Using Scientific Advances to Conceive the “Perfect” Donor: The Pandora’s Box of Creating Child Donors for the Purpose of Saving Ailing Family Members

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Faced with the knowledge that their daughter had fallen victim to the rare and deadly genetic disease, Fanconi Anemia, Lisa and Jack Nash embarked on a mission that many contend raised serious ethical questions: the creation of a child specifically to save another child’s life. Adam, conceived largely in an attempt to save his sister Molly, was born on August 29, 2000. The “Adam” embryo, pre-selected from among a number of viable embryos, was a necessary tissue match, free of Molly’s blood disease. Setting aside the moral and ethical implications of this particular story, the Nash experiment seems relatively innocuous in many respects. With respect to Adam, the procedure was non-invasive; Molly received stem cells from

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1 Discovered by Guido Fanconi, a Swiss pediatrician, Fanconi Anemia is an inherited anemia that is typically observed in children between the ages of three and twelve. The disease eventually affects numerous, if not all, systems of the body. As time passes, the disease becomes more severe, and children suffering from Fanconi Anemia rarely reach adulthood. Fact Sheet, Fanconi Anemia Research and Family Support Network, at http://www2.cybernex.net/~jj/ff/fanfa_facts.htm (last visited June 13, 2001) (on file with author).


5 For background reading on stem cells, see National Institutes of Health, Stems Cells: A Primer, at http://www.nih.gov/news/stemcell/primer.htm (last visited June 20, 2001) (describing stem cells as having “the ability to divide for indefinite periods...
Adam's discarded umbilical cord—Molly's best hopes for survival.\textsuperscript{6} Moreover, neither Molly nor Adam was harmed. The first "known case in which parents created a baby genetically selected to help save a sibling's life," however, may have inadvertently opened a Pandora's box of legal issues.\textsuperscript{7}

Legally and ethically, the Nash experiment presents the best-case scenario: no harm to the subsequent child and the use of a non-invasive procedure.\textsuperscript{8} But imagine, for instance, a slightly different fact pattern; one in which a child's Fanconi Anemia had manifested itself as a dysfunctional kidney.\textsuperscript{9} Despite the parents' best efforts, they are unable to secure a donor for their child, hypothetically named Melissa. Through a pre-selection process identical to the one used by the Nashes, a second child, hypothetically named John, is born—although in this instance, doctors remove one of John's kidneys.\textsuperscript{10}

\textsuperscript{6} An unrelated donor could have been an option, "but because the marrow came from someone who [was] related to [Molly], the chances for improvement [were] twice as good." \textit{Couple Conceived Son to Help Save Sibling's Life}, supra note 3. That being said, non-familial donors—or emotional donors, as they are commonly termed—such as spouses, are increasingly viewed as viable sources of organ donors. Modern immunosuppression with cyclosporine and tacrolimus, which has produced improved results, renders tissue-matching less of a necessity than previously thought. \textit{See} Jeff punch, \textit{Spouses as Kidney Donors}, at http://www.transweb.org/qa/askarchive/answers9507/95082102.htm (last visited July 19, 2001) (on file with author).

\textsuperscript{7} \textit{Made-to-Order Transplant a Success}, supra note 3.

\textsuperscript{8} In discussing the Molly Nash situation, one ethicist raised other more problematic options. For instance, in the event the stem cell transplant did not prove successful, the Nashes would have been faced with the difficult decision of harvesting bone marrow from Adam, which is by no means a risk-free procedure. \textit{Birth of a U.S. Boy as Donor Raises Ethical Questions}, supra note 2. Other difficult situations involve donations of a piece of lung or pancreas. \textit{Id.}

\textsuperscript{9} Fanconi Anemia may cause problems such as short stature, thumb and arm anomalies, skeletal abnormalities, renal problems, skin spotting, gastrointestinal problems, among others. \textit{FA Handbook—Main Section}, at http://www2.cybernex.net/jj/fa/fahandbo.html (last visited Nov. 15, 2000) (on file with author).

\textsuperscript{10} Live kidney donors must typically be no younger than fifteen and no older than eighty, possess two properly functioning kidneys, and be medically compatible with the recipient. \textit{See} Cliver O. Callender, \textit{Legal and Ethical Issues Surrounding Transplantation: The Transplant Team Perspective}, in \textit{Human Organ Transplantation: Societal, Medical-Legal, Regulatory, and Reimbursement Issues} 42 (Dale H. Cowan et al. eds., 1987). In some cases, however, courts have allowed children who have not attained the age of fifteen to act as donors. \textit{See}, e.g., \textit{Hart v. Brown}, 289 A.2d 386, 391 (Conn. Sup. Ct. 1972) (stating that "natural parents of a minor [of eight
Imagine two unfortunate but potentially realistic scenarios: 1) John was harmed during the involuntary surgical procedure to remove the kidney\(^{11}\) or 2) the subsequent child, some years after donation, suffers kidney failure.\(^{12}\) Given John’s inability to consent to the operation,\(^{13}\) the kidney removal, in and of itself, raises legal questions about John’s rights in his body and how best to protect those rights. Even apart from any “ownership” interests that may be at issue, the issue of consent becomes critical; specifically, should parents in such scenarios, be allowed to make donation decisions on behalf of potential child-donors? Against this hypothetical backdrop, this Article will analyze the aforementioned issues in turn.\(^{14}\)

Part I of this Article examines the possessory rights an individual has in her body. In Part II, this Article investigates the use of living donors, specifically minors, in organ transplantation and illuminates the need for an alternative approach to procedures enabling organ removal from involuntary minor donors. Part III discusses the traditional standard that courts apply in determining whether to

\(^{11}\) All living donation operations involve a certain amount of risk. Bryan Shartle, Comment, Proposed Legislation for Safely Regulating the Increasing Number of Living Organ and Tissue Donations by Minors, 61 LA. L. REV. 433, 437 (2001). Some of these risks entail wound infections and/or bleeding, urinary tract infections, and phlebitis. Id. With regard to live kidney donations, specifically, the mortality rate ranges between .03 and .06 percent. Id.

\(^{12}\) Callender, supra note 10, at 58 (“[L]iving kidney donors are at a greater medical risk with only one remaining kidney upon which they must rely to perform all of the body’s blood purification functions.”).

\(^{13}\) See Gloria J. Banks, Legal and Ethical Safeguards Protection of Society’s Most Vulnerable Participants in a Commercialized Organ Transplantation System, 21 AM. J.L. & MED. 45, 56, 57-58 (1995) (explaining that “[t]ypically, the living donor voluntarily agrees to donate a non-vital organ or tissue to a donee who is most often a blood relative” however, “transplantations involving living human organ donors have not always been viewed as purely voluntary,” also noting that “[o]ther instances of involuntary organ transplants involved live kidney donors who were mentally incompetent due to age or mental disability”).

\(^{14}\) Stephen Munzer notes that some risks may be associated with procedures performed on children born, largely, to save the lives of siblings. See Munzer, supra note 5, at 527-29. Munzer cites the case of Anissa Ayala, who was diagnosed with leukemia. Id. at 2. Parents, Abe and Mary Ayala, conceived Marissa Eve to save their daughter Anissa’s life. Id. at 527. The Ayalas consented to the harvesting of bone marrow from Marissa Eve, who at the time of the procedure was fourteen months old. Id. Although Munzer recognizes that “harvesting bone marrow is an invasive procedure that usually requires general anesthesia . . . [and] involves some risk to the donor,” he does not evaluate whether parents should be accorded deference in these decisions, which is entirely expected and justified in light of the article’s focus on the recognition of property rights in cord blood. Id. at 528.
approve decisions made on behalf of incompetent family members. Finally, in Part IV, this Article proposes a legislative approach that attempts to protect a minor’s possessory interests in her body through mandatory judicial involvement, the application of the “best interests” standard, and the appointment of representatives to safeguard the potential child-donor’s interests.

I. INDIVIDUAL RIGHTS IN ONE’S BODY: PROPERTY RIGHT OR PRIVACY RIGHT?

Law regarding the body “is currently in a state of confusion and chaos.” In some instances, rights in one’s body are characterized as property rights and as privacy rights in others. Very little analysis, however, has been devoted to determining “which rubric should be applied in which context” and whether the distinction is even of any importance. At a minimum, both constructs of the body “converge to the extent that they secure identical interests—namely, the right to possess one’s own body and the right to exclude others from it.” As discussed in this section, however, in instances where the incompetent tissue/organ donor is conceived solely to save another sibling, something akin to a property paradigm is more appropriate than a privacy analysis. In short, despite the “long tradition resisting property in human body parts,” individuals, such as potential child-donors, must have certain property rights in their bodies.

A. Interests in the Human Body Constitute a Property Interest

Black’s Law Dictionary defines “property” as describing “[t]he right to possess, use, and enjoy a determinate thing . . . ; the right of ownership . . . .” The human body appears to fall within this definition of “property.” Each individual has the exclusive right to

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16 See Rao II, supra note 15, at 363-64.
17 Id.
18 Id. at 364.
19 Although the term “incompetent” relates both to minor children and those who are mentally incapacitated, for the purposes of this Article, an “incompetent” person predominantly refers to a child who is legally unable to provide informed consent as to decisions regarding organ donation.
21 BLACK’S LAW DICTIONARY 1232 (7th ed. 1999).
“possess, use, and enjoy” her body. The right of ownership in one’s body is vested in that person alone.22 Using a rather simplistic analysis, the human body can be viewed as property.23 However, the debate over property rights in the body does not and cannot end through the application of a legal definition.

