## PROTECTING THE RIGHT TO PROCREATE FOR MENTALLY ILL WOMEN

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#### ABSTRACT

Involuntary sterilizations and abortions continue to pose problems for mentally ill women. This Note discusses the privacy implications of involuntary sterilizations and abortions. It also examines the degree of competency required for a mentally ill woman to make her own reproductive choices as well as who the alternate decision maker should be in the event that the mentally ill woman lacks competency. Current state court standards for granting sterilization petitions for mentally incompetent individuals are deficient and do not protect the rights of mentally ill women. This Note evaluates the substituted judgment standard, the mandatory criteria rule, and the best interests standard, and suggests a "hybrid" approach, which combines the present standards in order to maximize the reproductive rights of mentally ill women.

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#### I. INTRODUCTION

In January 2012, a Massachusetts trial judge ordered that Mary Moe, <sup>1</sup> a schizophrenic and bipolar pregnant woman, be "coaxed, bribed or even enticed" into a hospital where an abortion could be performed. <sup>2</sup> The judge ordered the abortion even though Moe was "very Catholic" and did "not believe in abortions." Additionally, the judge ordered *sua sponte*, and without notice, that Moe be sterilized "to avoid this painful situation from recurring."

By ordering the abortion and sterilization procedures, the trial court failed to adhere to Massachusetts' substituted judgment doctrine, which mandates that the court consider the decision Moe would have made if she were competent. Though the court-appointed guardian ad litem determined that Moe would not have had the abortion if she were competent, the judge dismissed the assessment and concluded that "if Moe were competent, she 'would not choose to be delusional,' and therefore would opt for an abortion" so that she could continue taking her medication. The sterilization order also violated Moe's basic due process rights by depriving her of due notice, the opportunity to be heard, and the opportunity to give informed consent.

Although the trial court's decision was eventually overturned,<sup>8</sup> the ruling demonstrates that judicial manipulation exists when courts must decide whether to grant abortion and sterilization petitions. Proper standards must therefore be established to avoid judicial abuse and to protect the reproductive rights of mentally ill women.

This Note offers a more effective approach for deciding whether to grant sterilization and abortion petitions for mentally ill women. Since the current standards are primarily for sterilization petitions and not abortion petitions, this Note recommends separate, revised standards for both.

<sup>&</sup>lt;sup>1</sup> Mary Moe is a pseudonym; Massachusetts General Law requires that informed consent proceedings for an abortion be kept confidential. MASS. GEN. LAWS ANN. ch. 112, § 12S (West 2012).

<sup>&</sup>lt;sup>2</sup> In re Guardianship of Moe, 960 N.E.2d 350, 353 (Mass. App. Ct. 2012).

<sup>&</sup>lt;sup>3</sup> *Id*.

 $<sup>^{4}</sup>$  Id

<sup>&</sup>lt;sup>5</sup> Id. at 354-55; MASS. GEN. LAWS ANN. ch. 190B, § 5-306A (West 2012).

<sup>&</sup>lt;sup>6</sup> In re Guardianship of Moe, 960 N.E.2d at 353.

<sup>&</sup>lt;sup>7</sup> *Id.* at 354.

<sup>8</sup> Id. at 355.

Part II begins with a history of the eugenics movement to explain the dangers of involuntary abortion and sterilization. Part III discusses the persistence of eugenics motivations and judicial abuse in modern times. Part IV argues that involuntary sterilizations and abortions deprive mentally ill women of their fundamental right to privacy. Part V discusses the degree of competency required for a mentally ill woman to make her own reproductive decisions. Part VI discusses the importance of having an alternate decision maker and examines who the alternate decision maker should be if a mentally ill woman is deemed incompetent. Part VII evaluates current state court standards for granting sterilization petitions for mentally incompetent individuals, including the substituted judgment standard, the mandatory criteria rule, and the best interest standard. Last, Part VIII recommends a revised "hybrid" approach for both sterilization and abortion petitions for mentally ill women.

#### II. HISTORY OF STERILIZATION OF MENTALLY ILL WOMEN

The involuntary sterilization of mentally ill women can be traced back to the eugenics movement beginning in the early 1900s. This part provides an overview of the movement to demonstrate how involuntary sterilization blatantly disregards the rights of mentally ill women. Part II.A provides an overview of the early eugenics movement. Part II.B examines the peak of the eugenics movement. Last, Part II.C explains the reasons for the eugenics movement's decline.

#### A. EARLY HISTORY OF EUGENICS

Eugenics is "the science of improving the qualities of the human race by the careful selection of parents." The term "eugenics" derives "from the Greek word meaning 'well born." Early eugenicists believed that "mental retardation, mental illness and criminality were incurable hereditary defects, and that measures preventing reproduction by those with such undesirable characteristics would eliminate many social

<sup>&</sup>lt;sup>9</sup> Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL'Y 1, 1–2 (1996).

<sup>&</sup>lt;sup>10</sup> Eric M. Jaegers, Note, *Modern Judicial Treatment of Procreative Rights of Developmentally Disabled Persons: Equal Rights to Procreation and Sterilization*, 31 U. LOUISVILLE J. FAM. L. 947, 950 (1992–93).

<sup>&</sup>lt;sup>11</sup> Id. (quoting Rex Dunn, Comment, Eugenic Sterilization Statutes: A Constitutional Re-Evaluation, 14 J. FAM. L. 280, 281 n.6 (1975–1976)).

problems."<sup>12</sup> Positive eugenicists encouraged procreation among the population with desirable characteristics, while negative eugenicists discouraged reproduction by the "inferior" population.<sup>13</sup>

In the early 1900s, many people in the United States believed that the "human race [could] be gradually improved and social ills simultaneously eliminated through a program of selective procreation." <sup>14</sup> Eugenicists were responsible for disseminating this idea, urging that bad genes should not be passed on and that it was the government's responsibility to contain such genes. <sup>15</sup> Thus, state legislatures began passing statutes that legalized eugenic practices. <sup>16</sup> These laws required that individuals who were feebleminded, insane, epileptic, addicted to drugs, infected with disease, blind, deaf, deformed, or homeless be sterilized. <sup>17</sup> Legislatures rationalized these laws as a way "to protect and streamline society by preventing reproduction by those deemed socially or mentally inferior." <sup>18</sup>

#### B. PEAK OF THE EUGENICS MOVEMENT

By the middle of the twentieth century, compulsory statutes requiring sterilization for the feeble-minded and insane had spread to approximately thirty states, <sup>19</sup> illustrating a deepening disregard for the rights of the mentally ill. The pivotal case responsible for this trend, *Buck v. Bell*, involved the sterilization of an eighteen-year-old woman, Buck, under a Virginia law that permitted the "sterilization of mental defectives." Although Buck argued that the statute violated her Fourteenth Amendment due process and equal protection rights, the Court found the statute constitutional <sup>21</sup> because "[t]he State's interest in preventing the procreation of socially inadequate offspring outweighs the mentally handicapped person's right to control his or her own reproductive

<sup>&</sup>lt;sup>12</sup> Id.

<sup>&</sup>lt;sup>13</sup> Elyce Zenoff Ferster, *Eliminating the Unfit—Is Sterilization the Answer?*, 27 OHIO ST. L.J. 591, 592 (1996).

<sup>&</sup>lt;sup>14</sup> Lombardo, supra note 9, at 1.

<sup>&</sup>lt;sup>15</sup> Jana Leslie-Miller, From Bell to Bell: Responsible Reproduction in the Twentieth Century, 8 MD. J. CONTEMP. LEGAL ISSUES 123, 125 (1997).

<sup>&</sup>lt;sup>16</sup> *Id.*; Jaegers, *supra* note 10, at 951–52.

<sup>&</sup>lt;sup>17</sup> Jaegers, supra note 10, at 951–52 (quoting Dunn, supra note 11, at 283).

<sup>18</sup> Id. at 948.

<sup>19</sup> Id at 953

<sup>&</sup>lt;sup>20</sup> Buck v. Bell, 274 U.S. 200, 205-06 (1927).

