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Blythe v. Seagraves: North Carolina Treats the Issue of Whether a Minor and Her Parents May Legally Consent to the Minor's Participation, as Donor, in a Kidney Transplant

North Carolina initially treated the issue of whether a minor and her parents may legally consent to the minor's participation, as the donor, in a kidney transplant, in *Blythe v. Seagraves*.¹ In *Blythe*, the court granted a declaratory judgment authorizing the defendant parents and minor donor to consent to the minor's participation in the transplant operation.

In *Blythe*, the factual situation is somewhat unique. Sandy Marleen Seagraves, a 15 year old girl, was suffering from chronic renal failure. There was no hope of normal renal function without a kidney transplant. Sandy's identical twin sister, Cindy Louise, was the most suitable donor.² Cindy and her parents desired to consent to the operation. However, the surgeons and attending physician required a judicial declaration that there existed legally effective consent³ before proceeding with the operation. Consequently, this suit was brought by the physicians and the University of North Carolina, as parties plaintiff, for a declaratory judgment, naming the prospective donor and her parents as parties defendant.⁴ By virtue of its equity jurisdiction, the court gave judicial authorization to the defendants to consent to the surgery. The court concluded that the need for the transplant was urgent; the probability of a successful transplant was highly favorable; this procedure was preferable to all the other alternatives; the duty of the court to authorize the operation was clear; the transplant would be beneficial to the donor; the psychological benefit to the donor greatly outweighed the slight hazards to her from the procedure; and the donor was capable of giving, and had given, an informed consent.⁵

A surgical operation is a technical battery unless there has been express or implied consent by the patient.⁶ The common law and major-

1. *Blythe v. Seagraves*, Civil No. 75-4980 (Guilford County Super. Ct., N.C., Jul. 18, 1975).

2. A one-egg twin graft from one to the other, as was the case in *Blythe*, is not presented with the problem of rejection, since a one-egg twin carries the same genetic material. *Hart v. Brown*, 29 Conn. Supp. 368, 372, 289 A.2d 386, 388 (1972). (This paper will necessarily deal only with cases of minor and incompetent donors; however, this fact would obviously increase the potential benefit to the donee.)

3. Consent constituting a complete defense to a battery action. See W. PROSSER, LAW OF TORTS § 18 (4th ed. 1971).

4. *Blythe v. Seagraves*, Civil No. 75-4980 (Guilford County Super. Ct., N.C., July 18, 1975).

5. *Id.* at 2-5 (mimeographed opinion).

6. *Wall v. Brim*, 138 F.2d 478, 481 (5th Cir. 1943); *Bonner v. Moran*, 126 F.2d 121, 122

ity rule is that minors are not legally capable of consenting to a surgical operation.⁷ There is, however, some authority to the effect that, whether a minor is legally capable of consenting to a medical procedure depends on his ability to understand the contemplated procedure.⁸ While the common law and majority rules have been that parents may consent to medical procedures on their minor children, it was presupposed that the contemplated medical procedure would necessarily be potentially beneficial to the minor.⁹ There is, of course, no potential physiological benefit to the donor of a kidney. Therefore, courts presented with the question of whether or not to grant legal authority to parents or the minor, to consent to the minor's donating a kidney, have had to reevaluate what *is* in the best interests of the minor donor.¹⁰ Thus, different tests and doctrines have been developed and applied.

Due to the relatively recent advent of this particular branch of medico-legal jurisprudence, there has been a paucity of cases dealing with the subject.¹¹ Curran¹² found and discussed three unreported Massachusetts cases significant enough to be worthy of mention here. The first, and probably most significant case was *Masden v. Harrison*.¹³ In *Masden*, Leon Masden, 19 years old, was suffering from chronic glomerulonephritis, with the only hope for life being the transplant of one of twin-brother Leonard's kidneys. Both Leonard and his parents testified at the hearing. Leonard affirmed that he had been fully informed of the operation and gave full consent thereto. A psychiatrist who had interviewed the twins testified that, if the operation was not performed and the sick twin died, it would result in "grave emotional impact" on Leonard.¹⁴ The court, finding that the transplant was nec-

(D.C. Cir. 1941). See Note, *Medical Jurisprudence—Parental Consent to an Operation—Parents May Authorize a Kidney Transplant from One Child to Her Identical Twin*, 4 TEX. TECH. L. REV. 244 (1959).