Literature on the topic is expansive24 and can be traced back centuries to the works of Locke and Hegel, whose theories, in part, rested on the premise that the human body constitutes property.25 For both, possession of the body was central to possession of external entities.26 Locke, a natural rights theorist, argues that the ability to own products created from the labor of the body stems from a person’s physical ownership of his body.27 Hegel, on the other hand,

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22 See U.S. Const. amend. XIV.
23 Similarly, the Uniform Anatomical Gift Act (“UAGA”) can be used to support the proposition that human body “parts” can be considered property. Under the UAGA, a donation of human body parts is viewed as a gift. See UAGA §§ 1 (defining “anatomical gift” as “a donation of all or part of a human body to take effect upon or after death”), 4, 6(a), 8A U.L.A. 33, 55 (1987 & Supp. 1999). “Gift,” in turn, is defined as the “act of voluntarily transferring property to another without compensation.” BLACK’S LAW DICTIONARY 696 (7th ed. 1999) (emphasis added).
25 JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 27, at 305 (Peter Laslett ed., 2d ed. 1967) (“[E]very man has a Property in his own Person.”); see also G. HEGEL, PHILOSOPHY OF RIGHT § 47 (T. Knox trans. 1967) (“I possess the members of my body, my life, only so long as I will to possess them.”).
26 See Bray, supra note 24, at 213.
27 See Margaret Jane Radin, Property and Personhood, 34 STAN. L. REV. 957, 965 (1982) (opining that Locke “may well mean here that one literally owns one’s limbs and hence must own their product”); Bray, supra note 24, at 212 (stating that, according to Locke, “[o]nly because people have physical ownership of their bodies do they have an ownership of their bodies’ products”); see also Catherine M. Valerio
did not contend that individuals have an absolute property right in their bodies, but instead posited that so long as an individual lives within his physical body, he possesses it. In short, both Locke and Hegel assumed a property right in the human body. Next, this Article evaluates modern conceptions of property, before embarking on a detailed analysis of whether the human body constitutes property.

1. Property, A Bundle of Rights

The current understanding of property is best described as a “bundle of rights,” which combines theories advanced by Wesley Hohfeld and A.M. Honore. Hohfeld contended that rights in rem should be seen as a “bundle of rights [that] the owner holds against many others.” Meanwhile, Honore’s concept of “full ownership” consisted of eleven different rights, with the presence of all eleven unnecessary for assertion of ownership rights over the object. The Hohfeld “bundle of rights” framework separated property rights into different groupings, such as “liberties, claim-rights, powers, and immunities.”

Under the Honore-Hohfeld “bundle of rights” rubric, the holder possesses numerous rights, including the right to possess, exclude, use, dispose, and destroy. More importantly, as Honore suggested,

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Barrad, Genetic Information and Property Theory, 87 Nw. U. L. Rev. 1037, 1062 (1992) (stating that “[t]he natural rights theory of property postulates that every person has property in his own body and that the person’s individuality, created by nature, is innate and cannot be separated from the person”) (citations omitted).

29 See Hegel, supra note 25, at § 47.


30 See J. E. Penner, The “Bundle of Rights” Picture of Property, 43 UCLA L. Rev. 711, 712 (1996); see also Erik S. Jaffe, Note, “She’s Got Bette Davis’s Eyes”: Assessing the Nonconsensual Removal of Cadaver Organs Under the Takings and Due Process Clauses, 90 Colum. L. Rev. 528, 548-49 (1990); Brotherton v. Cleveland, 923 F.2d 477, 481 (6th Cir. 1991) (“The legal definition of ‘property’ most often refers not to a particular physical object, but rather to the legal bundle of rights recognized in that object. Thus, ‘property’ is often conceptualized as a ‘bundle of rights.’”) (internal citations omitted).

31 See Penner, supra note 30, at 712; see also Wesley N. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays 67 (Walter W. Cook ed., 1929).


an individual need not possess all rights in an object in order to have property rights in that object.\textsuperscript{55} Under the "bundle of rights" framework, the hallmarks of a property right include the ability to control something and the ability to prevent others from interfering with that control.\textsuperscript{56}

2. Legal Conceptions of the Human Body

Historically, courts "have not recognized property rights in the human body,"\textsuperscript{57}—a viewpoint that originated with Sir Edward Coke\textsuperscript{58} when he wrote that the "burial[ ] of the cadaver . . . is nullius in bonis, and belongs to ecclesiastical arrogance."\textsuperscript{59}

The earliest cases involving the application of property rights to the human body emerged in the context of will interpretation—specifically, whether an individual had the right to dispose of her body by will.\textsuperscript{60} Under English common law, property rights were not recognized in corpses, so individuals could not dispose of their

\textsuperscript{55} See Seeney, supra note 32, at 1151; see also Wagner, supra note 24, at 933; Jaffe, supra note 30, at 549.

\textsuperscript{56} See Wagner, supra note 24, at 933 ("Property rights are not absolute, but are limited to the extent that they may not be exercised to interfere with another's property rights."); see also Aaron Chess Lichtman, Note, \textit{Commercial Exploitation of DNA and the Tort of Conversion: A Physician May Not Destroy a Patient's Interest in Her Body-Matter,} 34 N.Y.L. SCH. L. REV. 531, 540 (1989) ("Property is a term of art, indicating that a person has a right to control something and seek redress under the law if another person interferes with the exercise of that control.").

\textsuperscript{57} Jennifer Lavoie, Note, \textit{Ownership of Human Tissue: Life After Moore v. Regents of the University of California,} 75 VA. L. REV. 1363, 1363 (1989). I would be remiss, however, if I did not note that common law courts, in limited instances, recognized property rights in the human body—in scenarios typically involving reprehensible fact patterns: slavery and the treatment of women as their husbands' "chattels." See Collins, supra note 15, at 663. These courts, however, did not recognize the possessor's property rights in her own body, which, today, is what is more commonly considered in discussions about property rights in the human body.

\textsuperscript{58} See Patricia A. Lacy, \textit{Gene Patenting: Universal Heritage Versus Reward for Human Effort,} 77 OR. L. REV. 783, 786 (1998) (citing Griffith v. Charlotte, Columbia & Augusta R.R. Co., 23 S.C. 25 (1885), for the proposition that Coke's statement became the foundation for the Anglo-American law that human body parts cannot be property); see also Griffith, 23 S.C. at 32 ("Coke was understood to say that 'a dead body was the property of no one.' No matter what he did say; this understanding, or misunderstanding, has come down to us as law.").

\textsuperscript{59} 3 EDWARD COKE, INSTITUTE OF THE LAWS OF ENGLAND 203 (1644).

\textsuperscript{60} Brotherton, 923 F.2d at 481.
remains by will. Under both American and English common law, next of kin were eventually recognized to hold a “quasi-property right” in the decedent’s body for certain limited purposes, including the right to bury the deceased and the right to maintain or ensure the dignity of the corpse. That right was vested in someone other than the decedent, while cases involving decedents resulted in the recognition of a limited property right in corpses.

In more recent times, courts have chosen to wrestle with the harder question of an individual’s property rights in her living tissue, organs and the like. Specifically, courts have addressed this question in cases involving waste, pre-zygotes, spleens, pre-embryos, sperm, and pap-smear slides. As indicated below, the legal system has neither been uniform nor consistent in its treatment of the human body. Instead, analysis has been varied and unclear, which is emblematic of the confusion that surrounds the topic.
Using Scientific Advances

Venner v. State. In Venner, the Maryland Supreme Court examined ownership rights in bodily waste. Hospital staff discovered that defendant had ingested several balloons containing hashish oil. Defendant passed the balloons during his hospital stay, and hospital staff provided the balloons to the police. Defendant contended that his bodily waste, and also the balloons, remained his property. Hinging its opinion on the principle of abandonment, the Venner court disagreed with defendant's contention. According to the court, "things" such as human excrement, which are typically discarded, will be treated as abandoned upon separation from the body, unless the original possessor expresses an interest in the discarded material. Venner failed to assert any interest in the waste prior to delivery to the police; thus, the waste could no longer be considered his property. Having determined that Venner abandoned his excrement, the court concluded that the police had obtained the waste lawfully.

York v. Jones. Having moved from Virginia to California, plaintiffs, the progenitors of cryogenically preserved pre-zygotes, sought the transfer of a preserved pre-zygote from The Howard and Georgeanna Jones Institute for Reproductive Medicine, in Virginia, to a different facility in their new home state of California. Defendants refused release of the pre-zygote, stating that "plaintiffs' proprietary rights in the pre-zygote [were] limited to three fates," none of which included "the inter-institutional transfer of pre-zygotes." Plaintiffs subsequently filed suit; in response, defendants filed a motion to dismiss all of plaintiffs' claims, including the property-based claim of detinue. The court dismissed the use of human hair for the manufacture of wigs also has a long history.