<sup>&</sup>lt;sup>21</sup> Id at 205.

destiny.",22

Further, *Buck* is noteworthy for "Justice Holmes' unquestioning acceptance and positive endorsement of eugenic theories with no consideration of procreation as a right."<sup>23</sup> Justice Holmes, writing for the majority, stated that "[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."<sup>24</sup> He added that "[t]hree generations of imbeciles are enough,"<sup>25</sup> suggesting that Buck, her mother, and her child, were all feeble-minded. As a result, *Buck* tilted the scale in favor of eugenics over an individual's Fourteenth Amendment rights, <sup>26</sup> and gave legislatures and courts the justification they needed to enact and uphold statutes requiring the sterilization of mentally ill people.<sup>27</sup>

#### C. A DECLINE IN EUGENICS

Four main factors in the late 1930s and 1940s eroded support for the eugenics movement, and involuntary sterilization laws began to change. First, an increased scientific understanding of mental disabilities and mental illness led scientists to challenge the basis of eugenics. Evidence showed that there was "no specific biological factor" to account for most mental disabilities and illnesses, and that most inheritable mental deficiencies were transferred by parents who did not have mental

<sup>&</sup>lt;sup>22</sup> Jaegers, supra note 10, at 954.

<sup>&</sup>lt;sup>23</sup> Id. at 953; see also Beverly Horsburg, Schrodinger's Cat, Eugenics, and the Compulsory Sterilization of Welfare Mothers: Deconstructing an Old/New Rhetoric and Constructing the Reproductive Right to Natality for Low-Income Women of Color, 17 CARDOZO L. REV. 531, 578 (1996) (stating that cases have "established a fundamental right to reproductive autonomy").

<sup>&</sup>lt;sup>24</sup> Buck, 274 U.S. at 207.

<sup>25</sup> Id. at 207.

<sup>&</sup>lt;sup>26</sup> See Vanessa Volz, Note, A Matter of Choice: Women with Disabilities, Sterilization, and Reproductive Autonomy in the Twenty-First Century, 27 WOMEN'S RTS. L. REP. 203, 205 (2006).

<sup>&</sup>lt;sup>27</sup> Jaegers, *supra* note 10, at 953–54. For example, in 1975, the North Carolina Supreme Court held that a statute providing for the sterilization of the mentally ill was constitutional and "a valid and reasonable exercise of the [State's] police power." *In re* Sterilization of Moore, 221 S.E.2d 307, 313 (N.C. 1976). According to the court, North Carolina had a "compelling state interest" in "prevent[ing] the procreation of children who [would] become a burden on the State." *Id.* at 312–13.

<sup>&</sup>lt;sup>28</sup> Jaegers, supra note 10, at 954; Elizabeth S. Scott, Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy, 1986 DUKE L.J. 806, 809–14.

<sup>&</sup>lt;sup>29</sup> Jaegers, *supra* note 10, at 954; Scott, *supra* note 28, at 811 n.16, 814.

deficiencies themselves.<sup>30</sup> Such findings discredited eugenics theories and supported the idea that "undesirable characteristics" often result from nonhereditary environmental factors.<sup>31</sup>

Second, the constitutional protection of reproductive rights also contributed to the decline of the eugenics movement. As a result of the U.S. Supreme Court's 1973 decision in *Roe v. Wade*, courts must acknowledge "a [woman's] fundamental right to reproductive autonomy" when reviewing sterilization petitions of mentally ill women. This right has been reaffirmed in other cases. For example, in 1977, the Court held in *Carey v. Population Services International* that the "decision whether [...] to beget or bear a child is at the very heart of [the] cluster of constitutionality protected choices." Additionally, in 1992, the Court explained in *Planned Parenthood of Southeastern Pennsylvania v. Casey* that "[it] is settled now ... that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, as well as bodily integrity."

Third, judicial abuse of sterilization practices against those not proven to be mentally impaired contributed to the decline in support for eugenic practices.<sup>37</sup> For example, in *Buck v. Bell*, "Buck's status as an uneducated, poor woman from the South appeared to factor into the Court's analysis of her competency to bear and raise children as strongly as any identifiable mental disability." About fifty years after *Buck* was decided, however, "Buck was found to be of perfectly average intelligence," and she eventually married and mourned her inability to have children. Buck's attorney was allegedly conspiring with others in favor of the sterilization law. Unfortunately, Buck's situation

<sup>&</sup>lt;sup>30</sup> Jaegers, supra note 10, at 954-55; see also Rebecca M. Jill Gould, Note, Procreation: A Choice for the Mentally Retarded, 23 WASHBURN L.J. 359, 364 (1983-84).

<sup>&</sup>lt;sup>31</sup> Jaegers, supra note 10, at 955; see also Gould, supra note 30, at 364.

<sup>&</sup>lt;sup>32</sup> Scott, *supra* note 28, at 809; Volz, *supra* note 26, at 206–07.

<sup>&</sup>lt;sup>33</sup> Roe v. Wade, 410 U.S. 113 (1973).

<sup>&</sup>lt;sup>34</sup> Horburgh, *supra* note 23, at 578.

<sup>35</sup> Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977).

<sup>&</sup>lt;sup>36</sup> Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849 (1992) (citations omitted).

<sup>&</sup>lt;sup>37</sup> Jaegers, supra note 10, at 955.

<sup>&</sup>lt;sup>38</sup> Volz, *supra* note 26, at 205–06.

<sup>39</sup> Id. at 205

<sup>&</sup>lt;sup>40</sup> Catherine M. French, Protecting the "Right" to Choose of Women Who Are Incompetent: Ethical, Doctrinal, and Practical Arguments Against Fetal Representation, 56 CASE W. RES. L. REV. 511, 527 (2005).

was not an anomaly; there are many other instances in which an "allegedly mentally impaired person was sterilized due simply to a perceived threat to society."

Fourth, Adolph Hitler's use of eugenics theories, although inspired by America's "obsession" with eugenics in the early 1900s, 42 contributed to the downfall of the eugenics movement in the United States. 43 Initially, Hitler's government enacted the Eugenic Sterilization Law, which called for the sterilization of "all who were considered genetically inferior, such as the feeble-minded, drug addicts, epileptics, schizophrenics, the blind, and the physically deformed."<sup>44</sup> This resulted in the sterilization of 225,000 people within three years after its enactment, 45 and within a few more years, sterilization had evolved into the "open killing of all those who were not considered Aryan by Hitler, including Jews, the handicapped, homosexuals, and gypsies."46 Eugenics thereby became associated with "Hitler's master race ideology and the genocidal policies of the Nazis."47 The idea that the American eugenics movement served as a framework for Hitler's regime "jarred America's conscience and served as a valuable lesson about racism and the power of discrimination, especially [when viewed] within a scientific framework."48

As a result of these developments there was increased opposition to the eugenics movement and involuntary sterilization procedures in particular, which led to the repeal of many compulsory sterilization laws in the United States. <sup>49</sup> Involuntary sterilization of mentally ill women, however, did not completely cease.

<sup>&</sup>lt;sup>41</sup> Jaegers, supra note 10, at 956.

<sup>&</sup>lt;sup>42</sup> Kris W. Druhm, Comment, A Welcome Return to Draconia: California Penal Law 645, the Castration of Sex Offenders and the Constitution, 61 ALB. L. REV. 285, 287–88 (1997).

<sup>&</sup>lt;sup>43</sup> Jaegers, supra note 10, at 955.

<sup>&</sup>lt;sup>44</sup> Nicole Huberfeld, Recent Development, *Three Generations of Welfare Mothers Are Enough: A Disturbing Return to Eugenics in the Recent "Workfare" Law*, 9 UCLA WOMEN'S L.J. 98, 119 (1998).

<sup>&</sup>lt;sup>45</sup> *Id*.

<sup>46</sup> Id. at 119-20.

<sup>&</sup>lt;sup>47</sup> *Id.* at 120.

<sup>&</sup>lt;sup>48</sup> Leslie-Miller, supra note 15, at 126.

<sup>&</sup>lt;sup>49</sup> Gould, *supra* note 30, at 364.

# III. MODERN CONTEXT FOR STERILIZATION OF MENTALLY ILL WOMEN

Although a few states banned sterilization of mentally ill women, most states still allow it with prior judicial approval. Today, sterilization of mentally ill women is "driven by parents, guardians, and social service providers who are uneasy...[that] they will incur the additional burden of caring for the offspring. Indeed, parents and guardians of mentally ill women often petition for abortion or sterilization citing financial instability as a major consideration.

