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# Case Commentary: Kidney Donation from Minors and Incompetents

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## CASE COMMENTARY

### KIDNEY DONATION FROM MINORS AND INCOMPETENTS

Roger Stetter\*

In the novel case of *In re Richardson*,<sup>1</sup> the Louisiana courts were asked to sanction the donation of a kidney from a mongoloid child to his critically ill sister. At the time suit was filed, Roy Richardson was seventeen years old with the mental age of only a three or four-year-old.<sup>2</sup> Roy's sister, Beverly, age thirty-two, was suffering from almost total kidney failure complicated by severe high blood pressure and internal bleeding. Her kidneys had steadily deteriorated to the point where she needed to be placed on an artificial kidney machine, or to receive a suitable donor organ from a living person;<sup>3</sup> otherwise, Beverly would certainly die within a matter of months.<sup>4</sup> Although the testimony of her transplant surgeon was not consistently clear on this score, he stated that in Beverly's case the use of an artificial kidney machine would be tremendously risky because of her severe high blood pressure and tendency to bleed.<sup>5</sup> All of Beverly's siblings, except an older brother who did not volunteer, and her mother and father were tested to establish their suitability as kidney donors. Only Roy's kidney matched perfectly with Beverly's.<sup>6</sup>

Roy's parents believed the transplant of one of his healthy kidneys to his sister Beverly would be in the boy's best interest because Beverly was Roy's closest sibling and she would be the "logical" person to care for him in the event of his parents' demise.<sup>7</sup> Beverly

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1. 284 So. 2d 185 (La. App. 4th Cir.), *cert. denied*, 284 So. 2d 338 (La. 1973) (Barham, J., dissenting). This is a case of first impression in Louisiana.

2. All of the following facts are as reflected in the transcript of testimony taken before Judge Gerald P. Federoff, *In re Roy Allen Richardson*, No. 562-103 (Civ. Dist. Ct., Parish of Orleans, Div. J., Sept. 28, 1973) [hereinafter cited as *Transcript*]. This transcript is part of the record on file, *In re Richardson*, No. 6091 (La. App. 4th Cir. Oct. 10, 1973) [hereinafter cited as *Record*].

3. Although Louisiana has enacted legislation patterned after the Uniform Anatomical Gift Act, LA. R.S. 17:2351-59 (Supp. 1968), which greatly facilitates the procurement of organs from cadavers, the testimony of Dr. John C. McDonald was that due to the waiting list, Beverly could not get a cadaver transplant for four or five years. *Transcript* at 73.

4. *Transcript* at 25, 42.

5. *Id.* at 48-52, 73-74.

6. Due to the human body's built-in rejection mechanism, the use of one of Roy's kidneys in preference to one from another relative offered a significantly greater likelihood that Beverly would be restored to a healthy life. *Id.* at 49-50, 53.

7. *Id.* at 14-15, 17-19.

herself, after some soul-searching, agreed to accept one of Roy's kidneys.<sup>8</sup> But the lack of precedent for using a donor who is mongoloid, and the unknowable risk of incurring civil or possibly even criminal liability, counseled legal precautions on the part of the surgeons and a case was made to obtain the umbrella of a judicial decree.<sup>9</sup> Roy's father filed suit against the child's mother to compel her to consent to transplant surgery,<sup>10</sup> though in fact both parents favored the operation,<sup>11</sup> and the only issue was whether their consent was legal.

The appellate court, affirming the trial judge, found that the removal of one of Roy's healthy kidneys for transplantation to his sister would not be in his best interest, would solely benefit Beverly, and would therefore be illegal.<sup>12</sup> Significantly, both courts stated they had authority to authorize the transplant of a minor's kidney with his parents' consent if this were found to be in the minor's best interest.<sup>13</sup> In denying the requested authorization, the appellate court found "highly unlikely" the postulated benefit to Roy in having a healthy sister to care for him.<sup>14</sup> Given the serious nature of Beverly's underlying disease, her medical history of dizzy spells, weakness and toxic psychosis, and the uncertainty as to how long she could live with a successful transplant,<sup>15</sup> as well as Roy's limited life expectancy of

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8. *Id.* at 46.