7. 126 F.2d at 122; accord, *Farber v. Olkon*, 246 P.2d 710 (Cal. App. 1952); *Anonymous v. State*, 17 App. Div. 2d 495, 236 N.Y.S. 2d 88 (1963); *Sharpe v. Pugh*, 270 N.C. 598, 155 S.E.2d 108 (1967); see also *Morse, Legal Implications of Clinical Investigation*, 8 WM. & MARY L. REV. 359 (1967).

8. RESTATEMENT OF TORTS § 59 (1934); Skegg, *Consent to Medical Procedures on Minors*, 36 MODERN L. REV. 370, 373 (1973) [hereinafter cited as Skegg]. However, RESTATEMENT (SECOND) OF TORTS (1965) abandoned this approach due to widespread disapproval of the courts. See also *Savage, Organ Transplantation with an Incompetent Donor: Kentucky Resolves the Dilemma of Strunk v. Strunk*, 58 KY. L.J. 129, n.57 at 134 (1970).

9. Curran, *A Problem of Consent: Kidney Transplantation in Minors*, 34 N.Y.U.L. REV. 891, 892 (1959) [hereinafter cited as Curran]; Skegg, *supra* note 8, at 375-77.

10. For an excellent discussion on the rights of minor donors in Massachusetts and generally, see Baron, Botsford, and Cole, *Live Organ and Tissue Transplants From Minor Donors in Massachusetts*, 55 B.U. L. REV. 159 (1975) [hereinafter cited as Baron, Botsford and Cole].

11. *Id.* at 162, n.16; Curran, *supra* note 9, at 892.

12. Curran, *supra* note 9, at 892-98.

13. No. 68651 (Eq. Mass. Sup. Jud. Ct., June 12, 1957); cited in Curran, *supra* note 9, at 892, n.4.

14. Curran, *supra* note 9, at 893.

essary for Leon's survival; that Leonard had been fully informed, understood the nature of the operation and possible consequences, and had consented to it; held that the hospital and surgeon could perform the operation, upon the consent of the parents and both twins, without incurring either civil or criminal liability.¹⁵ The judge, noting the testimony in reference to the "clear therapeutic value" to the well twin, applied the "best interest of the minor" test:

I am satisfied from the testimony of the psychiatrist that grave emotional impact may be visited upon Leonard if the defendants refuse to perform this operation and Leon should die, as apparently he will Such emotional disturbance could well affect the health and physical well-being of Leonard for the remainder of his life. I therefore find that this operation is necessary for the continued good health and future well-being of Leonard and that in performing the operation the defendants are conferring a benefit upon Leonard as well as upon Leon.¹⁶

The two other Massachusetts decisions came shortly after *Masden*, and both involved 14 year old twins.¹⁷ All three of these cases relied heavily on psychiatric opinion to treat the question of whether or not there was a benefit to the donor, and found this to be the case. All three holdings were, in substance, that the operation was necessary, and that the twins and their parents had consented to it.¹⁸

In *Strunk v. Strunk*,¹⁹ the court relied on the Doctrine of Substituted Judgment to establish its chancery power to grant the parent the legal authority to consent to the kidney transplant.²⁰ The use of substituted judgment was necessary because the prospective donor, Jerry, 27 years old, was mentally incompetent, although he had the emotions and reactions of a normal person.²¹ His emotional attachment to his 28 year old brother, Tom, made his treatment and eventual rehabilitation extremely dependent on Tom's survival. Further, the court found it significant that, after the death of their parents, then in their fifties, Tom would be Jerry's closest surviving relative.²² Without a kidney from Jerry, Tom was not likely to survive. Furthermore, the court cited convincing evidence of the growing acceptance of renal transplants, and the minimal degree of risk to the donor.²³ Asserting its chancery

15. *Id.*

16. *Id.* at 3 (mimeographed opinion).

17. *Foster v. Harrison*, No. 68674 (Eq. Mass. Sup. Jud. Ct., Nov. 20, 1957); *Huskey v. Harrison*, No. 68666 (Eq. Mass. Sup. Jud. Ct., Aug. 30, 1957); both cited in Curran, *supra* note 9, at 893 nn.8 & 9.