Modern courts support sterilization statutes for a similar reason; justifying sterilization on the assumption that because mentally ill women are "incapable of adequate parenting," their children will "inevitably be a financial burden on the state." Thus, although "judicial approval may be considered the most fundamental procedural protection prerequisite for forced sterilization today," ironically, such approval may actually hinder the rights of mentally ill women.

This part evaluates the current status of sterilization of mentally ill women. Part III.A discusses how courts continue to authorize involuntary sterilizations and abortions based on eugenic motivations, and Part III.B examines the judicial abuse that exists in granting such procedures.

## A. EUGENIC MOTIVATIONS STILL PERSIST

Eugenics seems to be a subtle ideology that has disguised itself in various ways. 55 While modern courts do not cite eugenics as reason for sterilizing mentally ill women, 56 the eugenics movement remains a significant legal influence. 57

Even though the "eugenic rhetoric might have declined," the

<sup>&</sup>lt;sup>50</sup> Volz, *supra* note 26, at 208.

<sup>&</sup>lt;sup>51</sup> Horsburgh, *supra* note 23, at 572.

<sup>&</sup>lt;sup>52</sup> Roberta Cepko, *Involuntary Sterilization of Mentally Disabled Women*, 8 BERKELEY WOMEN'S L.J. 122, 126 (1993).

<sup>&</sup>lt;sup>53</sup> Id.

<sup>&</sup>lt;sup>54</sup> Volz, *supra* note 26, at 208.

<sup>55</sup> Mary Ziegler, Reinventing Eugenics: Reproductive Choice and Law Reform After World War II, 14 CARDOZO J.L. & GENDER 319, 350 (2008).

<sup>&</sup>lt;sup>56</sup> See Horsburgh, supra note 23, at 571.

<sup>&</sup>lt;sup>57</sup> Ziegler, *supra* note 55, at 350.

"eugenic motivations and eugenic laws did not." Lawmakers and proeugenic organizations have disassociated themselves from the early eugenics movement and its negative connotations, by "reshaping the very idea of eugenic reform" and "invoking and redefining the idea of reproductive choice." Involuntary sterilization justifications for mentally ill women are now "couched in terms designed to make sterilization seem more palatable, ostensibly protecting the personal rights of the women involved."

Currently, a woman's "right to be sterilized is encompassed within [her] constitutional interest in reproductive autonomy." Thus, a court can use a woman's right to procreate against her by suggesting that an incompetent woman would choose to undergo a sterilization procedure if she were competent. In this way, the court is substituting its own volition for that of the woman's.

#### B. JUDICIAL ABUSE

Judges abuse their authority by ignoring statutory provisions for granting sterilization and abortion petitions. This abuse is seen in *In re Guardianship of Moe*, in which, as previously discussed, a Massachusetts trial judge failed to adhere to a Massachusetts statute by ordering a mentally ill woman to undergo an abortion and sterilization procedure. The judge ignored the guardian ad litem's assessment of the abortion and ordered that the woman be sterilized without notice. Even though the appellate court overturned this decision, the trial court's order demonstrates a judicial disregard for the reproductive rights.

Similarly, in Stump v. Sparkman, a "somewhat retarded" woman, for whom a sterilization procedure had been ordered, brought a civil rights

<sup>&</sup>lt;sup>58</sup> *Id*.

<sup>&</sup>lt;sup>59</sup> See supra Part II.C.

<sup>&</sup>lt;sup>60</sup> Ziegler, supra note 55, at 350.

<sup>61</sup> Horsburgh, supra note 23, at 569-70.

<sup>62</sup> Id. at 570.

<sup>63</sup> Id. at 570-71.

<sup>64</sup> Id

<sup>65</sup> In re Guardianship of Moe, 960 N.E.2d 350, 354-55 (Mass. App. Ct. 2012).

<sup>66</sup> Id. at 353.

<sup>67</sup> Id. at 355.

action against the judge who ordered it.<sup>68</sup> Although the judge approved the petition without notice to the woman, without appointing a guardian ad litem, and without giving the petition a docket number or placing it on file in the clerk's office, as required by statute, the Court found the judge immune from liability.<sup>69</sup> Such judicial abuse demonstrates that involuntary sterilizations still persist, which substantially undermines the reproductive rights of mentally ill women.

#### IV. REPRODUCTIVE RIGHTS

Reproductive rights are implicit in the constitutional right to privacy and should be granted to all women, regardless of whether they are mentally ill. To Reproductive rights include the right to procreate and the right not to procreate. Hentally ill women, however, are often denied their reproductive right to procreate through involuntary abortions and sterilization. This section provides an overview of the constitutional right to privacy and argues that involuntary abortions and sterilization violate a mentally ill woman's constitutional rights. Part IV.A describes the development of the constitutional right to privacy. Part IV.B examines the conflict between the right to and the right not to procreate. Last, Part IV.C highlights the lack of protection for a mentally ill woman's right to procreate.

#### A. RIGHT TO PRIVACY

During the 1960s and 1970s, the U.S. Supreme Court expanded the Fourteenth Amendment's right to privacy to include a woman's right to control her own reproductive behavior. In *Griswold v. Connecticut*, the Court held a state statute barring the use of contraceptives was unconstitutional because it impinged upon the right of marital privacy. 73

<sup>&</sup>lt;sup>68</sup> Stump v. Sparkman, 435 U.S. 349, 353-55 (1978).

<sup>69</sup> Id. at 360, 364.

<sup>&</sup>lt;sup>70</sup> Maura McIntyre, Note, Buck v. Bell and Beyond: A Revised Standard to Evaluate the Best Interests of the Mentally Disabled in the Sterilization Context, 2007 U. ILL. L. REV. 1303, 1305; Scott, supra note 28, at 813.

<sup>&</sup>lt;sup>71</sup> Scott, *supra* note 28, at 813 (Reproductive rights include the right "to avoid unwanted pregnancy through abortion, contraception, and (for adults) sterilization," as well as the right to procreate.).

<sup>&</sup>lt;sup>72</sup> McIntyre, *supra* note 70, at 1306.

<sup>&</sup>lt;sup>73</sup> Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

The Court explained that the state may not control or prohibit activities that "sweep unnecessarily broadly and thereby invade the area of protected freedoms."<sup>74</sup>

Additionally, in *Eisenstadt v. Baird*, the Supreme Court invalidated a state statute that permitted only married people to obtain contraceptives; explaining that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." In *Roe v. Wade*, as previously mentioned, the Court went further, establishing the right to have an abortion as "fundamental," implicit in the right to privacy. As such, the government could only limit the right if it had a "compelling state interest."

#### B. A COLLISION OF REPRODUCTIVE RIGHTS

As the discussion of *Griswold*, <sup>78</sup> *Eisenstadt*, <sup>79</sup> and *Roe* <sup>80</sup> above illustrates, the Supreme Court has recognized that women have the right not procreate inasmuch as they have the right to procreate. <sup>81</sup> A woman's right to privacy protects her right to have children, as well as her right not to have children through abortion and contraception, including sterilization. <sup>82</sup> As some scholars have explained, "the right not to procreate and the right to procreate are equal components of a larger right of procreative choice." <sup>83</sup> These rights belong to all individuals

 $<sup>^{74}</sup>$  *Id.* at 485 (quoting NAACP v. Alabama *ex. rel.* Flowers, 377 U.S. 288, 307 (1964)) (internal quotation marks omitted).

<sup>&</sup>lt;sup>75</sup> Eisenstadt v. Baird, 405 U.S. 438, 453–55 (1972) (emphasis added).

<sup>&</sup>lt;sup>76</sup> Roe v. Wade, 410 U.S. 113, 152–53 (1973) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937), overruled on other grounds by Benton v. Maryland, 395 U.S. 784 (1969)) (internal quotation marks omitted).

<sup>&</sup>lt;sup>77</sup> Id. at 155 (quoting Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627 (1969)). But see Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 837 (requiring use of the "undue burden" standard in determining whether the government can limit reproductive rights).

<sup>&</sup>lt;sup>78</sup> Griswold, 381 U.S. at 479.

<sup>&</sup>lt;sup>79</sup> Eisenstadt, 405 U.S. at 438.