9. Letter from Robert E. Lee, attorney for petitioner, to Roger Stetter, May 20, 1974, on file in offices of *Louisiana Law Review*.

10. The device of suing the undertutrix was explicitly recognized as a procedural vehicle for getting the case into court. *In re Richardson*, 284 So. 2d 185, 186 (La. App. 4th Cir. 1973). Accordingly, no harm resulted from it not being evident upon the face of the pleadings that both parents consented to the transplant. However, there appears to be no reason why the doctors could not have brought a declaratory judgment against Roy's parents to establish their own non-liability. The federal declaratory judgment statute, upon which the Louisiana declaratory judgment act is patterned, allows prospective defendants to sue to establish their non-liability. *See Declaratory Judgment Act*, 28 U.S.C. §§ 2201-02 (1964); FED. R. CIV. P. 57; LA. CODE CIV. P. arts. 1871-83.

11. "Consent For Donation of Kidney," *Record* at 12.

12. *In re Richardson*, 284 So. 2d 185, 187 (La. App. 4th Cir. 1973). Judge Federoff dictated his reasons for judgment into the record. *See Transcript* at 88.

13. 284 So. 2d at 187; *Transcript* at 88.

14. 284 So. 2d at 187.

15. *Transcript* at 32-39, 70-71. Beverly was afflicted with the disease known as "Systemic Lupus Erythematosus." *See* 12 *CYCLOPEDIA OF MEDICINE & SURGERY* 398 A (1970). She died on December 12, 1973 from damage to her brain, heart and kidneys caused by this very complex disease, rather than from the failure to perform a kidney transplant. *Richardson* was not a good test case because, even as the trial date approached, it became evident to the medical team that a transplant was infeasible due to difficulties with Beverly's blood clotting, and that a transplant could not save her life because the clinical evidence began to strongly suggest S.L.E. involving damage to other organs, rather than the original diagnosis of kidney failure and hypertension.

twenty-five years,<sup>16</sup> this eminently reasonable conclusion is not surprising.

The court was also incapable of predicting the possible psychological detriment to Roy if Beverly should die. Roy's father's testimony revealed that Roy had never experienced the death of a loved one.<sup>17</sup> Roy's own testimony also belied the assumption he would suffer deep emotional trauma upon the death of his sister. Questioned by defendant counsel as to whether he loved his sister Bev, Roy responded "yes." But in response to a previous question as to the names he called his brothers and sisters, Roy responded "daddy."<sup>18</sup>

Bottomed on a faulty record, the Fourth Circuit Court of Appeal erroneously assumed that Beverly could be maintained indefinitely on an artificial kidney,<sup>19</sup> and pointed to the presence of other available sibling donors in support of its conclusion that kidney transplantation, and in particular the use of Roy's kidney, was not an "absolute medical necessity" to save Beverly's life.<sup>20</sup> Although the court thus noted Beverly's less than urgent need for Roy's kidney, it remains unclear from the opinion whether a finding of "absolute medical necessity" could tip the legal scales in a case in favor of authorizing a transplant from a minor. Specifically, if Beverly had no other adult siblings or parents who could spare her an organ, and if the record clearly showed that she could not use an artificial kidney,<sup>21</sup> would the

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It was upon the basis of that original diagnosis that the kidney donor selection process had been initiated and the court test conceived. Letter from Dr. Meyer Kaplan, Beverly Richardson's personal physician and an expert in renal failure who testified at the trial, to Roger Stetter, July 26, 1974, on file in offices of *Louisiana Law Review*.

16. *In re Richardson*, 284 So. 2d 185, 186 (La. App. 4th Cir. 1973).

