121. See Baron, supra note 4, at 180. See text accompanying notes 51-53, 66-73 supra.
122. "Studies of adult donors indicate that the main benefits [of an organ or tissue donation] are an increase in self-esteem, an avoidance of the guilt feelings that might result if the donor did not participate, and the satisfaction which follows from the family's gratitude." Baron, supra note 4, at 164 n.21. Therefore, there is a substantial
would also have to be considered in order to minimize the inherent limitations of the psychological evidence. Primary among these facts would be the nature of the relationship between the proposed donor and the sibling donee. Testimony by relatives, neighbors, teachers and clergy could clearly establish the degree of attachment and identification between the siblings and provide a demonstrable factual basis for any psychological conclusions of "benefit" or "emotional trauma" which often appear to be contrived or speculative. Indeed, evidence of prior manifestations of a loving and caring relationship could be the most concrete means of establishing that a minor donor would enjoy a "benefit" and that his donation would truly be in his best interests. In this manner, the court's determination of the best interests of the donor could rest upon objective facts of a nature more susceptible to judicial interpretation, and thereby could assume a more conclusive role in the court's review of the parental decision.

Following this suggested line of reasoning, the combination of the "best interests" test with the "review of parental decision" presents to courts viable alternatives to the confused paths of past decisions. On the one hand, the adoption of the prerequisite factual findings, including the "mature minor" aspect, places the court clearly in the conceptual position of reviewing the parental consent decision. In addition, the factual findings also restrict the potential re-occurrence of any difficulties with the "best interests" standard by allowing the court to dispose of some cases without an active application of the standard. In such cases, the court could at once act summarily and also in a manner consistent with the protection of personal dignity and integrity. On the other hand, when the court does resort to an active application of the "best interests" standard, it will do so through the evaluation of objective evidence of a clear and definite nature and as the conclusive finding in its review of the consent. In such cases, the paramount

basis for concluding that a donation by a minor may well produce psychological benefits, either at the time of the act or later in life. Id. at 178.

123. See text accompanying notes 74-78 supra.


125. See Stetter, supra note 75, at 561. Plainly, the most persuasive evidence presented at the Strunk hearing was the moving testimony of Mrs. Strunk describing the close relationship between her sons. Savage, supra note 32, at 144.
interests of the minor donor’s personal integrity and dignity are assured of complete protection from the effects of any parental conflict of interests. By this method, the “best interests” standard of review may be reconciled with the functional role of the “review of parental decision” for resolving the issue of the effectiveness of a minor donor’s consent to transplant surgery.

IV. Conclusion

In addressing the issue of the effectiveness of a minor donor’s consent to transplant surgery, the judicial role in reviewing any consent decision is, of course, necessitated by the parental conflict of interests. This conflict arises whenever an organ or tissue transplant is proposed and a minor donor is involved. In such cases the role of the court is to ensure the protection of the personal dignity and integrity of the minor donor. Specifically, courts assuming this role must focus upon three considerations. First, there must be an exact formulation of the function to be performed in the exercise of judicial reasoning and authority. In this context, the traditional conceptual foundation of the tort law, which involves reviewing the parental consent, has proven to be the most well considered. Second, there is the standard of review which must be applied to the consent issue. In this context, while some courts in their adoption of a “review of parental decision” have expressed their reluctance to accept findings of “benefit” to a minor who is about to lose an organ, the fundamental and well-reasoned standard of review must be one which addresses itself to the best interests of the minor donor. Last, the confrontation of these two considerations, and the inconsistencies that they entail, necessarily result in a need to delineate the means of applying the “best interests” standard within the functional role of the “review of parental decision.” Weighing these considerations, future courts should use prerequisite factual findings and objective evidence of donor benefit to apply the “best interests” standard within the “review of parental decision.” By the means of this suggested “review of the consent,” the “best interests of the donor” may be reconciled with the “review of parental decision” in resolving the issue of the effectiveness of a minor donor’s consent to transplant surgery.