18. Curran, *supra* note 9, at 893.

19. 445 S.W.2d 145, 35 A.L.R.3d 683 (Ky. 1969).

20. *Id.* at 148, 35 A.L.R.3d at 687.

21. *Id.* at 146, 35 A.L.R.3d at 685-86.

22. *Id.* at 147, 35 A.L.R.3d at 686.

23. *Id.* at 148-49, 35 A.L.R.3d at 688-89.

power, the court also noted the early recognition of the Doctrine of Substituted Judgment:

The "doctrine of substituted judgment," which apparently found its first expression in the leading English case of *Ex parte Whitebread* (1816 2 Meriv. 99, 35 Eng. Reprint 878 (Ch), supra 3(a), was amplified in *Re Eal of Carysfort* (1840) Craig & Ph 76, 41 Eng. Reprint 418, where the principle was first made to apply to one who was not next of kin of the lunatic The Lord Chancellor permitted the allowance of an annuity out of income of the estate of the lunatic earl as a retiring pension to the latter's aged personal servant, . . . , the court being "satisfied that the Earl of Carysfort would have approved if he had been capable of acting himself." Annot., 24 A.L.R. 3d 863 (1969).²⁴

Thus, it appears that the Kentucky court combined the "best interests of the incompetent" test, with the Doctrine of Substituted Judgment, to grant the authority to consent to the parent.²⁵

The Louisiana case of *In re Richardson*,²⁶ involved a 17 year old incompetent prospective kidney donor, with a mental age of 3 or 4 years, and his 32 year old sister, the prospective donee. The prospective donor was a mongoloid, with a life expectancy of 25 years. The prospective donee had a complicated and highly problematical medical condition, which rendered a successful transplant speculative at best.²⁷ While restricting its ruling to the facts of the particular case, the court relied on a strict "protection and promotion of the ultimate best interest of the minor" test in disallowing the parents' consent for the minor.²⁸ It analogized the protection of a minor's property with the protection of his body:

Since our law affords this unqualified protection against intrusion in a comparatively mere property right, it is inconceivable to us that it affords less protection to a minor's right to be free in his person from bodily intrusion to the extent of loss of an organ unless such loss be in the best interest of the minor.²⁹

The court distinguished the *Strunk* ruling on the facts, particularly with reference to the eventuality of the prospective donee caring for the minor after the death of the parents. Furthermore, the Louisiana court

24. *Id.* at 148, 35 A.L.R.3d at 687-88.

25. There was a three judge dissent in *Strunk* which reasoned that not only did the committee lack the jurisdictional power to control the matters of the incompetent, to the extent found possible by the majority, but also, that the action taken by the committee was not equal to the necessary "significant benefit to the incompetent" standard to justify the use of the doctrine. 445 S.W.2d at 149-51, 35 A.L.R.3d at 689-91.

26. 284 So.2d 185 (La. App. 1973).

27. *Id.* at 186.

28. *Id.* at 187.

29. *Id.* A concurring opinion by Judge Gulotta suggested that three requirements be met before the court may even consider the best interests of the minor: (1) that the surgical intrusion is urgent, (2) that there are no reasonable alternatives, and (3) that the contingencies are minimal. *Id.* at 188.

found that the procedural and substantive aspects of the *Strunk* ruling were not in accord with Louisiana law.³⁰ In *In re Guardianship of Pescinski*,³¹ the Wisconsin Supreme Court held that the trial court lacked the power to order the transplant of a kidney from an incompetent donor to his sister, notwithstanding the showing of her dire need therefor.³² The prospective donor, Richard Pescinski, was a 39 year old mental patient; diagnosed as a chronic, catatonic, schizophrenic, with an estimated mental age of 12 years. The prospective donee, his 38 year old sister, Elaine, was suffering from chronic glomerulonephritis. Her life was being sustained by the use of a dialysis machine, which functioned as a substitute, for her two, diseased surgically removed kidneys. Tests confirmed that Richard was a suitable donor. All other family members were ruled out, as donors, due to medical and personal reasons.³³ Richard, of course, was incapable of consenting to the procedure. When the guardian *ad litem* refused to consent for Richard, since no benefit was established, the county court held itself without the power to give consent for the transplant.³⁴