47 Venner, 354 A.2d at 485.
48 Id. at 485-87.
49 Id. at 486.
50 Id. at 485-87.
51 Id. at 493-99.
52 Id. at 499 ("[W]hen a person does nothing and says nothing to indicate intent to assert his right of ownership possession, or control over such material, the only rational inference is that he intends to abandon the material.").
53 Venner, 354 A.2d at 499.
54 Id.
55 York, 717 F. Supp. at 422.
56 Id. at 424-25.
57 Id. at 422, 427. In order to sustain an action for detinue in Virginia: "(1) plaintiff must have a property interest in the thing sought to be recovered; (2) the right to immediate possession; (3) the property [must be] capable of identification; (4) the property must be of some value; and (5) defendant must have had possession at some time." Id. at 427.
defendants' motion in its entirety, thereby recognizing plaintiffs' property right in the pre-zygotes.

Moore v. Regents of the University of California: Upon learning that defendant-hospital had created a highly lucrative cell line derived from plaintiff's spleen cells, specifically his T-lymphocytes, plaintiff instituted an action asserting that a portion of the profits should be awarded to him because of his alleged proprietary interest in his cells. Although plaintiff had signed a release authorizing removal of diseased tissue, he had no knowledge of the defendants' intention and ultimate decision to modify plaintiff's cell samples to create a commercially significant cell line. Plaintiff raised several claims, including a cause of action for conversion, which required the court to determine whether plaintiff retained any proprietary interest in the excised tissue. Upon review, the Appellate Division determined that plaintiff retained a property interest in the cells, stating that "plaintiff's spleen, which contained certain cells, was something over which plaintiff enjoyed the unrestricted right to use, control and disposition." The court continued, stating "the rights of dominion over one's own body, and the interest one has therein, are recognized in many cases. These rights . . . are so akin to property rights that it would be subterfuge to call them something else."

The California Supreme Court disagreed. The court began by stating that "no reported judicial decision supported Moore's claim [to a property right in the excised tissue]." Additionally, examination of California statutory law rendered Moore's ownership claim "problematic" because the law "drastically limit[ed] a patient's control over excised cells." The law, according to the court, "eliminate[d] so many of the rights ordinarily attached to property that . . . what [was] left [could not be assumed to] amount to 'property' or 'ownership' for the purposes of common law." Thus, the court refused to recognize a property right and rejected Moore's

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58 Id. at 427, 429.
59 Id. at 427.
60 Moore II, 793 P.2d 479 at 481-82 n.2.
61 Id. at 481.
62 Id.
63 Id. at 487-92.
64 Moore v. Regents of the Univ. of Cal., 249 Cal. Rptr. 494, 505 (App. Div. 1988) [hereinafter "Moore I"].
65 Id.
66 Moore II, 793 P.2d 479 at 489.
67 Id.
68 Id. at 491.
69 Id. at 491-92.
claim of conversion.

Davis v. Davis. Davis, a case of first impression in Tennessee, examined the proper fate of cryogenically-preserved pre-embryos. Having failed to conceive a child, Junior Lewis and Mary Sue Davis, plaintiff and defendant, respectively, began a series of attempts at in vitro fertilization—the only means by which they could become parents. Several ova were fertilized; however, not all of the pre-embryos were inserted into the defendant. The remainder were cryogenically preserved for later use, if necessary. The procedure proved unsuccessful. Shortly thereafter, plaintiff filed for divorce. During the divorce proceeding, plaintiff and defendant were unable to reach agreement as to the fate of the frozen pre-embryos; plaintiff then filed suit seeking an order for destruction of the pre-embryos. Having noted that the parties retained an “interest” in the pre-embryos, the Tennessee Supreme Court affirmed the lower court’s ruling in favor of the plaintiff-ex-husband, holding that the “interest” in the pre-embryos did not rise to the level of a property interest.

Hecht v. Superior Court of Los Angeles County. In Hecht, the California Supreme Court examined the validity of decedent’s disposition of sperm by will. Prior to his death, decedent deposited his sperm in a sperm bank and left instructions that upon his death, the frozen sperm be released to petitioner with whom decedent had been living prior to his death. Appealing to the California Supreme Court, petitioner sought relief from an order disregarding decedent’s express will and ruling decedent’s sperm be destroyed.

The court determined that “at the time of his death, decedent had an interest, in the nature of ownership, to the extent that he had decision making authority as to the use of his sperm for reproduction [and that] such interest [was] sufficient to constitute ‘property’ within the meaning” of the California Probate Code. Consequently,

70 Davis, 842 S.W.2d at 589.
71 Id. at 591-92.
72 Id. at 592.
73 Id.
74 Id. at 591-92.
75 Id. at 592.
76 Davis, 842 S.W.2d at 590. At the time of the action, both had already remarried. Id. Defendant did not want to retain the pre-embryos but rather wished to donate them to a childless couple. Id.
77 Id. at 597.
78 Hecht, 20 Cal. Rptr. 2d at 276.
79 Id. at 275-76.
80 Id. at 278-79.
81 Id. at 283.
the court ruled that the lower court had abused its discretion in ordering the destruction of the frozen sperm.\textsuperscript{82}

\textit{Cornelio v. Stamford Hospital}: In \textit{Cornelio}, plaintiff sought to recover pap smear slides “containing her tissue and genetic material” from Stamford Hospital.\textsuperscript{83} Plaintiff and defendant disagreed as to whether Cornelio had a property interest in the slides.\textsuperscript{84} Plaintiff contended that she “never expressed any intention of abandoning possession of the slides” and therefore they remained her property.\textsuperscript{85} In their papers, both parties relied on the \textit{Moore} line of cases.\textsuperscript{86} The Connecticut Superior Court ultimately agreed with defendant and adopted the analysis of the Supreme Court in \textit{Moore II},\textsuperscript{87} holding that plaintiff had no property interest in the slides because she lacked a “right of immediate possession under Connecticut law.”\textsuperscript{88}

\textit{Kass v. Kass}: \textit{Kass} involved a dispute over the disposition of frozen pre-zygotes.\textsuperscript{89} Shortly after their marriage, appellant and appellee unsuccessfully attempted to conceive a child.\textsuperscript{90} The couple turned to the John T. Mather Memorial Hospital for assistance, and, as in \textit{Davis},\textsuperscript{91} attempted conception using \textit{in vitro} fertilization (“IVF”) and cryo-preservation techniques.\textsuperscript{92} Prior to the final implementation procedure, the parties signed several consent forms.\textsuperscript{93} The “Informed Consent Form No.2” specifically provided that “[i]n the event of divorce, [the parties] understand that legal ownership of any stored pre-zygotes must be determined in a property settlement.”\textsuperscript{94} Addendum 2-1 added that if the parties were “unable to make a decision regarding the disposition of [the] stored, frozen pre-

\begin{itemize}
\item \textit{Id.} at 291.
\item \textit{Id.} at *8-10.
\item \textit{Id.} at *13.
\item \textit{Id.} at *14-15.
\item \textit{Moore II}, 793 P.2d at 487-92.
\item \textit{Cornelio I}, 1997 Conn. Super. LEXIS 1928, at *23, *24-25 (stating that “based upon practical public policy limitations placed on a patient’s use of pathological wastes removed from his or her body, . . . a patient has little or no interest in such removed substances, and a proprietary interest in them cannot be demonstrated for the purposes of maintaining a replevin action”); see also Cornelio v. Stamford Hosp., 717 A.2d 140, 143 (Conn. 1998) [hereinafter “Cornelio II”] (stating that “[t]he trial court concluded that, as a matter of law, the plaintiff lacked a property interest in the slides”).
\item \textit{Kass}, 696 N.E.2d at 175-76.
\item \textit{Id.} at 175.
\item \textit{Davis}, 842 S.W.2d at 591-92.
\item \textit{Kass}, 696 N.E.2d at 175.
\item \textit{Id.} at 175.
\item \textit{Id.} at 176.
\item \textit{Id.}
\end{itemize}
zygotes,” the IVF program would be directed to use the pre-zygotes for research.\textsuperscript{95} Despite the couple’s numerous attempts, all efforts ended in failure.\textsuperscript{96}

Thereafter, the parties divorced.\textsuperscript{97} Appellant sought to implant the pre-zygotes, stating that it was “her only chance for genetic motherhood;” appellee objected, indicating that he did not want to be saddled with the responsibilities attendant with fatherhood.\textsuperscript{98} The New York Court of Appeals, as a primary matter, discounted the applicability of a privacy analysis, stating that the “disposition of [the] pre-zygotes [did] not implicate a woman’s right of privacy or bodily integrity.”\textsuperscript{99} The court then turned to the language in the consent agreements.\textsuperscript{100} It found the language ambiguous and affirmed the appellate division’s order. It then stated that “the pre-zygotes [,] which were the property of both husband and wife[,] would be donated to the . . . program for approved research purposes.”\textsuperscript{101}

Although there is a dearth of cases analyzing treatment of the human body or its derivatives as property, an examination of relevant cases is fruitful for three principal reasons: 1) it reveals a long-standing unwillingness to treat the human body as property; 2) it indicates that the legal system has reached no consensus about the appropriate standard to be applied in such cases; and 3) it reveals the importance of the emergence of a uniform standard, particularly given the rapid rate of medical, scientific and technological breakthroughs. Having examined both the modern conception of “property” as well as cases involving property claims over the human body or its derivatives, this Article now evaluates the applicability of a property framework to the human body.