17. *Transcript* at 16.

18. *Id.* at 21-22.

19. Dr. McDonald, Roy's anticipated transplant surgeon, testified on direct examination that due to Beverly's severe high blood pressure and tendency to bleed it would be unwise and risky to place her on an artificial kidney. *Transcript* at 48, 52. Later, upon cross-examination, he was asked, "But, in all medical probability, Miss Richardson can be maintained on hemodialysis for five years?" He responded, "The chances are fifty to one." *Id.* at 73-74. Dr. McDonald has informed the author that his testimony in these particulars was confusing, but that his intent in responding to cross-examiner was to give the life-chances for a hypothetical patient on dialysis, rather than Beverly's chances, which were much more restricted. Letter from Dr. John C. McDonald to Roger Stetter, May 24, 1974, on file in offices of *Louisiana Law Review*. Unfortunately, this is not clear to one reading the transcript, and the Fourth Circuit cannot be faulted for making an erroneous assumption. See *Transcript* at 74.

20. 284 So. 2d at 186-87.

21. As previously discussed, the trial testimony was less than clear on this very crucial issue. See note 19 *supra* and accompanying text.

An excellent article discussing the scarcity of artificial kidney machines and the attendant problems of selecting candidates for such life saving treatment is Sanders

court have permitted the use of Roy's kidney? The appellate court did not even intimate what the answer would be. In contrast, it would appear that the trial court explicitly viewed its task as more of a balancing process, for the judge stated, "I suppose my job, in this case, is to weigh the humanitarian factors of Beverly's needs against the reasonable alternatives, other than Roy's being the donor, considering the positive factors that he may experience."<sup>22</sup>

A survey of the existing jurisprudence will serve to clarify the proper test to be used to determine under what circumstances a child or incompetent may "donate" a healthy kidney to a relative. First, it should be noted that the parents or other appropriate guardian (hereafter "guardian") of a minor or incompetent (hereafter "ward") have both the right and duty to consent to conventional medical or surgical procedures which are intended to directly benefit the ward.<sup>23</sup> However, the right of a guardian to consent to medical or surgical procedures which are non-therapeutic, that is, which do not have as their primary aim the physical or psychological well-being of his ward, is an entirely different question.

The courts confronted this problem in the early cases arising from kidney transplants,<sup>24</sup> a prime example of a non-therapeutic operation. In 1956, surgeons were requested to perform life-saving kidney transplant surgery on three pairs of identical twin children.<sup>25</sup>

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& Dukeminier, *Medical Advance and Legal Lag: Hemodialysis and Kidney Transplantation*, 15 U.C.L.A. L. REV. 357 (1968). The authors estimate the cost per patient to be as high as \$28,000 a year. *Id.* at 362. However, these cost barriers to hemodialysis are largely eliminated by the Social Security Act of 1972 which provides disability insurance to any employee covered by Social Security, his spouse or dependent child who needs hemodialysis or a kidney transplant. See 42 U.S.C.A. §§ 426(e)-(g) (Supp. 1973).

22. *Transcript* at 82.

23. For example, in *Owens v. State*, 116 P. 345 (Okla. Crim. App. 1911), the father of a child suffering from typhoid fever who refused to permit physicians to treat her illness was convicted of a misdemeanor for wilfully failing to perform his duty to furnish necessary medical care. See Annot., 12 A.L.R.2d 1047 (1950); cf. Annot., 100 A.L.R.2d 483 (1965). There have been numerous cases finding children "neglected" or "dependent" and depriving their parents of custody for their refusal to consent to surgery or other appropriate medical treatment. See, e.g., *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769 (1952). See Annot., 30 A.L.R.2d 1138 (1953); *Farber v. Oklon*, 254 P.2d 520 (Cal. 1953) (adult incompetent).