The Wisconsin Supreme Court upheld the lower court ruling and said, the guardian must act loyally in the best interests of his ward.³⁵ There was neither any evidence that the contemplated procedure would serve any interests of the ward, nor that Richard had consented thereto, the court noted.³⁶ Furthermore, there was no statutory authority to sanction the operation.³⁷ The court declined to adopt the Doctrine of Substituted Judgment, as followed by the Kentucky court in *Strunk*.³⁸ Following the dissent in *Strunk*,³⁹ the court said that "substituted judgment" meant that equity will speak for one who cannot speak for himself.⁴⁰ The court also noted that, historically, the doctrine had been used to permit gifts of an incompetent's property.⁴¹ However, the court refused to extend the doctrine to the donation of one of an incompetent's organs:

An incompetent particularly should have his own interests protected. Certainly no advantage should be taken of him. In the absence of real consent on his part, and in the situation where no benefit to him has been established, we fail to find any authority for the county court, or

30. *Id.*

31. 67 Wis.2d 4, 226 N.W.2d 180 (1975).

32. *Id.* at 5-6, 226 N.W.2d at 180-81.

33. *Id.* at 5-7, 226 N.W.2d at 180-81.

34. *Id.* at 6; 226 N.W.2d at 180-81.

35. *Id.* at 7; 226 N.W.2d at 181.

36. *Id.*

37. *Id.*

38. *Id.* at 7-8; 226 N.W.2d at 181.

39. See note 25 *supra*.

40. 67 Wis.2d 4, 7-8; 226 N.W.2d 180, 181-82.

41. *Id.* at 8; 226 N.W.2d at 182.

this court, to approve this operation.⁴²

One dissent, in agreeing with the majority position in *Strunk*, found a benefit to Richard, based on his predictably happy response, should he regain sanity, to the fact that his transplanted kidney had saved his sister's life.⁴³ The dissenting opinion also enunciated definite standards to be met before the court should authorize the transplant.⁴⁴

In the unreported Illinois case of *Children's Memorial Hospital v. Lewis*,⁴⁵ the facts were strikingly similar to those in *Blythe*. The prospective donor was a 15 year old girl, Mattie Belle Lewis. The prospective donee was her one-egg twin sister, Annie Belle. Annie Belle had been suffering from one-end kidney disease and had been kept alive by weekly dialysis treatment, with no potential for resumption of normal kidney function.⁴⁶ The only reasonable hope for her survival, was to have Mattie Belle donate a kidney for transplantation to Annie Belle.⁴⁷ When the hospital and physicians refused to perform the transplant without court approval for the twins' mother to consent, suit was brought by the hospital and physicians, as parties plaintiff, for a declaratory judgment, naming the prospective donor, donee and their mother as parties defendant.⁴⁸

The court found that Mattie Belle, Annie Belle and their mother, all had consented to the kidney transplant.⁴⁹ The court further found that all of the defendants and the guardians *ad litem*, for Mattie Belle and Annie Belle, had been fully informed of the risks and possible consequences and understood the nature of the operation.⁵⁰ In granting its approval of the operation, the court concluded that the need for the transplant was urgent; the probability of a successful transplant was high; the procedure was preferable to the other alternatives; the transplant would be beneficial to the donor; the psychological benefit to the donor outweighed the risks and potential disadvantages to her from the procedure; the donor was capable of giving, and had given, an informed consent; the mother had lawful authority to consent to the transplant; the guardians *ad litem* had carefully considered the facts and circumstances in the case, and had consented to the transplant; and it had full and complete jurisdiction over all parties and subject mat-

42. *Id.* at 8-9; 226 N.W.2d at 182.

43. *Id.* at 9-10; 226 N.W.2d at 182.

44. *Id.* at 10-12; 226 N.W.2d at 183-84.

45. *Children's Memorial Hospital v. Lewis*, Civil No. 73 CH 6936 (Cook County Cir. Ct., Ill., Nov. 21, 1973).

46. *Id.* at 2 (mimeographed opinion).

47. *Id.*; see note 2 *supra*.