3. Applicability of a Property Paradigm to the Human Body

One cannot deny that human beings have a self-ownership interest in their own bodies. As commentator David Favre notes, “it is fair to state that the newborn human is self-owned” and that “no one else is owner of [that person].”\textsuperscript{102} Because individuals have the ability to use and exclude others from the use of their bodies, human beings can be said to have a property interest in their bodies. Thus, a

\textsuperscript{95} Id.
\textsuperscript{96} Id. at 176-77.
\textsuperscript{97} Id. at 177.
\textsuperscript{98} Kass, 696 N.E.2d at 175.
\textsuperscript{99} Id. at 179.
\textsuperscript{100} Id. at 180.
\textsuperscript{101} Id. at 182.
\textsuperscript{102} Favre, supra note 29, at 481-82.
property paradigm is entirely appropriate and applicable to the human body.

Regardless of whatever self-ownership rights may exist in one’s body, the legal system’s treatment of the question, as indicated above, has been marked by a definitive lack of clarity or uniformity, which is representative of the much larger debate on the topic.\textsuperscript{103} Those who oppose the recognition of a property interest in cells and tissues often cite philosophical, religious, and moral concerns.\textsuperscript{104} For instance, Justice Arabian, in his concurrence in Moore, indicated that Moore raised a “moral issue . . . [by] entreat[ing] [the court] to regard the human vessel—the single most venerated and protected subject in any civilized society—as equal with the basest commercial commodity. He urge[d] . . . commingl[ing] the sacred with the profane.”\textsuperscript{105} Alternatively, proponents contend that property rights should be granted “to regulate existing commercial interests in the human body.”\textsuperscript{106}

Commentators on both sides of the issue, not surprisingly, incorrectly transform the question of property rights into one about market-alienability. Given the commercial significance of the human body, discussions about the market-alienability of human tissue are to be expected.\textsuperscript{107} That being said, property rights and market-alienability are not synonymous: whether a property right exists does not necessarily hinge on whether an individual has the right to buy or sell that good.

As discussed previously, modern conceptions of property are best described as a “bundle of rights,”\textsuperscript{108} where the possessor need not maintain all rights in order to have a property right in that good.\textsuperscript{109} Thus, market-alienability is unnecessary for the recognition of a

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\textsuperscript{103} In part, courts’ varied approaches to this issue directly relate to that fact that “[m]any courts still find the prospect of a property interest in the human body taboo.” Collins, supra note 15, at 665.


\textsuperscript{106} Cain, supra note 24, at 477; see also Hardiman, supra note 24, at 229.

\textsuperscript{107} See Wagner, supra note 24, at 932, 942.

\textsuperscript{108} See supra PART I.A.1.

\textsuperscript{109} See Wagner, supra note 24, at 933; see also Jaffe, supra note 30, at 549. This “bundle” approach to property determinations also obviates the need for an “intermediate” or “quasi” property right.
property right in the human body and indeed should not be
determinative for purposes of classifying the body as property.\footnote{110} With
respect to the human body, a competent individual can possess, use,
and exclude others from her body—lending support to classification
of the human body as property.\footnote{111} In short, although human bodies
are not market-alienable,\footnote{112} the rights an individual has in her body
cannot be characterized as anything but property rights.

B. The Applicability of a Privacy Framework to the Human Body

The constitutional right to privacy first entered American
discourse over a century ago through an article written by Samuel
Warren and Louis D. Brandeis, entitled “The Right to Privacy.”\footnote{113} The
authors argued for the recognition of a new right, which was later
referred to as the “right to be let alone.”\footnote{114}

Now viewed as having its roots in the Constitution,\footnote{115} the right to
privacy, as it has come to be known today, revolves around an
individual’s ability to be free from state involvement in certain
intimate decisions.\footnote{116} Privacy rights are typically viewed as being
doUBLE-stranded: one strand relates to personal privacy\footnote{117} and the

\footnote{110} Although some critics contend that the ability to sell is “so important that its
absence is sufficient to deny the label property to the remaining bundle . . . [t]his
view is unwarranted . . . because there are acknowledged forms of property that
cannot be sold.” Jaffe, supra note 30, at 551; see also Potts, supra note 104, at 486
(stating that an examination of cases involving human substances, such as blood
samples, “demonstrates that a person can retain a possessory interest in body samples
that do not have a direct medical value to the patient, and instead only have an
independent economic value after excision”).

\footnote{111} See supra note 34 and accompanying text.

\footnote{112} Under federal law, organs cannot be bought or sold. See Siegel, supra note 5, at
929-30. Incidentally, this Article does not address whether individuals should have
the right to buy and sell organs. Instead, it assumes the existing legal framework,
which has banned the alienation of human organs.

\footnote{113} See Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV.
193 (1890); see also Seeley, supra note 32, at 1158.

\footnote{114} See Seeley, supra note 32, at 1158.

\footnote{115} See id.

\footnote{116} Linda C. Fentiman, Privacy and Personhood Revisited: A New Framework for
Substitute Decisionmaking for the Incompetent, Incurably Ill Adult, 57 GEO. WASH. L. REV.
801, 815 (1989); see also Radhika Rao, Reconceiving Privacy: Relationships and

\footnote{117} See Rao II, supra note 15, at 388. With cases tracing back almost a century, the
right of “personal privacy” is by no means a recent construct. For notable personal
privacy cases, see Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (stating that “it is the
right of the individual . . . to be free from unwarranted governmental intrusion into
matters so fundamentally affecting a person as the decision whether to bear or beget
a child”); McFall v. Shrimp, 10 Pa. D. & C.3d 90, 91 (Ch. Ct. 1978) (stating that the
court could not intrude on Shrimp’s “bodily security” and command him to provide
other to relational privacy.\textsuperscript{118} The former preserves the sanctity and integrity of an individual’s body, while the latter relates to the right to engage in various consensual relationships.\textsuperscript{119} Both strands are often implicated in determinations involving the human body;\textsuperscript{120} however, for the purposes of this Article, only the personal privacy strand is at issue.

With respect to the human body and the latter strand of the privacy rubric, “[t]here has been] an implicit recognition in the law [that] a person has a strong interest in being free from nonconsensual invasion[s] of his bodily integrity.”\textsuperscript{121} Courts have repeatedly recognized this strong interest.\textsuperscript{122}

C. John’s Rights in His Body: Privacy Rights and/or Property Rights

Property rights and privacy concerns are both paramount with respect to decisions about organ donation. Both involve the ability to prevent or prohibit unwanted interference or invasions.\textsuperscript{123} A donor, who has exclusive use over an organ, could be regarded as having a property right over that organ. Additionally, the donor has a privacy right in her bodily integrity, to be free from unwanted invasion. In the context of a child conceived to act as an organ donor for an ailing family member—such as this Article’s initial hypothetical involving “John,”—a property paradigm is more appropriate for the purposes of addressing the child-donor’s rights in her body.

The appropriateness of a property framework becomes readily

\textsuperscript{118} See Rao II, supra note 15, at 388. Cases in which courts have addressed the topic of relational privacy include Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (stating that the “decision to marry . . . [is] protected by the right of privacy”); Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (stating that privacy rights, in part, prohibited the state from forcing Amish parents to school children through the age of sixteen); Griswold v. Connecticut, 381 U.S. 479 (1965) (finding unconstitutional a Connecticut statute that made use of a contraceptive device criminal).

\textsuperscript{119} See Rao II, supra note 15, at 389.

\textsuperscript{120} Id. at 388-89.

\textsuperscript{121} Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 424 (Mass. 1977).


\textsuperscript{123} See Rao II, supra note 15, at 482.
apparent when applied to the “John” hypothetical. Clearly, John has a right to protect his bodily integrity from unwarranted organ or tissue removal, implicating a privacy right. However, a privacy rubric is deficient because it does not allow John, or a parent or guardian, “to engage in [the] productive activity” of organ donation. According to commentator Radhika Rao, “[p]rivacy is a purely negative entitlement that guarantees security from governmental interference, whereas property possesses an affirmative dimension that enables purposive activity.” Here, a property framework is more appropriate because organ donation contemplates removal of a part of the human body—an “affirmative dimension,” so to speak. Although both privacy and property rights involve essentially the same right—to be free from unsolicited interference—a property paradigm is more appropriate in analyzing and evaluating John’s rights in his own body.

II. ORGAN DONATION AND CONSENT: AN EXAMINATION OF MINOR ORGAN DONORS AND THE NEED FOR AN ALTERNATIVE APPROACH

As indicated previously, in instances where a child is conceived to act as a donor for an ailing family member, the recognition of a property right is essential: it enables the parents, or an otherwise competent individual/entity, to consent on behalf of the child to the organ donation procedure. Having determined the appropriateness of applying a property framework to the human body, this Article now examines the concept of patient consent, as required for medical procedures such as organ donations, and the validity of that consent in instances where the patient is incompetent.