24. Actually, the first successful kidney transplant involved an adult identical twin donor whose informed consent obviated legal hurdles. Curran, *A Problem of Consent: Kidney Transplantation in Minors*, 34 N.Y.U. L. REV. 891, 892 (1959). Compare Kusanovich, *Medical Malpractice Liability and the Organ Transplant*, 5 U. SAN FRAN. L. REV. 223, 225-30 (1971) with Note, 20 STAN. L. REV. 99 (1967) (medical licensure action against doctors who experimented upon elderly debilitated patients without obtaining their informed consent).

25. At the time these cases were decided the expertise in the area of renal medi-

Because of the absence of obvious therapeutic benefit to the healthy minor donors, the surgical staffs brought declaratory judgment actions to establish their right to operate with the consent of the parents.<sup>26</sup>

In each of these three cases, the Massachusetts high court approved the donation of a kidney by the healthy twin to his sick sibling. Upon the basis of psychiatric testimony that "grave emotional impact" would result to the healthy twin if his sibling should die, the court specifically found the operation was for the benefit of the healthy twin as well as his sick brother or sister. Notwithstanding the existence of parental consent, the court took special pains to satisfy itself that the well twin understood and voluntarily chose to assume the risk of giving up one of his kidneys.

The first reported case in the United States involving a kidney donor who was not *sui juris* is *Strunk v. Strunk*.<sup>27</sup> At the time of suit, Jerry Strunk was a twenty-seven-year-old incompetent who had been committed to a state institution for the feeble-minded.<sup>28</sup> His older brother Tommy was the victim of a fatal kidney disease who needed a kidney transplant to survive much longer. All members of Tommy's family were tested as prospective kidney donors but found unsuitable with the exception of Jerry who was found to be an excellent match. The hospital, acting on advice of counsel, refused to proceed with the transplant upon the consent of Jerry's parents. Accordingly, Jerry's mother, as his committee, petitioned the county court to authorize her to consent. Based on the testimony of a psychiatrist that Jerry

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cine was such that the sick twin would have died without the donation of a kidney from his healthy sibling. The artificial kidney machine was not yet perfected. Sanders & Dukeminier, *supra* note 21, at 360. Successful transplant surgery was limited to identical twins. See Wasmuth & Stewart, *Medical and Legal Aspects of Human Organ Transplantation*, 14 CLEV.-MAR. L. REV. 442, 443 (1965).

26. These cases, brought as original actions in the Supreme Judicial Court of Massachusetts, resulted in three unreported opinions which are discussed in Curran, *supra* note 24. Savage also cites a 1960 unreported decision by the probate court for the District of Darien, Connecticut authorizing a kidney transplant from an incompetent to his sister, which the court found to be for the psychological benefit of the incompetent. Savage, *Organ Transplantation With an Incompetent Donor: Kentucky Resolves the Dilemma of Strunk v. Strunk*, 58 Ky. L.J. 129, 137 n.26 (1970). A 1973 unreported decision by the Georgia Superior Court permitted a 15-year-old retarded girl to donate a kidney to her mother who suffered from chronic renal disease. Howard v. Fulton-DeKalb Hosp. Auth., 42 U.S.L.W. 2322 (Ga. Super. Ct., Nov. 29, 1973).

27. 445 S.W.2d 145 (Ky. App. 1969). See Annot., 35 A.L.R.3d 692 (1971). *In re Richardson*, 284 So. 2d 185 (La. App. 4th Cir. 1973), is the third such reported case. See also note 32 *infra*.

28. The detailed presentation of facts and lower court findings in the text is based on Savage, *Organ Transplantation With an Incompetent Donor: Kentucky Resolves the Dilemma of Strunk v. Strunk*, 58 Ky. L.J. 129 (1970).

had some understanding of the situation and would be "saddened more or less [by the death of his brother] in the same manner as someone who had normal mentality," the testimony of the State Department of Mental Health that Jerry's close ties with Tommy were a vital part of his rehabilitation, and the poignant testimony of Jerry's mother regarding Tommy's remarkable dedication to his mentally retarded brother,<sup>29</sup> the trial court found that "it would be psychologically beneficial and in the best interest of the incompetent" to donate the kidney and the committee was authorized to consent. The Kentucky Court of Appeals affirmed the judgment by a four to three majority on the basis of substantial evidence.

