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Casenotes: Constitutional Law — Maryland Circuit Courts Have Parens Patriae Jurisdiction to Authorize Guardians to Consent to Sterilization of Incompetent Minors When the Procedure Is Medically Necessary. Wentzel v. Montgomery General Hospital, Inc., 293 Md. 685, 447 A.2d 1244 (1982)

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CASENOTES

CONSTITUTIONAL LAW — MARYLAND CIRCUIT COURTS HAVE *PARENS PATRIAE* JURISDICTION TO AUTHORIZE GUARDIANS TO CONSENT TO STERILIZATION OF INCOMPETENT MINORS WHEN THE PROCEDURE IS MEDICALLY NECESSARY. *Wentzel v. Montgomery General Hospital, Inc.*, 293 Md. 685, 447 A.2d 1244 (1982).

Wentzel v. Montgomery General Hospital, Inc.[1] involved the petition for a court order authorizing the sterilization of Sonya Star Flanary, a blind and severely mentally retarded thirteen year old.[2] Mrs. Nancy Wentzel and Ms. Gail Sheppard, the child's grandmother and aunt respectively, filed the petition in the Circuit Court for Montgomery County after the hospital refused to perform a hysterectomy without judicial authorization.[3] The circuit court concluded that Sonya was incapable of consenting to the procedure herself and, appointing Mrs. Wentzel and Ms. Sheppard as co-guardians of the child and her property, denied them permission to consent to the operation.[4] The trial court held that it was powerless to grant the requested relief absent specific statutory authorization or a life threatening situation.[5] The guardians appealed to the Court of Special Appeals of Maryland, but certiorari was granted by the court of appeals prior to the intermediate appellate court's consideration.[6]

The sole issue, as framed by the court of appeals, was whether a court of general jurisdiction is empowered to grant a guardian's petition to sterilize an incompetent minor.[7] After concluding that circuit courts have subject matter jurisdiction to consider such a petition,[8] the court enumerated and discussed procedural requirements which a court

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1. 293 Md. 685, 447 A.2d 1244 (1982).
2. *Id.* at 687-88, 447 A.2d at 1245-46. Sonya reportedly has an I.Q. of 25 to 30, the equivalent of a mental age of one to two years. Although she was a normal child at birth, Sonya suffered severe brain damage and other physical injuries in an automobile accident when she was five months old. *Id.* at 687, 447 A.2d at 1246.
3. *Id.* at 687-88, 447 A.2d at 1246. Although it was argued that Sonya is an easy target for rape and possible resulting pregnancy, the principal motivation for the guardians' request for sterilization was to terminate Sonya's menstruation and resulting pain and disorientation. *Id.* Judge Smith, in his part concurring and part dissenting opinion, reviewed the testimony at length and stressed this point. *See id.* at 706-12, 447 A.2d at 1255-58 (Smith, J., concurring and dissenting).
4. *Id.* at 689-90, 447 A.2d at 1247.
5. *Id.* at 690, 447 A.2d at 1247.
6. *Id.*
7. *Id.* at 687, 447 A.2d at 1245.
8. *Id.* at 702, 447 A.2d at 1253. Under a *parens patriae* theory, meaning "father of the country," the state assumes the common law equity jurisdiction of guardianship over minors and other persons under disability. *See also* Taylor v. Taylor, 246 Md. 616, 229 A.2d 131 (1967); Thistlewood v. Ocean City, 236 Md. 548, 204 A.2d 688 (1964); Stirn v. Stirn, 183 Md. 59, 36 A.2d 695 (1944); Barnard v. Godfrey, 157 Md. 264, 145 A. 614 (1929); Jenkins v. Whyte, 62 Md. 427 (1884); Ellis v. Ellis, 19 Md. App. 361, 311 A.2d 428 (1973).

must observe to protect the ward's interests,[9] coupled with factors to be considered in determining whether sterilization is in the incompetent's best interests.[10] The court held that in addition to these factors, consent to sterilization could be judicially authorized only when it is demonstrated by clear and convincing evidence that the procedure is "medically necessary to preserve the life or physical or mental health of the incompetent minor."[11] Emphasizing that society's welfare and a guardian's convenience should play no part in a court's consideration, the majority upheld the trial court's decision that Sonya's pain, irritability, disorientation, and general inability to cope with her menstrual cycle were of insufficient danger to her health to justify sterilization.[12] Additionally, the court of appeals called upon the legislature to declare the state's public policy with regard to the sterilization issue.[13]