<sup>80</sup> Roe, 410 U.S. at 113.

<sup>&</sup>lt;sup>81</sup> Estate of C.W., 640 A.2d 427, 441 (1991) (Johnson, J. dissenting).

 $<sup>^{82}</sup>$  Note, The Evolution of the Right to Privacy After Roe v. Wade, 13 Am. J. L. & MED. 368, 483 (1987).

<sup>83</sup> Jaegers, supra note 10, at 977.

regardless of their mental competency.<sup>84</sup>

The intersection of the right to procreate and the right not to procreate is problematic for courts. When a court orders that a mentally ill woman be sterilized or undergo an abortion, it denies her of her fundamental right to procreate. Likewise, when a court does not allow a mentally ill woman to consent to an abortion or sterilization procedure, it denies her of her fundamental right not to procreate. Mentally ill women should not be precluded from either the right to procreate or the right not to procreate. Thus, courts should look at these rights in light of the more "comprehensive right of procreative choice" and uphold the right that better protects the individual's interests.

#### C. DENIAL OF THE RIGHT TO PROCREATE FOR MENTALLY ILL WOMEN

Even though current law claims to protect women's reproductive rights, the law primarily protects the right not to procreate rather than the right to procreate. This is likely because a woman's "right to bear children... has seldom been challenged." For mentally ill women, however, the right to procreate is an important issue as they are often forced to undergo involuntary abortions or sterilization. 91

Because "[t]he power to consent is conferred on persons other than the woman directly affected," courts often authorize abortions and sterilization against the wishes of mentally ill women, which denies them of their fundamental right to bear children. Nevertheless, the reproductive rights movement focuses on the "choice" involved in abortion and overlooks the reproductive rights of mentally ill women who want to have a child, but have "systematically been denied that right." 94

Similarly, laws that prohibit mentally ill women from undergoing a

<sup>84</sup> Estate of C.W., 640 A.2d at 441.

<sup>85</sup> Jaegers, supra note 10, at 949.

<sup>&</sup>lt;sup>86</sup> See id.

<sup>&</sup>lt;sup>87</sup> Id.

<sup>88</sup> Id. at 949-50.

<sup>89</sup> Volz, *supra* note 26, at 211.

<sup>90</sup> Id

<sup>&</sup>lt;sup>91</sup> *Id.* at 211–12.

<sup>&</sup>lt;sup>92</sup> Horsburgh, *supra* note 23, at 570.

<sup>93</sup> See Jaegers, supra note 10, at 949-50.

<sup>94</sup> Volz, *supra* note 26, at 213.

sterilization or abortion procedure deprive such women of their right not to bear children.<sup>95</sup> It is therefore important to determine appropriate standards for granting such petitions for mentally ill women so that the procedures remain an option, but do not become coercive.

#### V. DETERMINING COMPETENCY

Before a court decides whether to authorize a mentally ill woman's petition for sterilization or an abortion, the court must determine whether the mentally ill woman is capable of making her own reproductive decisions. <sup>96</sup> This part is divided into four sections and frames the issue of competency to make reproductive decisions. Part V.A defines and distinguishes capacity from competency. Part V.B evaluates the degree of competency required to make reproductive decisions. Part V.C examines how competency determinations are made. Last, Part V.D discusses some of the implications of competency determinations.

#### A. DEFINING CAPACITY AND COMPETENCY

Capacity "refers to an individual's actual ability to understand, appreciate, and form a relatively rational intention with regard to some act." It is determined by an individual's ability to function in the present, not how the individual will function in the future. See Capacity also takes into account an individual's "ability for self-care, cognition, risk of harm, and underlying conditions, such as mental [illness]." By comparison, competency is "a legal determination of capacity." So, if an individual fails a legal standard of capacity, courts may find that person incompetent and bar that person from making certain decisions.

Further, competency can vary depending on the individual's level of impairment and the specific decision to be made. <sup>102</sup> For example, a mildly mentally ill person may have the capacity to make most of the same

<sup>95</sup> Conservatorship of Valerie N., 707 P.2d 760, 771-72 (1985).

<sup>&</sup>lt;sup>96</sup> Jaegers, supra note 10, at 961.

<sup>&</sup>lt;sup>97</sup> Steven B. Bisbing, *Competency and Capacity: A Primer*, in LEGAL MEDICINE 325, 325 (Am. C. of Legal Med. ed., 7th ed. 2007).

<sup>&</sup>lt;sup>98</sup> French, *supra* note 40, at 516–17.

<sup>99</sup> Id. at 517.

<sup>&</sup>lt;sup>100</sup> Id.

<sup>&</sup>lt;sup>101</sup> *Id*.

<sup>102</sup> Id.; Scott, supra note 28, at 836.

legally relevant decisions as a non-mentally ill person, despite a slight difference in impairment. Additionally, "a given individual might be competent to make some decisions but incompetent to make others." For example, a person could be legally incompetent to make financial decisions, but legally competent to make medical decisions. 105

## B. EVALUATING COMPETENCY FOR REPRODUCTIVE DECISIONS

A mental illness diagnosis should not equate to an automatic determination of incompetence. This is particularly important when it comes to reproductive decisions, regardless of whether the individual is incompetent, because the fact that a guardian is appointed for some reasons does not mean that the individual is incompetent to make her own reproductive decisions. To avoid the automatic determination pitfall, medical experts must evaluate the individual's capacity to give or withhold consent to sterilization or an abortion before evaluating her competency to make reproductive decisions. 108

For a mentally ill woman to have the capacity to consent in decisions regarding sterilization and abortion, she must be competent to make reproductive and medical decisions. To be competent to make reproductive decisions, a woman must have an "understanding of reproductive functions and the relationship between sexual intercourse, pregnancy, and childbirth." Additionally, she must be capable of making the decision to have a child or not to have a child. Capacity to make such a decision requires that the mentally ill woman clearly and consistently "express a stable preference" either to have or not to have a child. To be competent to make medical decisions, the woman must be capable of giving or withholding informed consent for an abortion or sterilization procedures, understand "the nature and purpose of the

<sup>103</sup> Scott, *supra* note 28, at 836.

<sup>&</sup>lt;sup>104</sup> Id.

<sup>&</sup>lt;sup>105</sup> French, *supra* note 40, at 517.

<sup>&</sup>lt;sup>106</sup> Id. at 516.

<sup>&</sup>lt;sup>107</sup> Scott, *supra* note 28, at 836.

<sup>&</sup>lt;sup>108</sup> Michelle Oberman, Thirteen Ways of Looking at Buck v. Bell: Thoughts Occasioned by Paul Lombardo's Three Generations, No Imbeciles, 59 J. LEGAL EDUC. 357, 390 (2010).

<sup>109</sup> See Scott, supra note 28, at 840.

<sup>110</sup> Id. at 820.

<sup>111</sup> Id. at 840.

<sup>112</sup> Id. at 838.

procedure, its risks and benefits, and its consequences in comparison with available alternatives," and communicate her decision about the procedure verbally or nonverbally. 113

#### C. DETERMINING COMPETENCY

A judge must determine whether a mentally ill woman is competent to make decisions regarding sterilization and abortion. To determine competency, some courts appoint three impartial experts in the field of mental health, including at least one psychologist or psychiatrist to evaluate the individual's competency and testify at the hearing. Further, if an individual is deemed incompetent, some laws require that the experts present evidence of the individual's incapacity to give or withhold consent for abortion or sterilization procedures. The judge may also meet with the individual separately "to obtain his own impressions of competency." Last, many states require that it be proven "by clear, cogent and convincing evidence that the individual is . . . incapable of making . . . her own decision about sterilization, and . . . [is also] unlikely to develop sufficiently to make an informed judgment . . . in the foreseeable future."

#### D. IMPLICATIONS OF A COMPETENCY DETERMINATION

If a mentally ill woman is deemed competent to make reproductive and medical decisions, she should be allowed to consent or withhold consent for an abortion or sterilization procedure and a court should abide by her decision. A competent mentally ill woman "should be free to weigh whatever other interests are subjectively important to her, regardless of what an objective decision maker would consider to be in her

<sup>113</sup> Id. at 838-39; French, supra note 40, at 517.