*Strunk* was the only case cited by counsel for petitioner in *In re Richardson*,<sup>30</sup> but was found factually distinguishable, especially relative to the conclusion of "best interest" of the incompetent. While both cases dispense with the requirement of informed consent of the donor ward, they illustrate the importance of the ward's mental development to a finding of best interest. Jerry Strunk, the equivalent in mental age of a six-year-old, was incapable of giving his informed consent, yet he did have some understanding of the procedure and a desire to help his brother. Roy Richardson, with the mental age of a three or four-year-old, did not. The persuasiveness of psychiatric testimony relative to a finding of best interest is not very great where the donor is of such low mental age, and the court may prefer its common sense judgment over that of the psychiatrists.<sup>31</sup> In such cases, absent some uniquely beneficial relationship such as an identical twin, or parent and child,<sup>32</sup> the courts will probably conclude that the operation is not in the ward's best interest. Such a

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29. Mrs. Strunk testified that after she and her husband were gone "the only living person who will be there will be Tommy to go to the school and see about Jerry and take him out and let him have a half-normal life and let him know what it is outside the cold institution walls." Savage, *supra* note 28 at 144.

30. Brief for Petitioner, *Record*.

31. See Curran, *supra* note 24 at 893-95.

32. In a recent decision, the Superior Court of Connecticut upheld the right of parents of identical twins, aged 7, to consent to transplantation of a kidney from one twin to the other. The court found that the operation on the donee was necessary to save her life, but in view of the twins' tender years characterized as of slight value psychiatric testimony that if the expected success-results were achieved they would be of immense benefit to the donor twin. While the court noted that the transplant would be of some benefit to the donor, it emphasized the negligible risk to the donor, the life-saving nature of the transplant, and the fact that the parents' motivation and reasoning had been favorably reviewed by the guardian ad litem for the donor (who also conferred with the donor child), a clergyman and the court itself. *Hart v. Brown*, 29 Conn. Supp. 368, 289 A.2d 386 (Super. Ct. 1972). See *Howard v. Fulton-Dekalb Hosp. Auth.*, 42 U.S.L.W. 2322 (Ga. Super. Ct., Nov. 29, 1973) (parent and child).

uniquely beneficial relationship existed between Jerry and Tommy Strunk but did not so clearly exist between Roy and Beverly Richardson. The finding of our court that *Strunk* was factually distinguishable relative to the conclusion of best interest of the incompetent thus seems sound.

*Strunk* is also distinguishable in terms of the medical predicament of the donee.<sup>33</sup> It occupies a middle position between the Massachusetts identical twin cases where death was imminent if the healthy twin could not donate a kidney and *In re Richardson* where less suitable donors were available and a cadaver transplant more likely to succeed.<sup>34</sup> Although the effect of *Strunk* is to liberalize the donee's requirements before a transplant on a ward can be sanctioned, the benefit to the donee must still be very substantial. While this "very substantial" benefit to the donee test was probably satisfied in *Richardson*, the case faltered for a lack of positive benefit to the donor.

Thus, there first emerges from the kidney transplant cases the uniform requirement that the guardian consent to the operation. This is consistent with the general rule that a non-emergency operation performed upon a minor without his parents' consent is legally a battery,<sup>35</sup> with the limited exception recognized in some cases that minors who have reached the age of discretion may consent to *therapeutic* operations.<sup>36</sup> In the few reported cases where the courts

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33. In *Strunk*, all other members of the family including distant relatives were tested and found to be totally unsuitable donors; a cadaver transplant could be performed, but with only about a forty per cent chance of success. Savage, *supra* note 28, at 145.