Sterilization of the mentally retarded has been at issue in the United States for nearly a century. What began as the legally unauthorized experimentation with institutionalized incompetents soon gained widespread support as the eugenics movement flourished at the beginning of the twentieth century.[14] Eugenicists sought elimination of

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9. 293 Md. 685, 703, 447 A.2d 1244, 1253-54 (1982). The court must: (1) appoint an independent guardian *ad litem* to act on behalf of the ward at a full judicial hearing; (2) receive independent medical, psychological and social evaluations from court-appointed experts if necessary; (3) personally meet with the ward to make its own determination regarding competency and the ward's desires; and (4) find by clear and convincing evidence that the ward lacks competency to make the sterilization decision and that the incapacity is not likely to change. *Id.*

10. *Id.* at 703, 447 A.2d at 1254. The factors are: (1) whether the incompetent minor is capable of reproduction; (2) the child's age and circumstances; (3) the extent of the child's exposure to sexual contact; (4) the feasibility of utilizing effective contraception in lieu of sterilizaton; (5) the availability of less intrusive sterilization procedures; and (6) the possibility that future scientific advances will result in improvement of the ward's mental condition. *Id.*

11. *Id.*

12. *Id.* at 704-05, 447 A.2d at 1254.

13. *Id.* at 705, 447 A.2d at 1255 ("In view of the profound and recurring nature of the issue here involved, and its obvious importance to the public, the legislature may deem it appropriate" to enact statutory guidance.).

14. Eugenics, a term coined by Sir Francis Galton in 1883, was the study of genetically transmitted characteristics for the purpose of improving future generations of the human race. Ferster, *Eliminating the Unfit—Is Sterilization the Answer?*, 27 OHIO ST. L.J. 591, 591 (1966). Sterilization of those thought to carry undesirable genes was a necessary outgrowth of the eugenics theory.

The philosophical forerunners of eugenics, Mendelism and Social Darwinism, were practiced throughout Europe in the mid-1800's. The social and political attitude in the United States in the late 19th century contributed to guarded acceptance of the hereditarian philosophies because emphasis was on the welfare of society as a whole rather than individual rights. *See* Cynkar, Buck v. Bell: *"Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1423-24, 1426-27 (1981). Eugenics advocates began private campaigns by systematically sterilizing youngsters at institutions. Although public disapproval led to an abrupt halt to this experimentation, successful lobbying efforts for legal endorsement of these programs soon ensued. *Id.* at 1431-33. *See* text accompanying notes 17-23 *infra.*

For an excellent synopsis of the history and theory of eugenics, see Cynkar,

defective genes from the human race.[15] Their theory affected the retarded, the insane, the criminal and those with stigmatizing diseases such as epilepsy.[16] Statutes providing for the compulsory sterilization of these designated groups were soon introduced in state legislatures;[17] the first to be enacted was Indiana's in 1907.[18] Although many of the first statutes were found constitutionally deficient,[19] the Virginia statute of 1924 was upheld by the United States Supreme Court in *Buck v. Bell,*[20] a 1927 decision. Amidst a barrage of constitutional arguments,[21] the Court held that, considering the public welfare, it was within the state's police power to prevent the "manifestly unfit" from procreating.[22] With this Supreme Court sanction, thirty states eventually enacted compulsory eugenic sterilization laws.[23]

Years later, however, scientific discoveries and changing social and

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Buck v. Bell: *"Felt Necessities" v. Fundamental Values?,* 81 COLUM. L. REV. 1418 (1981). For thorough treatment of the subject, including its theory, history, sociological implications, legal principles, and statutory development, see M. HALLER, EUGENICS: HEREDITARIAN ATTITUDES IN AMERICAN THOUGHT (1963); J. LANDMAN, HUMAN STERILIZATION (1932); H. LAUGHLIN, EUGENICAL STERILIZATION IN THE UNITED STATES (1922).