<sup>&</sup>lt;sup>114</sup> Miranda K. Pollak, Article, New Illinois Legislation Regulating Sterilization of Wards: Does It Provide Adequate Protection?, 13 DEPAUL J. HEALTH CARE L. 237, 246 (2010).

<sup>115</sup> See, e.g., CONN. GEN. STAT. ANN. § 45a-695 (West 2011).

<sup>&</sup>lt;sup>116</sup> See, e.g., ME. REV. STAT. ANN. tit. 34-B, § 7008(3) (1988).

<sup>&</sup>lt;sup>117</sup> See, e.g., CONN. GEN. STAT. ANN. § 45a-695 (West 2011).

<sup>&</sup>lt;sup>118</sup> In re Terwilliger, 450 A.2d 1376, 1383 (Pa. Super. Ct. 1982); see also McIntyre, supra note 70, at 1317–18.

 $<sup>^{119}</sup>$  In re Guardianship of Hayes, 608 P.2d 635, 641 (Wash. 1980); see also Volz, supra note 26, at 208.

<sup>&</sup>lt;sup>120</sup> See Scott, supra note 28, at 840.

best interest."<sup>121</sup> If a court determines that a mentally ill woman is incompetent to make reproductive and medical decisions, however, the court "should facilitate her reproductive choice through a surrogate who can consent to the medical procedure for her."<sup>122</sup>

## VI. ALTERNATE DECISION MAKER FOR THE MENTALLY INCOMPETENT

An alternate decision maker for a mentally ill woman should only be appointed if she is deemed incompetent. <sup>123</sup> This part is divided into three subparts. Part VI.A describes the importance of an alternate decision maker if a mentally ill woman is deemed incompetent to make her own reproductive and medical decisions. Part VI.B compares guardians and guardians ad litem in an effort to determine which one is better suited to represent the best interests of a mentally incompetent woman. Part VI.C evaluates the power that judges have in being the final decision maker and urges that judges act more as a safety mechanism rather than actively using their discretion in the decision-making process.

#### A. IMPORTANCE OF AN ALTERNATE DECISION MAKER

A categorical exclusion of sterilization or abortions for mentally incompetent women deprives such women of "their constitutionally protected procreative rights." For many courts, appointing an alternate decision maker is the only way to provide incompetent individuals with the constitutional right to procreate, a right that is granted to all competent individuals. 125

In *In re Grady*, the court held that appointing a surrogate decision maker on behalf of a mentally incompetent woman is critical to the woman's constitutional interests. <sup>126</sup> In *Conservatorship of Valerie N*., the

<sup>&</sup>lt;sup>121</sup> Scott, *supra* note 28, at 840. For example, a competent mentally ill woman should be allowed to have a child even if a medical condition would make it risky. *Id.* 

<sup>&</sup>lt;sup>122</sup> Id.

<sup>123</sup> Id.

<sup>&</sup>lt;sup>124</sup> Katie Barnhill, Comment, Substituted Judgment and Best Interests Analysis: Protecting the Procreative Medical Rights of the Mentally Incompetent in Texas, 50 Hous. L. Rev. 157, 182 (2012).

<sup>&</sup>lt;sup>125</sup> Norman L. Cantor, The Relation Between Autonomy-Based Rights and Profoundly Mentally Disabled Persons, 13 Annals Health L. 37, 57 (2004).

<sup>&</sup>lt;sup>126</sup> In re Grady, 426 A.2d 467, 480-81 (N.J. 1981).

court noted that "[t]rue protection of procreative choice can be accomplished only if the state permits the court-supervised substituted judgment of the conservator to be exercised on behalf of a conservatee who is unable to personally exercise this right." Having an alternate decision maker for mentally incompetent women therefore extends the right to choose whether to undergo sterilization and abortion procedures to all women. 128

### B. ALTERNATE DECISION MAKER: GUARDIAN VS. GUARDIAN AD LITEM

If a mentally ill woman is deemed incompetent to make decisions regarding sterilization and abortion procedures, either a guardian or a guardian ad litem should be allowed to act as the alternate decision maker and give or withhold consent for the procedures. <sup>129</sup> It is therefore important to evaluate the effectiveness of guardians compared to guardians ad litem for the role of the alternate decision maker.

The guardian of a mentally ill woman is usually her parent. <sup>130</sup> In *In re Barbara C.*, the court allowed the father of a twenty-five-year-old mentally impaired woman to consent to an abortion because she was incapable of giving consent herself. <sup>131</sup> The approach taken in *In re Barbara C.* is similar to parents providing consent in place of their minor children. <sup>132</sup> On the one hand, parents of mentally incompetent women may be in the best position to make sterilization and abortion determinations for their children because they have their children's best interest in mind. <sup>133</sup> Additionally, since most mentally incompetent women are dependent on their guardians, the guardians would most likely be responsible for any children that are born. <sup>134</sup> Thus, allowing guardians to make sterilization and abortion determinations for their mentally incompetent dependents may be most reasonable.

<sup>&</sup>lt;sup>127</sup> Conservatorship of Valerie N., 707 P.2d 760, 773 (Cal. 1985).

<sup>&</sup>lt;sup>128</sup> See French, supra note 40, at 532–33.

<sup>129</sup> See id.

<sup>130</sup> Barnhill, supra note 124, at 183.

<sup>&</sup>lt;sup>131</sup> In re Barbara C., 474 N.Y.S.2d 799, 800-01 (N.Y. App. Div. 1984).

<sup>132</sup> Barnhill, supra note 124, at 182.

<sup>&</sup>lt;sup>133</sup> William A. Krais, Note and Comment, *The Incompetent Developmentally Disabled Person's Right of Self-Determination: Right-to-Die, Sterilization and Institutionalization*, 15 AM. J. L. AND MED. 333, 357–58 (1989).

<sup>134</sup> Id

On the other hand, appointing the guardian as the alternate decision maker for a mentally incompetent woman creates significant potential for abuse. Unlike other medical procedures for which a guardian may consent, a guardian's interests for consenting to sterilization and abortion procedures may not be identical to those of his or her child. For instance, guardians may prefer sterilization and abortion "because they do not want to raise their children's accidental offspring or . . . deal with the challenges of feminine hygiene for a menstruating ward." Due to this potential for abuse, almost all laws presume that there is a conflict of interest between guardians and their children with respect to sterilization and abortion decisions. <sup>138</sup>

By comparison, a guardian ad litem is more disinterested. <sup>139</sup> A guardian ad litem is court appointed, and his or her authority is "limited" to determinations of sterilization and abortion procedures. <sup>140</sup> Because guardians ad litem are disinterested parties, there is presumably no conflict of interest. <sup>141</sup> A guardian ad litem, however, is likely to be unfamiliar with the woman's preferences as there is no long-standing relationship. <sup>142</sup> As such, guardians ad litem might make impersonal decisions that inadequately reflect the needs and wishes of the mentally ill woman. <sup>143</sup> Thus, neither guardians nor guardians ad litem, alone, would be the most appropriate alternate decision maker.

#### C. THE APPROPRIATE DECISION MAKER

Judicial involvement is imperative in sterilization and abortion decisions because judges "are usually without direct interest in the particular controversy," which allows them to "provide an objective perspective." Although the judge may consider the opinions of the guardian and guardian ad litem, he or she should be "the ultimate arbiter"

<sup>&</sup>lt;sup>135</sup> Barnhill, supra note 124, at 183.

<sup>&</sup>lt;sup>136</sup> In re Guardianship of Hayes, 608 P.2d 635, 640 (Wash. 1980) (en banc).

<sup>137</sup> Barnhill, supra note 124, at 183.

<sup>&</sup>lt;sup>138</sup> Jaegers, supra note 10, at 962.

<sup>&</sup>lt;sup>139</sup> In re Guardianship of Hayes, 608 P.2d at 640.

<sup>&</sup>lt;sup>140</sup> See French, supra note 40, at 520.

<sup>&</sup>lt;sup>141</sup> See Susan Goldberg, Article, Of Gametes and Guardians: The Impropriety of Appointing Guardians Ad Litem for Fetuses and Embryos, 66 WASH. L. REV. 503, 505, 507 (1991).

<sup>&</sup>lt;sup>142</sup> See Volz, supra note 26, at 208.

<sup>143</sup> See id.