34. In *Richardson*, there was a ninety-five percent chance of success using Roy's kidney as compared to a seventy to eighty percent chance of success using one of Beverly's other siblings. *Transcript* at 53. The chances of success using a cadaver when one became available would be between fifty and sixty percent. *Transcript* at 67. See also note 3 *supra*.

35. Compare *Zoski v. Gaines*, 271 Mich. 1, 3, 260 N.W. 99, 102 (1935) (father recovered against surgeon who performed tonsillectomy on minor without parental consent) with *Wells v. McGehee*, 39 So. 2d 196, 202 (La. App. 4th Cir. 1949) (emergency excused physician's failure to obtain mother's consent before attempting to set child's fractured arm).

36. In the first reported case recognizing this exception, involving the accidental death from anesthetic of a mature 17-year-old boy who consented to the removal of a tumor upon his left ear, a death action brought by his father, who knew nothing of the attempted operation, was unsuccessful. The court stressed the maturity of the boy and the acquiescence of other adult relatives who accompanied him to the surgeon's office. *Bakker v. Welsh*, 108 N.W. 94 (1906). The same court upheld recovery where the child was only 9½ years old. *Zoski v. Gaines*, 271 Mich. 1, 260 N.W. 99 (1935). More recently, the Ohio Supreme Court, after a thorough review of the authorities, concluded that an intelligent 18-year-old girl who consented to plastic surgery to im-



have faced squarely the question whether absent guardian approval a minor's consent to a *non-therapeutic* operation shielded the physicians from liability, the courts have held against the physicians.<sup>37</sup>

The kidney transplant cases also make benefit to the donor a cardinal requirement which must be proven in each case. This is in harmony with the principle of shipwreck cases<sup>38</sup> that, in the eyes of the law, every human life is of equal value; therefore, the law can never sanction human sacrifice intended to benefit some persons at the expense of others. Dicta in earlier cases implied the right of a parent to consent to an operation which was of no conceivable benefit to his child,<sup>39</sup> presumably for the unstated reason that parents know better than judges what is best for their children. But modern child neglect cases demonstrate that a parent, regardless of his good faith, is required to act in his child's best interest and is held strictly accountable for his failure to do so. Contrary to the once held view that only moral depravity could oust a parent of his guardianship,<sup>40</sup> a parent's "defective judgment," even in a non-critical case involving the physical welfare of his child, whether it is based on ignorance,

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prove the appearance of her nose was not entitled to recover against her surgeon for assault and battery even though her parents' consent had not been secured. *Lacey v. Laird*, 166 Ohio St. 12, 139 N.E.2d 25 (1956). However, it was explicitly recognized that the court was not faced with a situation where the operation was not for the benefit of the minor. *Id.* at 26, 139 N.E. 2d at 34 (Taft, J., concurring).

37. See *Zaman v. Schultz*, 19 Pa. D. & C. 309 (Cambria County Ct. 1933) (young maidservant and her father recovered damages against a surgeon for taking blood transfusions for the benefit of the girl's employer's wife without her father's consent). The *Zaman* court correctly distinguished those cases excusing a physician's failure to secure parental consent, by noting that, in each of them, the operation was for the direct benefit of the child. *Id.* at 312. See also *Bonner v. Moran*, 126 F.2d 121 (D.C. Cir. 1941) (Surgeon liable for skin graft performed on minor for another's benefit).

38. See *United States v. Holmes*, 26 F. Cas. 360 (No. 15,383) (C.C.E.D. Pa. 1842) (seaman convicted of manslaughter for sacrificing passenger without opportunity to draw lots). The pertinency of the shipwreck cases to the problems of kidney transplantation is explored in *Sanders & Dukeminier, supra* note 21, at 374.

39. See *Bonner v. Moran*, 126 F.2d 121 (D.C. Cir. 1941); *Zaman v. Schultz*, 19 Pa. D. & C. 309 (Cambria County Ct. 1933).