15. *See* note 14 *supra.* Preventing the transmittal of undesirable genes was known as "negative" eugenics. "Positive" eugenics consisted of the identification of preferred traits or cultural characteristics to encourage further breeding of individuals thought to possess those traits. *See* M. HALLER, EUGENICS: HEREDITARIAN ATTITUDES IN AMERICAN THOUGHT 77-82 (1963); Cynkar, Buck v. Bell: *"Felt Necessities" v. Fundamental Values?,* 81 COLUM. L. REV. 1418, 1427-30 (1981).
16. *See* H. LAUGHLIN, THE LEGAL STATUS OF EUGENICAL STERILIZATION 65 (1929).
17. *See* Ferster, *Eliminating the Unfit—Is Sterilization the Answer?,* 27 OHIO ST. L.J. 591, 592-93 (1966). Michigan and Pennsylvania were the first states to introduce eugenic sterilization statutes. Although the Pennsylvania bill was passed by its legislature, the governor vehemently vetoed it. *See id.*
18. *Id.* at 592. Fourteen years later, the Act was declared unconstitutional as violative of the fourteenth amendment's due process clause. Williams v. Smith, 190 Ind. 526, 527-28, 131 N.E. 2, 2 (1921).
19. *See, e.g.,* Mickle v. Henrichs, 262 F. 687 (D. Nev. 1918) (sterilization of criminals is cruel and unusual punishment); Davis v. Berry, 216 F. 413 (S.D. Iowa 1914) (violating procedural due process), *rev'd on other grounds,* 242 U.S. 468 (1917) (moot as a result of intervening state legislation); Williams v. Smith, 190 Ind. 526, 131 N.E. 2 (1921) (violating procedural due process); Haynes v. Lapeer Circuit Judge, 201 Mich. 138, 166 N.W. 938 (1918) (violating equal protection clause); Smith v. Board of Examiners of Feeble-Minded, 85 N.J.L. 46, 88 A. 963 (1913) (violating equal protection clause).
20. 274 U.S. 200 (1927). The Supreme Court of Appeals of Virginia had previously upheld the statute under both the state and federal constitutions. Buck v. Bell, 143 Va. 310, 130 S.E. 516 (1925), *aff'd,* 274 U.S. 200 (1927). Prior to the *Bell* decision, appellate courts in at least two states had upheld their sterilization laws. *See* Smith v. Command, 231 Mich. 409, 204 N.W. 140 (1925); Washington v. Feilen, 70 Wash. 65, 126 P. 75 (1912).
21. It was argued that the Virginia statute violated procedural and substantive due process as well as the equal protection guarantee. Buck v. Bell, 274 U.S. 200, 201-02 (1927).
22. *Id.* at 207. Justice Holmes, in his brief opinion, likened the compulsory sterilization statute to laws requiring vaccination of school children. *Id.*
23. *See* J. LANDMAN, HUMAN STERILIZATION 54-93 (1932). Maryland was not among those thirty states.

political policies contributed to the repeal or constitutional invalidation of many of these statutes. First, the eugenics theory fell into disrepute among scientists.[24] Few of the causes of mental retardation were found to be genetically transmitted,[25] and of those, some are passed on by intellectually normal individuals, thereby causing great difficulty in identifying a carrier prior to the birth of his or her child.[26] The social aspects of eugenics also came into question. One commentator described eugenics as an exercise in "rampant racism";[27] others criticized the movement as reminiscent of the Hitlerian philosophies practiced in Nazi Germany.[28] One court stated, "We cannot adequately express our abhorrence for the kind of ideology that assigns vastly differing value to the lives of human beings because of their innate group characteristics or personal handicaps."[29] These attitudes were reflected in changing legal standards and the recognition of fundamental rights, specifically including the right to procreate.[30] This increased awareness of individual rights, accompanied by the higher standard applied when fundamental rights are implicated,[31] left few remaining statutory guidelines for courts approached by parents or guardians requesting judicial authorization for sterilization of their children or wards.[32]

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24. *See* Sherlock & Sherlock, *Sterilizing the Retarded: Constitutional, Statutory and Policy Alternatives,* 60 N.C.L. REV. 943, 949-50 (1982). *See generally* Note, *Eugenic Sterilization—A Scientific Analysis,* 46 DEN. L.J. 631 (1969).
25. *See* Ross, *Sterilization of the Developmentally Disabled: Shedding Some Myth-Conceptions,* 9 FLA. ST. U.L. REV. 599, 614-15 (1981); Sherlock & Sherlock, *Sterilizing the Retarded: Constitutional, Statutory and Policy Alternatives,* 60 N.C.L. REV. 943, 949-50 (1982).
26. *See* Ross, *Sterilization of the Developmentally Disabled: Shedding Some Myth-Conceptions,* 9 FLA. ST. U.L. REV. 599, 615 (1981). Furthermore, it has been asserted that even if all defectives could be sterilized, only an eleven percent reduction of retardation would result. *Id.* at 614 n.60.
27. S. GOULD, THE MISMEASURE OF MAN 22 (1981).
28. Comment, *A Conflict of Choice: California Considers Statutory Authority for Involuntary Sterilization of the Severely Mentally Retarded,* 4 WHITTIER L. REV. 495, 495 (1982). *See generally* S. GOULD, THE MISMEASURE OF MAN 22 (1981).
29. *In re* Grady, 85 N.J. 235, 245, 426 A.2d 467, 472 (1981).
30. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (statute authorizing the sterilization of criminals violated the equal protection clause, and the right to procreate was designated "one of the basic civil rights of man"). Following *Skinner,* several privacy rights evolving from the right to procreate were recognized by the Supreme Court. *E.g.,* Carey v. Population Services Int'l, 431 U.S. 678 (1977) (right to use contraceptives extended to minors); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (minor has right to obtain an abortion without parental consent); Roe v. Wade, 410 U.S. 113 (1973) (state cannot interfere with woman's right to obtain an abortion during the first trimester of pregnancy); Eisenstadt v. Baird, 405 U.S. 438 (1972) (unmarried persons have right to acquire and use contraceptives); Griswold v. Connecticut, 381 U.S. 479 (1965) (state could not interfere with married person's right to use contraceptives).
31. When fundamental rights are implicated, courts apply a strict scrutiny analysis whereby states have the burden of proving that the challenged law serves a compelling and overriding state interest. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 382-83 (1978).
32. For an analysis and classification of the remaining statutes, see Ross, *Sterilization*