With regard to organ donation procedures, organs and tissues come from two principle sources: living donors and cadavers. Under the principle of informed consent, living donors, who

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124 Id.
125 Id. at 432-33.
126 Id. at 433, 459.
127 Id. at 425.
128 The human body presently contains approximately thirty transplantable organs and tissues. See Shartle, supra note 11, at 436 (“These organs and tissues include: a variety of glands (e.g., pancreas, pituitary, thyroid, parathyroid, and adrenal), parts of the ear, blood vessels, tendons, cartilage, muscles (including the heart), testicles, ovaries, fallopian tubes, nerves, skin, fat, bone marrow, blood, livers, lungs, kidneys, and corneas.”).
129 See id. at 433 (stating that living donors now rival cadaveric donors); Cara Cheyett, Note, Organ Harvests from the Legally Incompetent: An Instrument Against Compelled Atrocity, 41 B.C. L. Rev. 465, 465 (2000).
130 See Maria N. Morelli, Notes and Comments, Organ Trafficking: Legislative
typically include adults, voluntarily agree to medical procedures. In certain instances, however, individuals who cannot consent to donation procedures, such as minor children or otherwise incompetent individuals, act as donors. In these cases, medical professionals seek authorization from parents or guardians.

Parental consent is inadequate in instances where parental interests/concerns do not align with the child-donor’s interests. This may occur when parents have conceived a potential donor child—such as “John,” from the hypothetical—to save the life of an ailing family member. In these instances, parental consent on behalf of the child-donor should be deemed inadequate. In the following sections, this Article will explore the deference traditionally accorded parents in decisions involving children, employing the John hypothetical to highlight instances where deference is inappropriate and, as a legal matter, insufficient to constitute effective consent.

A. Medical Treatment—The Need for Consent

Under common law, the tort of battery recognized an individual’s right to remain free from unwanted physical contact. With regard to the medical profession, surgery has been considered a “technical battery,” excused so long as the patient has consented to the operation. An uniformed “yes,” though, is not sufficient for the


\textsuperscript{131} See Cheyett, supra note 129, at 465.

\textsuperscript{132} See Shartle, supra note 11, at 436.

\textsuperscript{133} See Cheyett, supra note 129, at 466-67.

\textsuperscript{134} See Morelli, supra note 130, at 939 (“Assuming donations by minors presumably would be for the benefit of a family member, allowing parental consent to be determinative could pose a conflict of interest and would not protect the interests of children.”); see also Michael J. Saks, \textit{Social Psychological Perspectives on Consent, in Children’s Competence to Consent 48-49} (Gary B. Melton et al. eds., 1983) (noting the potential for intrafamily conflict in donor decisions).


\textsuperscript{137} Bonner v. Moran, 126 F.2d 121, 122 (D.C. Cir. 1941) (stating that “there can be no doubt that a surgical operation is technical battery, regardless of its results, and is excusable only when there is express or implied consent by the patient; or, stated somewhat differently, the surgeon is liable . . . if the operation is unauthorized”); Mohr v. Williams, 104 N.W. 12, 14 (Minn. 1905) (stating that “it cannot be doubted that ordinarily the patient must be consulted, and his consent
pursposes of consent. Rather, the consent must be informed\textsuperscript{138} — that is, the patient's consent must have been obtained after the patient has been appraised of all risks associated with the procedure.\textsuperscript{139} Then, and only then, is the patient's consent adequate.\textsuperscript{140}

Medical procedures performed on minors or otherwise incompetent patients require consent.\textsuperscript{141} Minors and mentally-disabled persons may not be able to understand fully the consequences of medical procedures. This renders them incapable of providing informed consent. Therefore, the involvement of a third party, typically a parent or guardian, becomes critical.\textsuperscript{142} In these instances, consent is obtained not from the potential patient but from the parent or guardian, who acts in the patient's stead.\textsuperscript{143} With respect to minors, the belief is that, "at a certain age, the minor is too young to say 'yes.'"\textsuperscript{144} The rationale behind the requirement for parental or guardian consent rests on two premises: 1) that minors and otherwise incompetent persons lack the ability to understand and appreciate the significance of the proposed medical treatment,\textsuperscript{145} and 2) that a parent or guardian would act in the incompetent patient's best interests.\textsuperscript{146}

B. The Presumption of Parental Deference

The family unit is traditionally afforded a "zone of privacy" beyond state interference.\textsuperscript{147} Courts have deemed parental authority

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\textsuperscript{138} A physician who fails to provide adequate information and/or fails to obtain the consent of her patient may be subject to liability. See Povenmire, supra note 136, at 98.
\textsuperscript{139} See id.
\textsuperscript{140} See id.
\textsuperscript{141} See Shartle, supra note 11, at 440 (“And without consent, any medical procedure performed on a minor is considered a battery.”).
\textsuperscript{142} See Cheyett, supra note 129, at 466; see also Shartle, supra note 11, at 440-41 (“Therefore, the law delegates the power to make medical care decisions for minors to surrogate decision makers, such as parents.”).
\textsuperscript{143} See Cheyett, supra note 129, at 466.
\textsuperscript{144} See Povenmire, supra note 136, at 102.
\textsuperscript{145} See id. at 101; Shartle, supra note 11, at 439-40 (“[T]he presumption is that young age reflects inexperience and an inability to fully comprehend the ramifications of the chosen action.”); cf. Glantz, supra note 135, at 218 (noting that children are particularly vulnerable as research subjects because they "may not be competent to volunteer to participate in a research project").
\textsuperscript{146} See Cheyett, supra note 129, at 466.
\textsuperscript{147} See Povenmire, supra note 136, at 103; see also Troxel v. Granville, 530 U.S. 57, 68-69 (2000) (“Accordingly, so long as a parent adequately cares for his or her children . . . there will normally be no reason for the state to inject itself into the
and decisions affecting the well-being of children to be "fundamental interests." Accordingly, courts have granted parents broad authority in decisions involving both the family unit and their children, including the right to make health care decisions on behalf of and regarding these children.

Parental deference is based on two basic premises: 1) parents are better arbiters than third parties because parental loyalties are typically aligned with a child's best interests, and 2) parents are better suited to act as decision makers for a child because of their close ties with the child. When compared with parents, third parties are perceived as being too removed and uninterested, thereby rendering them incapable of determining that which is in a child's best interests. With respect to the legal system, in particular, judicial intervention in parental decisions has often been criticized on the theory that courts and judges lack the time or knowledge needed to render an informed decision in the child's best interests. In addition, these non-familial decision-makers are often unable to weigh non-quantifiable factors such as the myriad moral and ethical considerations that may affect a particular family. In short, as the Supreme Court noted in Parnham v. J.R.,

The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions . . . . [H]istorically, it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

See Povenmire, supra note 136, at 103.

See Glantz, supra note 135, at 219; see also Rosato, supra note 135, at 6 ("Parents possess a fundamental right to the care, control, and custody of their children, which includes making major decisions on their behalf.").

See Shurtle, supra note 11, at 443.

See Rosato, supra note 135, at 42, 51.

See id. at 42.

See id.


Id. at 602 (emphasis added) (citing I.W. Blackstone, Commentaries 447). Moreover, support for parental deference has been reaffirmed in cases both before and after Parnham. See, e.g., Troxel, 530 U.S. at 66 ("[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."); Wisconsin v. Yoder, 406 U.S. 205 (1972) (striking down law forbidding the instruction of German and stating that parental liberty interests include the right to "bring up children"); Meyer v. Nebraska, 262 U.S. 390 (1923) (allowing Amish parents to withdraw children from high school, thereby circumventing mandated educational requirements).
C. Questioning the Sufficiency of Parental Consent: The Case of Divided Loyalties

The recognition of parental discretion is based implicitly on the belief that parents will act in the best interests of their child.156 Where medical treatment is necessary for the child’s well being, parental consent is typically deemed sufficient.157 The sufficiency of parental consent is less clear, however, when the medical procedure is unnecessary for that child’s direct well being,158 such as when parents consent to an organ donation by one child to save the life of a family member.159 In these instances, consent may be ineffective because of a conflict of that pits the interests of the child patient against the parents.160

With respect to the hypothetical example of child-donor “John,” his parents had consented to the removal of one of John’s kidneys for reasons not directly related to the donor. Facing the impending death of a child, John’s parents conceived John largely to save another dying child and therefore likely could not have objectively appraised the risks presented by kidney removal.161 As highlighted by the hypothetical, parents should not be accorded deference in instances where their loyalties, quite naturally and reasonably, are divided.162

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156 See Rosato, supra note 135, at 51 (stating that “[b]ecause of . . . mutual love and concern, the parent usually will act in the child’s best interests”).

157 See Cheyett, supra note 129, at 466.

158 See id. In fact, some would argue that parental “authority does not include the right to consent to nontherapeutic medical procedures such as living organ or tissue donations.” Shartle, supra note 11, at 443.