40. See *In re Tuttendario*, 21 Pa. Dist. 561 (Q.S. Phil. County, 1911). Petition was filed by the Society for the Prevention of Cruelty to Children to transfer custody of a 7-year-old boy afflicted with rickets. The child's mother, who had lost seven other children, refused to consent to corrective surgery because she believed the child would die. The medical testimony indicated the operation could be safely performed and that without it the child's condition would grow progressively worse until he eventually became permanently crippled. The court concluded it had no authority to override the mother's refusal, even if it were based on an unreasonable apprehension of death because, "As the law stands, the parents forfeit their natural right of guardianship only in cases where they have shown their unfitness by reason of moral depravity." *Id.* at 563. *Accord, In re Hudson*, 126 P.2d 765 (Wash. 1942).

fanaticism, or other arbitrary reasons, may now be made the basis of a finding of neglect and the entry of an order transferring custody so that the child will be afforded appropriate surgical or medical care. Thus, in an early pathbreaking case<sup>41</sup> a two-year-old child was found to be "neglected" and her parents temporarily deprived of custody so that she might undergo an operation for the removal of an eye which was malignant with cancer. There was no element of cruelty in the case, her mother simply testifying, "God gave her the baby and God can do what he wants." More recently, New York's highest court upheld an order permitting massive surgery to be performed to remove a grotesque tumor from the face and neck of a fifteen-year-old boy, although the operation was quite dangerous and the boy's underlying disease posed no immediate threat to his life.<sup>42</sup> The religious convictions of the boy's mother, a Jehovah's Witness, against blood transfusions, without which the surgery could not be undertaken, were not felt to be a serious obstacle.<sup>43</sup> In light of this modern approach to child neglect cases the principle followed in the kidney transplant cases requiring that any non-therapeutic operation must be in the ward's best interest seems unassailable.<sup>44</sup>

The recent child neglect cases are also significant in that they have focused consideration on the child's wishes as to whether to undergo therapeutic surgery despite the resulting infringement on

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41. *In re Vasko*, 238 App. Div. 128, 263 N.Y.S. 552 (2d Dept. 1933).

42. *In re Sampson*, 29 N.Y.2d 900, 278 N.E.2d 918 (1972), *aff'g* 317 N.Y.S.2d 641 (Fam. Ct. 1970).

43. The lower court in *Sampson* quoted from the famous case of *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944): "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." *In re Sampson*, 317 N.Y.S.2d 641, 652 (Fam. Ct. 1970).

44. See generally, Morse, *Legal Implications of Clinical Investigation*, 8 WM. & MARY L. REV. 359 (1967). The author predicts that the courts will probably regard voluntary participation in medical experiments where the possibility of danger to life or health is not remote as a privilege reserved only for adults. *Id.* at 368. In *In re Simpson*, 180 N.E.2d 206 (Ohio Probate 1962), the court ordered sterilization of an eighteen-year-old, feeble-minded girl upon application of the girl's mother. The court stated in its opinion, however, that the operation was necessary for the health and welfare of the girl. *Id.* at 208. Such a borderline case does not disprove the general principle advanced in the text, although it does strain it to the limit. *Cf.* *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

It must be noted that the rationale of *Hart v. Brown*, 29 Conn. Supp. 368, 289 A.2d 386 (Super. Ct. 1972), in which minimal risk to the child donor and parental judgments were key considerations, may seem inconsistent with this writer's conclusion regarding the best interest requirement. Consistent analysis indicates, however, that the uniquely beneficial relationship which exists between identical twins achieves the same result as the best interest requirement.