48. *Children's Memorial Hospital v. Lewis*, Civil No. 73 CH 6936 (Cook County Cir. Ct., Ill., Nov. 21, 1973).

49. *Id.* at 3 (mimeographed opinion).

50. *Id.*

ter.⁵¹

*Hart v. Brown*⁵² involved a factual situation very similar to the one in *Blythe*. Katheleen and Margaret Hart were 7 year old identical twins. Initial and subsequent diagnosis revealed that Katheleen was suffering from a potentially fatal renal disorder. A kidney transplant from her identical twin, rather than bi-weekly dialysis therapy, appeared to be critical to Katheleen's chances for survival, particularly in light of her young age. When the physicians refused to operate without a judicial declaration of the parents' legal authority to consent, suit was brought by the parents for a declaratory judgment, naming the physicians as defendants.⁵³

The court established its power to exercise its equity jurisdiction, as in *Strunk*, by the "Doctrine of Substituted Judgment."⁵⁴ The court first indicated that the "[n]eed must be urgent, the probabilities of success should be most favorable, and the duty must be clear. . . ."⁵⁵ In addition to citing *Ex parte Whitebread*,⁵⁶ the court reviewed the acceptance and expansion of the doctrine in American courts since 1844.⁵⁷ In concluding that the parents should be granted the authority to consent to the transplant for both minors, the court employed a combination of the legal doctrines enunciated in the *Strunk* case, the *Bonner*⁵⁸ case and the Massachusetts cases.⁵⁹

Expert medical testimony established an urgent need for the operation and a high likelihood of success. The evidence indicated almost a one hundred percent certainty that the twins would live out an emotionally and physically normal life span, if Margaret was allowed to be the donor.⁶⁰ On the other hand, a much lower probability of success, and a wide range of side effects (from the administering of immunosuppressive drugs) were indicated if one of the parents acted as donor.⁶¹ Further evidence was introduced to establish the fact of a minimal risk to the prospective donor. The surgical procedure was shown to carry no greater risk than that associated with the anesthesia. It was shown that life insurance actuaries rate kidney donors no higher than persons with both kidneys. The worst risk to the donor would be trauma to the

51. *Id.* at 2-4 (mimeographed opinion).

52. 29 Conn. Supp. 368, 289 A.2d 386 (1972).

53. *Id.* at 368-72, 289 A.2d at 386-88.

54. *Id.* at 369-71, 289 A.2d at 387-88.

55. *Id.* at 369, 289 A.2d at 387.

56. *Id.* at 370; see 245 S.W.2d at 148-49, 35 A.L.R.3d at 688-89.

57. 29 Conn. Supp. 368, 369-70, 289 A.2d 386, 387 (1972).

58. *Bonner v. Moran*, 126 F.2d 121 (D.C. Cir. 1941). See also note 67 *infra*.

59. 29 Conn. Supp. at 377, 289 A.2d at 391.

60. *Id.* at 371-73, 289 A.2d at 388.

61. *Id.* at 373, 289 A.2d at 388-89.

remaining kidney, which was shown to be only a remote possibility.⁶² As in the Massachusetts cases,⁶³ there was psychiatric testimony that the prospective donor strongly identified with her sister and would be greatly benefitted by a successful operation, although this carried less weight here, due to the prospective donor's young age.⁶⁴

With the urgency of the need, and the high probability of success established, the court perceived its duty was clear and allowed the parents to consent for the minor.⁶⁵ The court cited *Bonner v. Moran*⁶⁶ as authority for the rule that parents may consent to non-therapeutic operations on their minor children. However, a reading of *Bonner* shows that the court there did not deal squarely with the question of when the parent may consent for the minor.⁶⁷ The court in *Hart* pointed out that, whereas in *Bonner* the contemplated medical procedure was "relatively novel," in *Hart* they were dealing with a generally accepted, proven "perfect" operation.⁶⁸

The *Hart* court analogized that in *Strunk* there was an incompetent adult with a mental age of six, while in *Hart* there was a minor, age eight. While both prospective donors would potentially benefit by a successful transplant, there was a greater probability of success in the *Hart* case, since it involved identical twins.⁶⁹ The court also noted the similarity to the Massachusetts cases, in that they all involved identical twins.⁷⁰

Thus, the court in the *Hart* case reasoned that a ruling in favor of granting the legal authority to the parents to consent to the transplant could and would be determined on the basis of a combination of the legal doctrines enunciated in the *Bonner* case, the *Strunk* case, and the Massachusetts cases.⁷¹

It seems likely that *Blythe v. Seagraves*⁷² will have a substantial persuasive effect on North Carolina courts faced with the same or similar questions in the future. This appears likely since *Blythe* was the initial

62. *Id.* at 373-75, 289 A.2d at 389.