159 Though outside of the purview of this Article, I would be remiss if I did not note that similar controversy surrounds the use of anencephalic infants as organ donors. See Jennifer S. Bard, The Diagnosis is Anencephaly and the Parents Ask About Organ Donation: Now What? A Guide for Hospital Counsel and Ethics Committees, 21 W. New Eng. L. Rev. 49 (1999); see also Beth Brandon, Note, Anencephalic Infants As Organ Donors: A Question of Life or Death, 40 Case W. Res. L. Rev. 781 (1989/1990); Jay A. Friedman, Taking the Camel By the Nose: The Anencephalic As a Source for Pediatric Organ Transplants, 90 Colum. L. Rev. 917 (1990). Anencephaly is a severe defect involving stunted development of the neural tube that results in the absence of the skull, scalp, forebrain, or cerebral hemispheres. See id at 921; Brandon, supra, at 783-84. Because infants suffering from anencephaly can only survive for a short period of time after birth, typically hours or days, they are often seen as potential organ donor candidates and are therefore particularly vulnerable to organ retrieval operations. See E. Haavi Morel, Futilitarianism, Exoticare and Coerced Altruism: The ADA Meets Its Limits, 25 Seton Hall L. Rev. 883, 886 (1995) (An anencephalic “will die soon no matter what physicians do.”). 

160 See Morelli, supra note 130, at 939.

161 See Rosato, supra note 135, at 51.

162 See Cheyett, supra note 129, at 466-67.
Because of concerns about divided loyalties—in cases, for instance, where parents seek medical treatment on a child for the benefit of another family member—parents and/or medical professionals have sought court approval of medical procedures on the legally incompetent.\(^\text{163}\) In Part III, this Article examines judicial involvement and the traditional standards that have been employed in cases where family members seek approval for procedures on legally incompetent relatives.

III. ORGAN DONATION BY MINORS: JUDICIAL INVOLVEMENT AND THE APPLICATION OF THE "BEST INTERESTS" STANDARD OR THE "SUBSTITUTED JUDGMENT" STANDARD

Because of potential conflicts between the interests of the parents and the child-donor, hospitals and physicians are increasingly seeking court approval of tissue and/or organ donation procedures on minors.\(^\text{164}\) It is by no means surprising that state courts have come to be seen as the appropriate fora for such determinations.\(^\text{165}\) Under the doctrine of parens patriae, the court has the power to protect the interests of those in its jurisdiction, including minor children and infants.\(^\text{166}\) In fact, the state “shares the duty of parents to safeguard the welfare of children and may intervene when parents fail to meet this obligation.”\(^\text{167}\) Thus, parens patriae embodies the state’s responsibility to protect its most vulnerable citizens.

Literally translated as “parent of his . . . country,”\(^\text{168}\) parens patriae has its origins in English common law, originating at a time when the King served as “guardian to persons with legal disabilities such as infants, idiots and lunatics.”\(^\text{169}\) American jurisprudence has similarly


\(^{164}\) See Cheyett, supra note 129, at 485. That being said, jurisprudence on the appropriateness of organ and tissue donations by minors is scant; many cases remain “not reported, and because parental consent is often deemed sufficient[,] many donations are never challenged.” Shartle, supra note 11, at 450.

\(^{165}\) See generally Strunk, 445 S.W.2d 145; Curran, 566 N.E.2d 1319; Doe, 481 N.Y.S.2d 932; Little, 576 S.W.2d 493; Hurdle, 5 Va. Cir. 509.

\(^{166}\) See Povenmire, supra note 136, at 106; Shartle, supra note 11, at 445.


\(^{168}\) BLACK’S LAW DICTIONARY 1137 (7th ed. 1999) (defining “parens patriae” as when a “state [acts] in its capacity as provider to those unable to care for themselves”).

\(^{169}\) Brandon, supra note 159, at 811 (quoting BLACK’S LAW DICTIONARY 1005 (5th ed. 1979)).
embraced the concept of *parens patriae*, as evidenced by the Supreme Court's express limitation on parental authority:170 "[p]arents 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 make that choice for themselves."171 Although courts may be reluctant to do so,172 they may usurp parental authority and intervene on behalf of a child, for instance, when she is endangered.173

Despite concerns about potential conflicts, organ donation by minors remains largely unregulated in the United States174 and falls within the purview of common law.175 Courts, therefore, in determining whether to authorize an *inter vivos* organ donation by a minor, can seek no guidance from a statutory framework. Where judicial involvement has been requested, courts have typically applied either a "best interests" standard or a "substituted judgment"

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170 See Bard, *supra* note 159, at 73 ("The parental right to make decisions for one's child . . . stops short of actions which endanger the child in question."); see also Fithian, *supra* note 167, at 200-01 ("The state has never allowed parents unlimited control over their children . . . . Parental rights . . . are still subject to the superior right of the state to protect children against abuse of parental authority.").


172 As noted by one commentator, courts rarely intervene in parental decisions that involve one of the following four conditions: 1) the parents are choosing from professionally accepted treatments; 2) the child's disease or condition is not severe or life-threatening; 3) it is not possible to delay decisions about treatment until the child reaches maturity; and 4) parents have a reasonable concern that the risks of treatment outweigh its benefits, even if withholding that treatment may be life-threatening." Brandon, *supra* note 159, at 810.

173 See Shartle, *supra* note 11, at 445. In addition, courts in appropriate circumstances may punish parents or appoint guardians specifically to protect the interests of the endangered child. See Brandon, *supra* note 159, at 811 ("The state may punish parents or others who abuse or neglect children. Courts also will appoint guardians when they find that the parents are incapable of making decisions concerning their children, or if the parents' choice conveys a disregard for the child's welfare.").

174 Although organ donation by minors is approved in qualified circumstances in the United States, many countries, including Bolivia, Colombia, Mexico, Lebanon, Russia, and Turkey, have prohibited organ donation by minors. See *WHO Guiding Principles on Human Organ Transplantation*, pmbl. 1, reprinted in *LEGISLATIVE RESPONSES TO ORGAN TRANSPLANTATION* 470-71 (World Health Organization ed., 1994). In fact, the World Health Organization ("WHO") advocates an absolute ban on use of minor organs. See id. (stating in Principle 4 of the Guiding Principles that "[n]o organ should be removed from the body of a living minor for the purpose of transplantation").

175 See Shartle, *supra* note 11, at 448 ("The United States has . . . taken a common law approach to regulating living organ and tissue donations by minors, leaving the power to adjudicate the disposition of a donation within the purview of a judge's discretion.").
standard, as explained in the following sections.\textsuperscript{176}

A. Best Interests Standard

The “best interests” standard traces back to the eighteenth and nineteenth centuries, during a time period that experienced significant social, philosophical, and economic shifts.\textsuperscript{177} At the same time, perceptions of children underwent radical changes as well—from that of little adults to the most vulnerable individuals in society.\textsuperscript{178} The American legal system subsequently adopted the “best interests” standard, which “remains the governing principle for adjudicating cases involving minors.”\textsuperscript{179}

As the title implies, the “best interests” standard attempts to determine those actions that would best serve the minor in question.\textsuperscript{180} Under a “best interests” analysis, the paramount consideration is “what will promote the welfare of the child.”\textsuperscript{181} Although the court in such determinations considers both the attendant risks and benefits of various alternatives,\textsuperscript{182} personal preferences do not weigh heavily, if at all, in a best interests determination.\textsuperscript{183}

In the health care context, a “best interests” analysis is often applied when family members seek to authorize the execution of a medical procedure on behalf of an individual who is legally incompetent. As indicated in the cases summarized below, the court under its \textit{parens patriae} authority ensures that the incompetent’s interests have been addressed,\textsuperscript{184} and using a “best interests” standard, courts have both rejected and approved requested organ donation procedures on incompetent donors.

\textit{In re Richardson}:\textsuperscript{185} Using a “best interests” analysis,\textsuperscript{186} the Louisiana Court of Appeals refused to authorize the removal of a kidney from Roy Allen Richardson, a seventeen-year-old mentally

\begin{itemize}
  \item See Shurtle, \textit{supra} note 11, at 448, 485-86; Cheyett, \textit{supra} note 129, at 485.
  \item See Cheyett, \textit{supra} note 129, at 486.
  \item See id.; see also Janet L. Dolgin, \textit{The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship}, 61 ALB. L. REV. 545, 360-61 (1997).
  \item See Cheyett, \textit{supra} note 129, at 486.
  \item See Shurtle, \textit{supra} note 11, at 448-49.
  \item Chapsky v. Wood, 26 Kan. 650, 654 (1881).
  \item See id.
  \item See id.
  \item See In re Pescinski, 226 N.W.2d 180, 188-89 (Wis. 1975).
  \item 284 So. 2d 185 (La. Ct. App. 1973).
  \item \textit{Id.} at 187.
\end{itemize}
retarded minor, to save his sister Beverly's life. The court recognized the severity of Beverly's condition—almost certain death from chronic nephritis without a kidney transplant. The court, however, noted its responsibility to the incompetent minor and rejected the plaintiff's weak evidence suggesting that the procedure would serve Roy's best interests.