<sup>&</sup>lt;sup>144</sup> Volz, *supra* note 26, at 208.

for abortion and sterilization procedure petitions. <sup>145</sup> It is also important, however, to acknowledge that "judges have their own prejudices and shortcomings," and judicial discretion has been abused in sterilization authorizations. <sup>146</sup> Thus, due to the "sordid past" relating to the sterilization of mentally ill women, <sup>147</sup> judges should have limited discretion. The judge's proper role should be to serve as a "safety mechanism" to protect mentally ill women from coerced sterilizations and abortions. <sup>148</sup>

#### VII. CURRENT STANDARDS

Three different standards are currently used to determine whether to grant a sterilization petition to a mentally ill woman who has been "deemed incompetent for the purpose of giving informed consent": (1) the substituted judgment standard, (2) the mandatory criteria rule, and (3) the best interest standard. All three standards require court approval as a way to "protect the interests of the mentally disabled." Although each standard has its merits, none are ideal because of immense deficiencies. 151

#### A. THE SUBSTITUTED JUDGMENT STANDARD

The substituted judgment standard requires "the decision[]maker to 'step into the shoes' of the incompetent in order to make a decision that subjectively reflects what the individual's values and preferences would be were she competent." This standard generally applies to cases where a person communicated a desire regarding sterilization while competent and is now incompetent. 153

An advantage of this standard is that it allows mentally ill women "to exercise their rights in spite of their mental limitations by focusing on the

<sup>&</sup>lt;sup>145</sup> In re A.W., 637 P.2d 366, 370 (Colo. 1981).

<sup>&</sup>lt;sup>146</sup> Volz, supra note 26, at 208; see supra Part III.B.

<sup>&</sup>lt;sup>147</sup> In re Grady, 426 A.2d 467, 472 (N.J. 1981).

<sup>&</sup>lt;sup>148</sup> Volz, *supra* note 26, at 208.

<sup>&</sup>lt;sup>149</sup> McIntyre, *supra* note 70, at 1311–12.

<sup>150</sup> Id. at 1312.

<sup>151</sup> See id.

<sup>&</sup>lt;sup>152</sup> Scott, *supra* note 28, at 823–24 n.56 (citing *In re* Quinlan, 355 A.2d 647, 664 (N.J. 1976)).

<sup>&</sup>lt;sup>153</sup> Robert Randal Adler, Notes and Comments, Estate of C.W.: A Pragmatic Approach to the Involuntary Sterilization of the Mentally Disabled, 20 NOVA L. REV. 1323, 1344 (1996).

decision they *would* make rather than the decision they *should* make."

The substituted judgment standard is believed to reflect the mentally ill woman's wishes better than the other standards. 155

The substituted judgment standard, however, is not without limitations. For example, there are situations where an incompetent individual's actual wishes may not be known. When this happens, the substituted judgment standard requires the alternate decision maker to discern the preferences of an individual who may not have expressed any preferences. This subjectivity leaves open the possibility that the alternate decision maker will interject his or her own values or preferences into the sterilization decision. The standard preferences into the sterilization decision.

Additionally, individuals can change their mind, so "[e]ven if the incompetent individual had made her subjective feelings clear before becoming incompetent, the validity of those clear feelings may have been lost due to the significant passage of time between her expressions and the time of the sterilization decision." For instance, a young girl may want to become a mother, but decide not to have children later in life. Thus, as time passes, it becomes harder "for [an alternate] decision maker to effectively step into the incompetent individual's shoes and make the decision that she would have made for herself." 161

As such, the substituted judgment standard can create confusion for courts. <sup>162</sup> Courts often end up "filling the gaps in [their] knowledge about the incompetent by taking into account what most persons are likely to do in a similar situation." <sup>163</sup> Substituted judgment therefore creates a sort of "fictional competency" that gives mentally incompetent people the power to make decisions that may not match their actual desires. <sup>164</sup>

<sup>&</sup>lt;sup>154</sup> McIntyre, *supra* note 70, at 1313 (emphasis added).

<sup>155</sup> Id

<sup>&</sup>lt;sup>156</sup> In re Boyd, 403 A.2d 744, 751 (D.C. 1979); Krais, supra note 133, at 344.

<sup>&</sup>lt;sup>157</sup> Scott, *supra* note 28, at 823 n.56.

<sup>158</sup> McIntyre, supra note 70, at 1313.

<sup>159</sup> Steven J. Cleveland, Note, Sterilization of the Mentally Disabled: Applying Error Cost Analysis to the "Best Interest" Inquiry, 86 GEO. L.J. 137, 140-41 (1997).

<sup>160</sup> McIntyre, supra note 70, at 1314.

<sup>&</sup>lt;sup>161</sup> Id. (citing Cleveland, supra note 159, at 141).

<sup>162</sup> Barnhill, supra note 124, at 185.

<sup>&</sup>lt;sup>163</sup> In re Boyd, 403 A.2d 744, 751 (D.C. 1979).

<sup>&</sup>lt;sup>164</sup> Walter M. Weber, Substituted Judgment Doctrine: A Critical Analysis, 1 ISSUES L. & MED. 131, 141 (1985).

#### B. THE MANDATORY CRITERIA RULE

Under the mandatory criteria rule, before ordering that a mentally incompetent woman be sterilized, a judge must find by clear, cogent, and convincing evidence that the woman needs contraception, and that there are no alternatives to sterilization. This standard is rigid and places a very high burden on the petitioner. <sup>166</sup>

The mandatory criteria rule creates "major impediments" to sterilization. 167 First, for the judge to find that the woman needs contraception, the judge must determine that she is physically capable of reproduction and that she is likely to be sexually active. 168 Additionally, many mandatory criteria rules require evaluation of the individual's potential as a parent, including consideration of her age and education. 169 Second, for the judge to find that there are no alternatives to sterilization, the judge must evaluate whether "sterilization is medically indicated as the best and last resort for the individual"—for example, whether other "less drastic forms of birth control are inapplicable or unworkable." 170

Proponents believe that the stringent standards of the mandatory criteria rule better protect the privacy interests of the mentally ill individual while properly restricting judicial discretion. This rule limits judges by placing a heavy burden of proof on the petitioner and requiring specific factual findings. Further, the mandatory criteria rule is easy to apply because it incorporates only a few factual variables. 173

For mentally incompetent women who desire sterilization, however, fulfilling these requirements can be a substantial hurdle. <sup>174</sup> For instance, "the heavy burden placed on the petitioner... 'overvalues' the individual's right to procreate... at the expense of the equally significant right not to procreate." <sup>175</sup> Additionally, the mandatory criteria rule does

<sup>&</sup>lt;sup>165</sup> McIntyre, *supra* note 70, at 1314–15.

<sup>166</sup> Id. at 1315.

<sup>&</sup>lt;sup>167</sup> Jaegers, supra note 10, at 963.

<sup>&</sup>lt;sup>168</sup> Id. at 963-64.

<sup>169</sup> Id. at 963.

<sup>&</sup>lt;sup>170</sup> Id.

<sup>&</sup>lt;sup>171</sup> McIntyre, supra note 70, at 1315.

<sup>172</sup> Id

<sup>&</sup>lt;sup>173</sup> Scott, *supra* note 28, at 822 n.53.

<sup>&</sup>lt;sup>174</sup> Jaegers, *supra* note 10, at 965.

<sup>&</sup>lt;sup>175</sup> McIntyre, supra note 70, at 1316.

not consider important factors like the potential trauma that could result from the pregnancy and childbirth. <sup>176</sup> The rule also "makes sterilization seem so undesirable that courts are likely to deny petitions for sterilization even in situations where the procedure should be performed." <sup>177</sup>

#### C. THE BEST INTERESTS STANDARD

The best interests standard empowers a court to independently decide what the mentally incompetent person should do based on what would most benefit that person. <sup>178</sup> In *In re Terwilliger*, the court stated that to decide "whether to authorize sterilization, a court should consider *only* the best interest of the incompetent person, not the interests or convenience of the individual's parents, the guardian or of society." <sup>179</sup>

The best interests standard is the most flexible because "[r]ather than requiring specific findings, ... [it] directs judges to consider certain criteria in order to determine whether sterilization is in the mentally disabled individual's best interest." The *In re Grady* court outlined nine factors that a court should consider when making a best interests determination regarding sterilization. <sup>181</sup> These factors include: (1) whether the incompetent person can get pregnant; (2) whether the incompetent person will experience trauma or psychological damage through pregnancy, giving birth, or as a result of being sterilized; (3) whether the incompetent individual will likely engage in sexual activity; (4) the incompetent person's current and likely future understanding of reproduction or contraception; (5) the possibility of less drastic means of contraception based on availability and the individual's situation; (6) the appropriateness of sterilization now rather than in the future; (7) whether the incompetent person can care for a child, now or in the future; (8) the likelihood of medical advances that may improve the individual's condition or create less drastic sterilization procedures; and (9) a demonstration that sterilization is being sought in good faith and that the primary concern is the best interest of the incompetent person. <sup>182</sup> The

<sup>&</sup>lt;sup>176</sup> Id.