parental autonomy. Thus, in one case<sup>45</sup> a trial judge said he would not hesitate to order corrective surgery on an intelligent twelve-year-old boy for a cleft palate and harelip over the unreasonable beliefs of his father in mental healing through "the forces of the universe," were it not for the fact that the boy had been "conditioned" to dread surgery. So that the boy could make his own decision, his father was restrained from interfering in discussions with experts which would acquaint the son with the benefits of surgery. It is believed that in view of these precedents deferring to the wishes of an intelligent child in the context of a non-critical therapeutic operation, no court would order a ward to undergo surgery for the benefit of another contrary to the ward's express wishes. Moreover, every court faced with a request to allow non-therapeutic surgery on a ward will very likely adopt the approach of the Massachusetts high court in the kidney transplant cases, attempting where possible to ascertain his wishes.

The courts protect minors and incompetents from abuse in transplant surgery primarily by erecting a legal safeguard against overzealous guardians and labelling it "best interest" of the ward. The bright child who testifies in open court that he desires to donate his kidney to his sick sibling may be the victim of "moral coercion," with the not improbable result that the case gets railroaded through court upon the basis of the parents' self-serving testimony that their children enjoy the closest of ties. The role of the child psychologist is to counteract such family pressure on the child to do the "right thing" by ferreting out his true wishes and fears, thus enabling the court to arrive at a correct solution. Given the small risk of harm attendant upon the kidney transplant procedure,<sup>46</sup> a child's truly voluntary decision to help his sibling should be deemed in his best interest because the intangible rewards of such a deed can be quite substantial.

In the case of the mentally incompetent donor, the best interest safeguard serves to protect the donor against disfavored treatment based on a low evaluation of his social worth. While it is undoubtedly true that many parents will show the most tender regard for a men-

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45. *In re Seiferth*, 127 N.Y.S.2d 63 (Child. Ct. 1954), *rev'd*, 285 App. Div. 221, 137 N.Y.S.2d 35 (4th Dep't 1955), *rev'd and order of Children's Ct. reinstated*, 309 N.Y. 80, 127 N.E.2d 820 (1955). *See also In re Green*, 448 Pa. 338, 292 A.2d 387 (1972), *review after remand*, 452 Pa. 373, 307 A.2d 279 (1973). *Cf. Wisconsin v. Yoder*, 406 U.S. 205, 241 (1972) (Douglas, J., dissenting) (failure to canvass views of mature Amish child who may wish to attend public high school against parents religious wishes violates child's constitutional rights).

46. *See* statistical evidence in *Strunk v. Strunk*, 445 S.W.2d 145, 148-49 (Ky. App. 1969). Of 3000 recorded kidney transplants from live donors, there is reported only one death of a donor, and this death may have resulted from unrelated causes. *See Hart v. Brown*, 29 Conn. Supp. 368, 373, 289 A.2d 386, 389 (Super. Ct. 1972).

tally handicapped child, the tendency to judge an individual by his contribution to society is too prevalent to rule out the possibility of favoritism being shown to the productive child. Since the mentally incompetent donor may be incapable of experiencing the intangible rewards of helping another, the role of psychiatric evidence will be limited and the courts will have to base their determinations of best interest on more objective criteria. The relevant inquiry should be whether the prospective donee is likely to repay the incompetent donor for the gift of life by helping to alleviate his plight. The surest evidence upon which to base such a prediction of future benefit to the donor is the concrete manifestations of love exhibited toward him in the past. Such a test is neither unrelated to the goal of protecting the donor nor is it unprecedented.<sup>47</sup>

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47. For the method of calculating monetary awards for mental anguish and loss of society as elements of wrongful death damages, see *Parker v. Smith*, 147 So. 2d 407 (La. App. 2d Cir. 1962) (\$20,000 award to husband for loss of wife's love and companionship held not excessive where husband and wife were practically inseparable during their 40 years of marriage); *Poindexter v. Service Cab Co.*, 161 So. 40 (La. App. 2d Cir. 1935) (\$150 to husband for grief and loss of wife held sufficient where husband contributed nothing to wife's support and was living in open adultery with another woman).