In re Pescinski: Appellant Janice Pescinski, in order to save her dying sister Elaine Jeske, sought court authorization of a procedure to remove a kidney from her brother, who had been declared incompetent and had been institutionalized as a "schizophrenic catatonic type." Elaine, who had had both kidneys removed because of kidney failure, relied on dialysis to sustain her life. The appellant contended that without a transplant, Elaine would not survive. Applying what was essentially a "best interests" analysis, the court rejected petitioner's request, stating that absent any real benefit to the incompetent, the court could not authorize the procedure.

In the Matter of John Doe: The New York appellate court examined a trial court's order authorizing a bone marrow transplant from an incompetent donor for the benefit of a dying sibling. Citing its authority under parens patriae, the reviewing court noted that the procedure 1) presented minimal risk to John Doe, a forty-three year-old suffering from severe mental retardation, and 2) offered the best chances of saving petitioner, stricken by chronic myelogenous leukemia, from almost certain death. Based on that analysis, the New York appellate court deemed the procedure in the "best interests" of the donor.

Curran v. Bose: In Curran, the Illinois Supreme Court ruled that twin three-and-a-half year-old children could not be forced to undergo bone marrow harvesting procedures. Tamas Bosze, the twins' father, sought the donation to save the life of the twins' half-

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187 Id. at 185-87.
188 Id. at 186.
189 Id. at 187.
190 226 N.W.2d 180.
191 Id. at 180-82.
192 Id. at 182 (Day, J., dissenting).
193 Id.
194 Id. at 182.
196 Id. at 932-33.
197 Id.
198 Id. at 933.
199 566 N.E.2d 1319 (Ill. 1990).
200 Id. at 1345.
sibling Jean Pierre, who was suffering from acute undifferentiated leukemia.\footnote{Id. at 1320-21.} Evaluating both the substituted judgment standard\footnote{See infra PART III.B.} and the best interests standard,\footnote{Curran, 566 N.E.2d at 1324-25.} the Court ruled the former standard inapplicable, largely because it was “not possible to discover that which does not exist, specifically, whether the [three-and-a-half] year-old twins would consent to the proposed bone marrow harvesting procedure if they were competent.”\footnote{Id. at 1326.} Having rejected the substituted judgment standard,\footnote{Id.} the Court relied on 1) the weak familial tie between Jean Pierre and the twins, 2) the strained relationship between mother Nancy Curran and Tamas Bosze, and 3) Curran’s objections arguing that the procedure was not in the twins’ best interests.\footnote{See id. at 1345.}

B. Substituted Judgment Standard

The “substituted judgment” standard was initially created to enable guardians or appointed persons to make determinations about the distribution of an incompetent’s property, “based on the principle that a court will not refuse to act if . . . the incompetent would have taken the same action had he been normal [competent].”\footnote{Little v. Little, 576 S.W.2d 493, 497 (Tex. Civ. App. 1979); see also Jennifer K. Robbenmolt et al., Advancing the Rights of Children and Adolescents to Be Altruistic: Bone Marrow Donations by Minors, 9 J.L. & HEALTH 213, 221 (1994/95); see also Little, 576 S.W.2d at 497 (‘[T]he substituted judgment [standard’s] stated purpose was to authorize gifts from an incompetent’s estate to persons to whom the incompetent owed no duty of support.’).} In its earliest form, the substituted judgment standard required the court to “don the metal mantle of the incompetent”\footnote{In re Carson, 39 Misc. 2d 544, 545 (N.Y. Sup. Ct. 1962).} and act on behalf of those individuals who were once competent.\footnote{See Cheyett, supra note 129, at 486.}

Under a substituted judgment standard, the court is required to “substitute itself as nearly as maybe for the incompetent, and to act upon the same motives and considerations as would have moved” the incompetent person herself.\footnote{City Bank Farmers Trust Co. v. McGowan, 323 U.S. 594, 599 (1945); see also Shartle, supra note 11, at 448; Tom L. Brauchamp & James F. Childress, Principles of Biomedical Ethics 171 (4th ed. 1994) (stating that the substituted judgment standard requires the decision maker to ‘make the decision the incompetent would...')} Thus, the court is not required to
“decide what is in necessarily the best decision but rather the decision that would be made by the incompetent person if he or she were competent.” 211 In rendering such a determination, the court need only proffer clear and convincing evidence substantiating the incompetent’s preferences and predilections. 212

Because the standard assumes some sort of prior decision-making capability, uniform application of the standard has been discouraged. 213 For instance, as one commentator noted, “[i]n cases involving minors, the potential donors have never been legally competent and have, thus, never been able to provide the kind of legal evidence, such as prior gifts and expressions of intent” that courts rely upon in making such determinations. 214

In the medical context specifically, courts often evaluate a host of factors when applying a “substituted judgment” standard, including: the psychological, physical and/or emotional effect of the procedure on the incompetent patient. 215 Under a strict reading of the “substituted judgment” standard, considerations of benefit to the incompetent are not appropriate. 216 As indicated below, courts have included this factor in their analyses, thereby misapplying or modifying the “substituted judgment” doctrine. 217

*Strunk v. Strunk:* 218 In *Strunk*, the Kentucky Court of Appeals affirmed the Chancery Court’s determination, allowing the removal of a kidney from an incompetent for transplantation into his dying
brother.\textsuperscript{219} Jerry Struck, a twenty-seven year-old, having an I.Q. of thirty-five was deemed mentally incompetent.\textsuperscript{220} Jerry’s brother, Tommy, suffered from chronic glomerulus nephritis.\textsuperscript{221} Recognizing the doctrine of substituted judgment,\textsuperscript{222} the appellate court noted the Chancery Court’s determination that the procedure “would not only be beneficial to Tommy but also beneficial to Jerry.”\textsuperscript{223} According to the Chancery Court, “Jerry was greatly dependent upon Tommy, emotionally and psychologically, and . . . [Jerry’s] well-being would be jeopardized more severely by the loss of his brother than by the removal of a kidney.”\textsuperscript{224} Having so determined, the Chancery Court ruled the operation necessary, and the Kentucky Court of Appeals agreed.\textsuperscript{225}

\textit{Hart v. Brown.}\textsuperscript{226} Plaintiffs, the parents of Kathleen and Margaret Hart, sought legal recognition of their parental right to consent to operations on their minor children.\textsuperscript{227} Kathleen, a seven year-old suffering from hemolytic uremic syndrome,\textsuperscript{228} underwent a bilateral nephrectomy, which resulted in the removal of both kidneys.\textsuperscript{229} After the surgery, regular dialysis treatments were necessary to keep Kathleen alive. Even with the treatments, however, Kathleen’s chances for survival remained low.\textsuperscript{230} The court recognized that the kidney removal procedure would present little risk to the donor, Margaret.\textsuperscript{231} Noting the similarity between the facts in Hart and those in Strunk,\textsuperscript{232} the court focused on testimony indicating that Margaret “would enjoy a better future life if (her) ailing twin were kept alive.”\textsuperscript{233} and ultimately ruled that “Eleanor Hart and Peter Hart have the right, under the particular facts and circumstances of this matter, to give their consent to the operations on both children.”\textsuperscript{234}

\textsuperscript{219} Id. at 145.
\textsuperscript{220} Id. at 146.
\textsuperscript{221} Id. at 145.
\textsuperscript{222} Id. at 148.
\textsuperscript{223} Id. at 146.
\textsuperscript{224} Id. at 146, 149.
\textsuperscript{225} 29 Conn. Supp. 368.
\textsuperscript{226} Id. at 369.
\textsuperscript{227} Id. at 371.
\textsuperscript{228} Id. at 372.
\textsuperscript{229} Id. at 374.
\textsuperscript{230} Id. at 372.
\textsuperscript{231} Id. at 374.
\textsuperscript{232} Strunk, 445 S.W.2d 145.
\textsuperscript{233} Hart, 289 A.2d at 390.
\textsuperscript{234} Id. at 391.
Little v. Little. Employing a variation of the "substituted judgment" standard, the Texas Court of Appeals authorized the removal of a kidney from Anne Little, who suffered from Down's Syndrome. Margaret Little, Anne's mother and guardian, sought approval for the procedure in order to save Anne's younger brother Stephen, who was suffering from renal disease. Margaret contended that the organ transplant was the only alternative to Stephen's continued hemodialysis. Although the court noted Texas' general rejection of the "substituted judgment" standard, the Court of Appeals adopted the Strunk standard, which "[is] based on the benefits that the incompetent donor would derive, rather than on the theory that the incompetent would have consented to the transplant if . . . competent." Under this purported "substituted judgment" standard, the Texas Court of Appeals ruled that the existence of "strong evidence . . . that [Anne] [would] receive substantial psychological benefits" from the procedure warranted the lower court's grant of petitioner's request.


Both the "best interests" standard and the "substituted judgment" standard have features that render application of each appealing. The "best interests" standard places the needs of the incompetent donor first. On the other hand, the "substituted judgment" standard examines the merits of the requested procedure from the perspective of the incompetent patient.