<sup>177</sup> Id

<sup>&</sup>lt;sup>178</sup> Barnhill, *supra* note 124, at 185; Weber, *supra* note 164, at 138.

<sup>&</sup>lt;sup>179</sup> In re Terwilliger, 450 A.2d 1376, 1382 (Pa. Super. Ct. 1982) (emphasis in original).

<sup>&</sup>lt;sup>180</sup> McIntyre, supra note 70, at 1317.

<sup>&</sup>lt;sup>181</sup> In re Grady, 426 A.2d 467, 483 (1981).

 $<sup>^{182}</sup>$  Id.

Terwilliger court also indicated that these factors are not exclusive and that they should be weighed based on the particular facts and circumstances of each case. 183

Since the only interest to be considered is the best interest of the incompetent person, this analysis is said to produce a "just and compassionate result." Proponents of the best interests standard believe that it provides "a fair evaluation of the individual's best interests and properly protects the individual's constitutional right to privacy." Nonetheless, this standard deprives mentally incompetent women of the "decision[] making autonomy that is more present with the doctrine of substituted judgment." 186

Further, the best interests standard draws criticism because of the broad discretion that judges have in weighing a non-exhaustive list of factors. This leeway "opened the door to a great deal of judicial manipulation in the application of the best interest[s] standard" in the past, and because courts use different approaches, their decisions are not always consistent. For instance, some state courts require that only certain factors be weighed while other courts require that certain factors be specifically met. 189

#### VIII. RESOLUTION

Due to the numerous shortcomings of the substituted judgment standard, the mandatory criteria rule, and the best interests standard, and the fact that none of the rules are specifically tailored to abortion petitions, a revised standard is necessary to ensure that both sterilization and abortion petitions for mentally ill women are properly decided. This part explores and advocates for the adoption of a revised standard with respect to sterilization, and recommends that abortion procedures also be subject to a revised standard. Part VIII.A outlines the revised standard articulated in *Estate of K.E.J.* as it applies to sterilizations. Part VIII.B evaluates the revised substituted judgment standard and proposes that abortion

<sup>&</sup>lt;sup>183</sup> Terwilliger, 450 A.2d at 1384.

<sup>&</sup>lt;sup>184</sup> Krais, *supra* note 133, at 356.

<sup>&</sup>lt;sup>185</sup> McIntyre, *supra* note 70, at 1319.

<sup>&</sup>lt;sup>186</sup> Barnhill, *supra* note 124, at 186.

<sup>&</sup>lt;sup>187</sup> See McIntyre, supra note 70, at 1317.

<sup>&</sup>lt;sup>188</sup> Id.

<sup>&</sup>lt;sup>189</sup> Id.

procedures also be subject to the revised substituted judgment standard. Part VIII.C examines the revised best interest standard and recommends that different factors apply depending on whether the petition is for an abortion or sterilization procedure. Last, Part VIII.D highlights the benefits of the revised hybrid approach.

#### A. HYBRID APPROACH

The proposed revised standard is a hybrid of the substituted judgment standard and the best interests standard and requires a two-step analysis. <sup>190</sup> The first step requires that the court decide whether there is clear and convincing evidence to show that the incompetent individual would have chosen a certain option if competent. <sup>191</sup> Second, based on the first decision, the court must determine whether to use a revised substituted judgment standard or a revised best interests standard. <sup>192</sup> If there is clear and convincing evidence to show that the incompetent person would have chosen a certain option, the court should make its decision in accordance with the revised substituted judgment standard. <sup>193</sup> If no clear and convincing evidence exists to show that an individual would have chosen a certain option, however, the court should make its decision using the revised best interests standard, which includes aspects of each of the three standards. <sup>194</sup>

#### B. REVISED SUBSTITUTED JUDGMENT STANDARD

The revised substituted judgment standard should be used to determine whether to grant a petition for sterilization or abortion if clear and convincing evidence exists to show that the incompetent woman would have made a particular decision if competent. 195

This standard requires that the judge, in weighing the opinions of the guardian and guardian ad litem, strictly base his or her decision on what

<sup>&</sup>lt;sup>190</sup> In re Estate of K.E.J., 887 N.E.2d 704, 720 (III. App. Ct. 2008) (describing a "dual standard" that uses a two-step approach with both the substituted judgment standard and the best interests standard).

<sup>&</sup>lt;sup>191</sup> Id.

<sup>&</sup>lt;sup>192</sup> Id

<sup>193</sup> Id.: see supra Part VIII.B.

<sup>&</sup>lt;sup>194</sup> In re Estate of K.E.J., 887 N.E.2d at 720; McIntyre, supra note 70, at 1323; see supra Part VIII.C.

<sup>&</sup>lt;sup>195</sup> In re Estate of K.E.J., 887 N.E.2d at 720.

the incompetent individual would choose if competent. Thus, "if an individual would, if competent, make an unwise or foolish decision, the judge must respect that decision as long as he would accept the same decision if made by a competent individual in the same circumstances." Moreover, it is necessary that the judge base his or her decision on what the incompetent individual would choose if competent, to avoid judicial abuses similar to that which occurred in *In re Guardianship of Moe*, where the judge blatantly ignored Moe's beliefs and the guardian ad litem's determination when he ordered that she undergo an abortion and be sterilized. Thus, to avoid such abuses of judicial power, judges must strictly base their decision on what the incompetent individual would do if competent, and not what they believe the incompetent individual should do.

In sum, if clear and convincing evidence exists to show that the incompetent woman would have made a particular decision if competent, that decision should be adhered to regardless of what a judge would deem to be in her best interest.

#### C. REVISED BEST INTERESTS STANDARD

The revised best interests standard should be used to determine whether to grant sterilization or abortion petitions when no clear and convincing evidence exists to show that the incompetent woman would have made a particular decision. The revised best interests standard weighs fewer factors to "better ensure that the proper result is reached" in each case and to remedy problems with the original best interests standard. Even though a revised best interests standard may not entirely eliminate judicial abuse, it allows the court to "focus on the individual to ensure that [the court] is making a decision that is actually in [the incompetent woman's] best interest." Due to the distinct nature of sterilization and abortion, slightly different factors should be used to determine whether to grant petitions for each procedure.

<sup>&</sup>lt;sup>196</sup> See McIntyre, supra note 70, at 1313.

<sup>&</sup>lt;sup>197</sup> In re Guardianship of Roe, 421 N.E.2d 40, 59 n.20 (Mass. 1981).

<sup>&</sup>lt;sup>198</sup> In re Guardianship of Moe, 960 N.E.2d 350, 352-53 (Mass. App. Ct. 2012); see supra Part III.B.

<sup>&</sup>lt;sup>199</sup> In re Estate of K.E.J., 887 N.E.2d at 720.

<sup>&</sup>lt;sup>200</sup> McIntyre, supra note 70, at 1323.

<sup>&</sup>lt;sup>201</sup> Id. at 1326.

#### 1. Abortion

When determining whether to grant petitions for abortion procedures, a court should consider three factors: (1) the recommendation of parents or guardians; (2) the physical and emotional trauma that the person would endure from pregnancy as opposed to the procedure; and (3) the likelihood that the individual will comply with prenatal care.