63. See notes 14 & 18 *supra*.

64. 29 Conn. Supp. 368, 374-75, 289 A.2d 386, 389 (1972).

65. *Id.* at 375-76, 289 A.2d at 390.

66. 126 F.2d 121 (D.C. Cir. 1941).

67. In *Bonner v. Moran*, 126 F.2d 121 (D.C. Cir. 1941), the minor had consented to act as donor in a skin graft operation, with his severely burned cousin. In a battery action against the physician, the court held that the consent of the parent was necessary for the physician to operate on the minor. Since the court undoubtedly would have allowed the parents to consent, had the operation been for the minor's benefit, it seems that the court in *Hart* inferred that this implied the parents could consent, even if the procedure was nonbeneficial to the minor.

68. 29 Conn. Supp. 368, 376-77, 289 A.2d 386, 390 (1972).

69. *Id.*; see note 2 *supra*.

70. 29 Conn. Supp. at 377, 289 A.2d at 390-91.

71. *Id.*

72. *Blythe v. Seagraves*, Civil No. 75-4980 (Guilford County Super. Ct., N.C., July 18, 1975).

North Carolina judicial encounter with this growing medico-legal issue. Furthermore, it was a broad decision which impliedly, if not expressly, accepted the doctrines and tests of nearly all the cases discussed in this note.

In substance, *Blythe* has enunciated a multi-pronged test, as in *Children's Memorial Hospital* and *Hart*. The court must determine: (1) whether the need is urgent; (2) whether the probability of a successful transplant is highly favorable; (3) whether this procedure is preferable to all the other alternatives; (4) whether there is any foreseeable benefit to the donor; (5) whether the minor donor is capable of giving an informed consent; and (6) whether the duty of the court is clear.⁷³

Blythe is analogous to the Massachusetts cases, *Children's Memorial Hospital* and *Hart*, in that they all involved identical twins. However, as to the issue of benefit to the donor, there was highly persuasive psychiatric testimony in the Massachusetts cases;⁷⁴ weak psychiatric testimony in the *Hart* case (due to the donor's young age);⁷⁵ and, finally, the objective finding of the judge, rather than any psychiatric testimony, in *Children's Memorial Hospital*⁷⁶ and *Blythe*.⁷⁷ By finding a benefit to the donor through that observation,⁷⁸ the court in *Blythe* has impliedly accepted and applied the "best interests of the minor" or "benefit" test, enunciated in the *Massachusetts* cases.⁷⁹ Ironically, the court in *Blythe* seems to have concomitantly accepted and applied the balancing test adopted in the *Hart* case.⁸⁰ This is ironic, because the court in *Hart* apparently used the balancing test to overcome the weak force of the psychiatric testimony, as to the benefit to the donor, so as to enable itself to grant the parents the requisite authority to consent. In effect, the court in *Blythe* provides an avenue for granting the authority to consent to the parents, in either of these situations.

In finding that the prospective donor was an "[i]ntelligent, bright, alert and healthy-appearing young lady with a deep love for her sister

73. *Id.* at 2-5 (mimeographed opinion).

74. See notes 14 & 16 *supra*. This practice has been criticized as creating contrived testimony to fit the requested relief. See, e.g., *Equity—Transplants—Power of Court to Authorize Removal of Kidney from Mental Incompetent for Transplantation into Brother*, 16 WAYNE L. REV. 1460, 1464-65 (1970); *Spare Parts from Incompetents A Problem of Consent*, 9 J. FAM. L. 309, 315 (1969).

75. See note 43 *supra*.

76. *Children's Memorial Hospital v. Lewis*, Civil No. 73 CH 6936 (Cook County Cir. Ct., Ill., Nov. 21, 1973), at 3-4 (mimeographed opinion).