With respect to donations by infants, such as "John," the classic version of the substituted judgment standard is not particularly useful because young children and infants are typically incapable of providing evidence that sufficiently indicates their intent or preferences. Thus, strict application of a substituted judgment

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235 576 S.W.2d 493.
236 See id. at 498-500.
237 Id. at 494.
238 Id. at 494, 496.
239 Id. at 497-98.
240 Id. at 498; Strunk, 445 S.W.2d at 145-48.
241 Little, 576 S.W.2d at 498.
242 Id. at 500.
243 See Shartle, supra note 11, at 448-49.
244 See Beauchamp and Childress, supra note 210, at 171; see also Macklin, supra note 214, at 290.
245 See Robbenmolt, supra note 207, at 226.
standard is not possible. Somewhat more useful is the modified standard espoused by the courts in *Strunk*, 246 *Hart* 247 and *Little*. 248 The court in *Strunk* noted that Jerry’s dependence on his ailing brother Tommy rendered the organ donation procedure, if successful, beneficial to Jerry. 249 Furthermore, the court in *Hart* noted that donee Margaret “would enjoy a better future life if [her] ailing twin were kept alive.” 250 The *Little* court applied a standard that was “based on the benefits that the incompetent donor would derive, and in each of these cases, the court’s determination rested on the benefit the incompetent donor would receive from the procedure.” 251

Although consideration of the benefit to the donor is of value, application of the modified substituted judgment standard alone—in the child-donor context—will not suffice because it does not require determination of what is in that child’s best interests, only that the infant benefits from the procedure. More importantly, benefits that are touted as justifications for the donation are often based on uncorroborated and sometimes mistaken assumptions: 1) that the donor will receive psychological benefits from the procedure and 2) that the survival of the ailing sibling will enhance the well-being of the family unit. 252 It is not surprising that these and similar assumptions are generally accepted. First, these assumptions are difficult to verify. Second, outsiders, such as courts, are reluctant to question or challenge what a family considers important to and for their children. 253

In light of the foregoing, the context of a child-donor, particularly one who is conceived to save the life of a sibling or other family member, a court should apply a “best interests” standard. 254 This standard is particularly appropriate because it places the needs and interests of the child first. In addition, an analysis of relevant risks and benefits is inherent within the best interests standard, 255 thereby subsuming a modified “substituted judgment” standard. 256

246 445 S.W.2d at 146-49.
247 289 A.2d at 386.
248 576 S.W.2d at 498-500.
249 *Strunk*, 445 S.W.2d at 146-49.
250 *Hart*, 289 A.2d at 386.
251 *Little*, 576 S.W.2d at 498.
253 I am by no means arguing that these assumptions are incorrect, only that they may not be universally applicable.
254 See *supra* PART III.A.
255 See *In re Zacharia* D, 862 P.2d 751 (Cal. 1993); see also Curran, 566 N.E.2d 1319; *Chapsky*, 26 Kan. 650.
256 The modified substituted judgment standard, which principally considers
IV. PROPOSED LEGISLATIVE APPROACH FOR REGULATING ORGAN DONATIONS BY MINORS

As discussed in the previous sections, organ donation in the United States by minors is largely unregulated by statute and often left to parental discretion. Although I do not advocate a complete ban on organ donation by minors, as is the case in various other countries, a significantly altered legislative approach regarding organ donations by minors is warranted, particularly in instances where a child-donor is conceived to save the life of an ailing family member.

The proposed legislative standard involves three principal aspects that attempt to balance the parents' rights to make decisions affecting their child's well-being and the state's equally compelling interest in ensuring the welfare of its incompetent minors: mandatory judicial involvement, application of the "best interests" standard, and the court appointment of representatives to safeguard the minor donor's interests:

Regulation of Organ Donations By Minors for the Benefit of Family Members:

The following legislative standard is proposed as a means to regulate organ donations by minors for the benefit of family members.

1. Parents or guardians must petition the court for approval of an organ donation by a minor.
   a. Court approval is a requisite for organ donations by minors.

2. When evaluating a proposed medical procedure, courts must apply a "best interests" standard.

3. Court representatives must be appointed to preserve the interests of the donor-child. Specifically,
   a. an attorney must be appointed to represent the interests of the potential child-donor and
   b. a medical doctor must be appointed to assess the effects of the procedure on the child.

A. Mandatory Judicial Involvement

Traditionally, decisions involving children were left to parental
discretion; indeed, this remains true to this day.259 Because parents are appropriately perceived as being the most suited to determine the best interests of their children, courts have typically been loath to interfere with the parent-child relationship or decisions borne of that relationship.260

In instances, however, where the parents' interests may run counter to their child's interests—such as when a minor child, such as "John," is conceived to serve as a donor for an ailing sibling—no such deference is warranted. Instead, parental discretion should be curtailed, and judicial involvement must become a prerequisite. The reason for judicial involvement is obvious: the deference accorded parents is premised on the assumption that the parents' interests are aligned with the child. Where, as here, that presumption proves wrong, no such deference is justified. Because the child-donor's interests may not be adequately addressed, this standard prevents "a minor [or] the minor's parents [from] proceed[ing] with the donation without judicial approval."261

B. Mandatory Application of the "Best Interests" Standard

Courts, as indicated previously, continue to use both a "best interests" test as well as a "substituted judgment" test in determining whether medically incompetent individuals should undergo medical procedures.262 Despite arguments favoring application of a "best interests" standard in cases involving child-donors,263 no regulation or statute requires use of this standard.

Thus, the second phase of the legislative approach proposed in this Article advocates the application of a uniform standard in instances where an incompetent child-donor is conceived to save the life of a family member. In particular, I advocate that courts must apply a "best interests" standard to petitions requesting organ donation by an incompetent child.

In instances where an incompetent child, conceived to donate organs to save a sibling's life, the "substituted judgment" standard, is inadequate for two principle reasons. First, the "substituted judgment" standard is premised on some prior decision-making

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259 See Rosato, supra note 135, at 35, 42.
260 Id.
261 See Shartle, supra note 11, at 465.
262 See supra PARTS III.A. and B.
263 See supra PART III.C; Robbenmolt, supra note 207, at 226; Shartle, supra note 11, at 448.
ability that evidences the child’s intent. But because the child is incompetent, and therefore cannot provide the evidence needed for application of the “substituted judgment” standard, the standard is rendered essentially worthless. Second, evidence proffered will likely be provided to the court by biased parties. Courts, as entities removed from the child’s personal life, have little choice but to rely on the those closest to the child—presumably the child’s parents—to provide evidence of the child’s intent. In instances where the parents may have interests that conflict with the child’s needs, they may be unable to review objectively the evidence they bring (or choose not to bring) before the court. Although such evidence should not be discounted, the “substituted judgment” standard would rely far too heavily on this evidence and therefore should not be applied.

On the other hand, the primary advantage of the “best interests” standard is that concerns about the child’s welfare are of preeminent importance. Because the standard looks to determine what is in the child’s best interests, courts can examine factors affecting the child’s mental, psychological and emotional well-being, in addition to the child’s physical well-being, to determine which course of action would, when examined comprehensively, be in the child’s best interests. In light of the aforementioned inadequacies of the “substituted judgment” standard and the unique strengths of the “best interests” standard, a “best interests” standard must be applied in scenarios where parents seek approval for a medical procedure on a child, conceived to save a sibling’s life, for the benefit of an ailing family member.

C. Court-Appointed Representatives

The prospective child-donor must have competent representatives safeguarding her interests because she is incapable of making decisions about her own future. To that end, whenever parents seek organ donation by a child for the benefit of an ailing family member, the proposed legislative standard would require the court appointment of two representatives whenever parents seek organ donation by a child for the benefit of an ailing family member.

First, an attorney must be appointed as the child’s representative to verify that the child’s interests and needs are safeguarded. In scenarios such as the “John” hypothetical, the child and her parents likely have divergent interests because the parents’ loyalties are

264 See Shartle, supra note 11, at 448; see also Morelli, supra note 130, at 941.
265 See Robbenmolt, supra note 207, at 226.
266 See Shartle, supra note 11, at 465.
divided. Absent an appointed attorney, the child's interests may go underrepresented or even unrepresented.

Second, due to the highly technical nature of the subject matter, which involves medical procedures, this Article also argues that a medical doctor be appointed to assess critically the potential medical effects the procedure may have on the child-donor.  

CONCLUSION

Given the genetic similarity between family members and the rapidity of medical breakthroughs, it is hardly surprising that parents view children as potential donors for ailing family members. However, when parents conceive a child for the primary purpose of saving another child's life, they must not be accorded the traditional deference that courts are accustomed to giving. The fact that the parents' interests may not align with the potential child-donor's interests renders the parents unfit to make organ donation decisions on behalf of that child. Having deemed the child-donor's interest in her body a property right, this Article proceeds to propose a legislative framework that requires judicial approval of parental requests for organ donation by a child. Under this standard, courts are required to apply a "best interests" analysis. Additionally, in light of the donor-child's legal incapacity to evaluate critically the merits and effects of the proposed medical procedure, court-appointed representatives—specifically, a lawyer and a medical doctor—must be assigned to represent the child and safeguard the potential donor's interests.

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267 Although either or both parties may provide the court with expert medical testimony, the advantage of a court-appointed doctor is that she does not appear before the court on behalf of either party. The hope, instead, is that the court-appointed doctor independently assesses the procedure from a medical standpoint, as if the child-donor were her own patient.