First, courts should "weigh the recommendations of the parents or guardians" so that they can better determine the incompetent individual's best interest. Although parents and guardians may arguably be self-interested, parents and guardians should still have a say because they are responsible for the care of the incompetent person. Additionally, if parents or guardians are petitioning the court to make a decision in the best interest of the mentally incompetent individual, their input is worthy of consideration and may prove to be significant. Bias can be avoided so long as courts do not rely entirely on their testimony to make the ultimate decision.

Second, courts should consider "the emotional and physical trauma that the individual would endure" during pregnancy versus if she underwent an abortion to determine if the procedure is in her best interest. To be as accurate and thorough as possible, the court should appoint at least three medical experts to evaluate the possible trauma. Courts should also "examine the current health of the mentally disabled individual" and "take into account the various medications that the mentally disabled individual might be taking and the consequences of discontinuing use of such medication if pregnancy occurred." 209

<sup>&</sup>lt;sup>202</sup> *Id.* at 1325. McIntyre proposes a revised best interests inquiry for sterilization petitions; this Note recommends that a similar revised standard be applied to abortion procedures as well.

<sup>&</sup>lt;sup>203</sup> See supra Part VI.B.

<sup>&</sup>lt;sup>204</sup> McIntyre, supra note 70, at 1325.

<sup>&</sup>lt;sup>205</sup> See Scott, supra note 28, at 847 ("[T]he interests of the mentally retarded person will be best protected by a legal rule that . . . supports private decision[]making by the individual or, if she is incompetent to make the reproductive decision, by her parents.").

<sup>&</sup>lt;sup>206</sup> McIntyre, supra note 70, at 1325.

<sup>&</sup>lt;sup>207</sup> Id. at 1326.

<sup>208</sup> See supra Part V.C. Similar to how some courts appoint three medical experts for determining competency, experts should also be appointed to evaluate the potential trauma that a mentally incompetent woman may endure if she were sterilized or needed to carry a child to term

<sup>&</sup>lt;sup>209</sup> McIntyre, supra note 70, at 1326.

Moreover, courts "should consider the potential emotional trauma the individual would suffer if after carrying the baby to term, she lost custody of the child."<sup>210</sup>

Last, courts should evaluate the likelihood that the individual will comply with prenatal care. Studies examining the pregnancy of mentally ill women indicate that such women have increased complications during pregnancy and childbirth, such as heartburn, bleeding, hypertension, and postpartum hemorrhage. These complications are exacerbated by the fact that women with mental illness are significantly less likely to be compliant with prenatal care. Therefore, in considering whether an abortion is in the individual's best interest, the court should consider whether the individual would be able to regularly comply with medical appointments and other aspects of prenatal care.

#### 2. Sterilization

Maura McIntyre, in Buck v. Bell and Beyond: A Revised Standard to Evaluate the Best Interests of the Mentally Disabled in the Sterilization Context, <sup>214</sup> and the Appellate Court of Illinois in Estate of K.E.J., both articulated a revised best interest inquiry for sterilization petitions. <sup>215</sup> This sub-part urges that both versions of the revised best interest inquiry be molded together into one revised standard to best protect the reproductive rights of mentally incompetent women whose wishes regarding sterilization are unknown.

Before a court considers whether to grant a petition for sterilization, the court should make a factual finding about whether contraception is required. To decide if contraception is required, the court must conclude "that the individual is fertile and that the individual lacks (and

<sup>210</sup> Ld

<sup>&</sup>lt;sup>211</sup> See Oberman, supra note 108, at 390. Prenatal care "provides an opportunity to monitor a woman's pregnancy and possibly to intervene when complications arise" and reduces the risk of complications during pregnancy and childbirth. William H. Miller Jr. et. al., *Prenatal Care for Pregnant Chronic Mentally Ill Patients*, 43 HOSP. & CMTY. PSYCHIATRY 942, 942 (1992).

<sup>&</sup>lt;sup>212</sup> Miller, supra note 211.

<sup>&</sup>lt;sup>213</sup> Id.

<sup>&</sup>lt;sup>214</sup> McIntyre, *supra* note 70, at 1322–26.

<sup>&</sup>lt;sup>215</sup> Estate of K.E.J., 887 N.E.2d 720 (III. App. Ct. 2008).

<sup>&</sup>lt;sup>216</sup> See McIntyre, supra note 70, at 1323.

will continue to lack) the mental capacity necessary to care for a child."<sup>217</sup> If the court determines that contraception is not required, the sterilization petition should not be granted. If the court determines that contraception is required, however, the court should determine whether to grant the petition for sterilization based on three factors: (1) the recommendation of the parents or guardians; (2) the physical and emotional trauma that the individual would endure from pregnancy as opposed to undergoing the sterilization procedure; and (3) whether less intrusive means of contraception are available.

The first two factors, discussed previously in the context of abortions, also apply to sterilization petitions. The third factor, the availability of less intrusive alternative means of contraception, however, is unique to sterilization petitions. Decisions regarding sterilization petitions "often turn on a determination of whether less intrusive means of contraception are available."

This involves "weigh[ing] the costs and benefits of alternative methods of birth control," including the effects of birth control on other medications the individual is taking and any potential side effects. Since other forms of birth control may either be "unworkable" or have too many side effects, the court may decide that sterilization through tubal ligation is the least intrusive form of birth control as it is a simple procedure that is now reversible.

#### D. BENEFITS OF THE HYBRID APPROACH

The hybrid approach incorporates aspects of the substituted judgment standard, the mandatory criteria rule, and the best interest standard, creating a two-step process to determine whether to grant a sterilization or abortion petition for mentally incompetent women. This approach is more expansive than the current standards as it provides guidelines for both sterilization and abortion procedures. Moreover, the hybrid approach retains the benefits of the three current standards while minimizing their disadvantages.

While the current substituted judgment standard creates a "confusing

<sup>&</sup>lt;sup>217</sup> Id.

<sup>&</sup>lt;sup>218</sup> See id.

<sup>&</sup>lt;sup>219</sup> Id.

<sup>&</sup>lt;sup>220</sup> Id. at 1325.

<sup>&</sup>lt;sup>221</sup> Id. at 1325-26.

<sup>&</sup>lt;sup>222</sup> Id. at 1325.

paradox" that forces courts to determine the wishes of incompetent individuals who may never have articulated their beliefs regarding sterilization or abortion, <sup>223</sup> the hybrid approach avoids this paradox and provides decision-making autonomy to the individual when possible "by using substituted judgment only when evidence of the individual's wishes exist."

Further, while the best interests standard "receives criticism for taking the right to medical decision making away from the patient," the hybrid approach protects the woman's decision-making autonomy except in the event that she lacks the "ability to exercise [her reproductive decision-making] right on her own." Last, the hybrid approach reduces judicial discretion and inconsistent results by following the mandatory criteria rule and using fewer factors. Thus, the hybrid approach protects incompetent individuals because courts are able to preserve "autonomous choice for an incompetent person to the maximum extent possible" while restricting discretionary judicial decision making.

#### IX. CONCLUSION

Proper precautions should be implemented to determine whether to grant petitions for abortion or sterilization procedures for mentally ill women. There should be a careful determination as to her competency with respect to decisions regarding sterilization and abortion procedures. If the mentally ill woman is deemed incompetent, then judges are the most appropriate decision makers regarding sterilization and abortion procedures. Judges, however, should be required to follow particular guidelines and not be given broad discretion.

Because none of the current standards for granting sterilization petitions are adequate on their own, the hybrid approach, proposed in this Note, incorporates aspects of all three in an effort to provide a functional approach that meets the needs of all sides. The hybrid approach is more expansive than the current standards because it provides guidelines for both sterilization and abortion procedures. Further, it eliminates many

<sup>&</sup>lt;sup>223</sup> Barnhill, supra note 124, at 187.

 $<sup>^{224}</sup>$  1d

<sup>225</sup> See id.

<sup>&</sup>lt;sup>226</sup> See McIntyre, supra note 70, at 1322-23.

<sup>&</sup>lt;sup>227</sup> Barnhill, *supra* note 124, at 187.

<sup>&</sup>lt;sup>228</sup> McIntyre, *supra* note 70, at 1322–23.

issues associated with the current standards by instating a two-step process to determine whether to grant a sterilization or abortion petition for a mentally incompetent woman. The hybrid approach guarantees better results than any of the current standards alone because it ensures maximum autonomous decision making for mentally incompetent women while limiting judicial discretion.