77. *Blythe v. Seagraves*, Civil No. 75-4980 (Guilford County Super. Ct., N.C., July 18, 1975), at 4 (mimeographed opinion).

78. *Id.*

79. See note 16 *supra*; Actually all of the courts have applied some form of the "best interests of the minor" or "incompetent" test, although only the Louisiana and Wisconsin courts found no benefit to the prospective incompetent donors.

80. 29 Conn. Sup. 368, 375-78, 289 A.2d 386, 390-91 (1972).

and that she expresses a deep desire to proceed with this operation,"⁸¹ the court in *Blythe*, not only adopted another aspect of the test of the Massachusetts cases⁸² and *Children's Memorial Hospital*,⁸³ but, it also would appear to have incorporated the common-law view as to a minor's capacity to consent, as interpreted by at least one commentator,⁸⁴ at least some courts,⁸⁵ and the *Restatement of Torts*.⁸⁶

Although the *Blythe* court did not directly apply the Doctrine of Substituted Judgment as in *Strunk*,⁸⁷ there is a sound basis for considering its more direct, extensive use, in future North Carolina cases involving the same and related issues. This common-law doctrine is solidly grounded in precedent in America.⁸⁸ By its use, the courts could consider only the relevant psychological testimony in the application of a more objective test.⁸⁹ The test under the doctrine would permit an objective inquiry by an impartial judge or tribunal into the facts and circumstances which a fully competent person would make.⁹⁰ The doctrine would most logically apply to incompetents and young minors, totally incapable of forming an adequate judgment. As to older minors approaching the age of consent, the court could reasonably consider the testimony of the prospective minor donor. If, after hearing the testimony, the court does not find the minor capable of an informed consent, then the court could still consider the testimony as to the weight of the objective evidence, *i.e.* with respect to what this particular minor would have decided, in the light of all the relevant facts and circumstances, had he been fully capable of understanding the nature of the proposed medical procedure. This alternative seems more desirable when one considers the degree to which some of the courts seem to have strained with the "best interests of the minor test," in the absence of any clear indication of concrete benefit to the minor donor.

81. *Blythe v. Seagraves*, Civil No. 75-4980 (Guilford County Super. Ct., N.C., July 18, 1975), at 4 (mimeographed opinion).

82. See Curran, *supra* note 9, at 893. The test here is whether the minor can understand the contemplated operation. It could be inferred that the Wisconsin court has impliedly adopted this test and applied it to the incompetent in *Pescinski*. The inference could be drawn, by the court's finding, that the incompetent *had not* consented, rather than that he *was incapable* of doing so.

83. *Children's Memorial Hospital v. Lewis*, Civil No. 73 CH 6936 (Cook County Cir. Ct., Ill., November 21, 1973), at 3 (mimeographed opinion).

84. Skegg, *supra* note 8, at 373.

85. *Bishop v. Shurly*, 237 Mich. 76, 211 N.W. 75 (1926); *Gulf & S.I.R. Co. v. Sullivan*, 155 Miss. 1, 119 So. 501 (1929); *Lacey v. Laird*, 166 Ohio St. 12, 139 N.E.2d 25 (1956). See Curran, *supra* note 9, at 896.

86. RESTATEMENT OF TORTS § 59 (1934); *but see* note 8 *supra*.

87. See 445 S.W.2d at 146, 148, 149-51, 35 A.L.R.3d at 685-86, 687, 689-91.

88. 29 Conn. Supp. at 369-70, 289 A.2d at 387.

89. See note 74 *supra*.

90. 445 S.W.2d at 148, 35 A.L.R.3d at 687-88. Factors to be considered would be relationship to donee, health of donor and donee, ages of donor and donee, etc.

The court in *Blythe* fully recognized, accepted, and exercised its duty as a chancery court. In light of the cases decided in other jurisdictions, and the equitable demands on the court, it is submitted that the decision in *Blythe* was an entirely equitable one. Nevertheless, the decision-making process, as well as the future North Carolina law on this subject, would be greatly facilitated by the direct use of the Doctrine of Substituted Judgment. The use of the doctrine will help to simplify the sometimes complicated task of determining benefit to the donor.

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