Courts have responded to this challenge of balancing the often divergent needs of society, guardians, and incompetents in a variety of ways.[33] Emphasizing that sterilization is an extreme remedy irreversibly denying the fundamental right to beget children, the majority of courts have declined to exercise jurisdiction absent specific statutory authority satisfying constitutional requirements, providing adequate safeguards, and reflecting current social policy.[34] More recently, however, some courts are taking the opposite approach, asserting that absent legislative or constitutional prohibition, courts of general jurisdiction are empowered to decide such controversies.[35] These courts stress their inherent equity powers and often apply the *parens patriae* doctrine, under which state courts have plenary power to provide for the general well-being of disabled persons. In some cases, this result is reached by a broad interpretation of guardianship statutes and

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of the Developmentally Disabled: Shedding Some Myth-Conceptions, 9 FLA. ST. U.L. REV. 599, 606-11 (1981).

33. For a discussion of these conflicting needs in conjunction with new justifications for sterilization statutes, see Sherlock & Sherlock, *Sterilizing the Retarded: Constitutional, Statutory and Policy Alternatives,* 60 N.C.L. REV. 943, 951-53 (1982).

34. *E.g.,* Hudson v. Hudson, 373 So. 2d 310, 312 (Ala. 1979) ("the profound nature of the constitutional and social issues . . . preclude judicial resolution"); *In re* Tulley, 83 Cal. App. 3d 698, 146 Cal. Rptr. 266 (1978) (power to authorize sterilization can derive only from explicit legislation and cannot be inferred from general principles of common law), *cert. denied,* 440 U.S. 967 (1979); *In re* S.C.E., 378 A.2d 144 (Del. Ch. 1977) (denying jurisdiction based on a subsequently reversed case); A.L. v. G.R.H., 163 Ind. App. 636, 325 N.E.2d 501 (1975) (common law does not confer upon parents the power to consent to sterilization of their children), *cert. denied,* 425 U.S. 936 (1976); Holmes v. Powers, 439 S.W.2d 579, 580 (Ky. 1969) (when there is no statutory or common law authority permitting sterilization of an incompetent adult, the court may not "fill the void"); *In re* M.K.R., 515 S.W.2d 467, 471 (Mo. 1974) (resolution of the issue rests with "the people's elected representatives . . . after full consideration of the constitutional rights of the individual and the general welfare of the people"); Frazier v. Levi, 440 S.W.2d 393 (Tex. Civ. App. 1969) (noting that sterilization statutes have been held valid, the court concluded that acting in absence of statutory authority would be in excess of judicial authority).

35. *E.g., In re* C.D.M., 627 P.2d 607 (Alaska 1981) (broadly construing guardianship statute); *In re* A.W., 637 P.2d 366, 374 (Colo. 1981) (illustrating other difficult cases in which courts have asserted *parens patriae* jurisdiction to authorize consent to surgery upon incompetents); *In re* Moe, 385 Mass. 555, 432 N.E.2d 712 (1982) (authorizing sterilization by finding that the incompetent would so choose if competent); *In re* Penny N., 120 N.H. 269, 414 A.2d 541 (1980) (enumerating procedural requirements and utilizing "clear and convincing evidence" standard of proof); *In re* Grady, 85 N.J. 235, 426 A.2d 467 (1981) (enunciating a constitutional right to sterilization and exercising substituted judgment to authorize sterilization); *In re* Hayes, 93 Wash. 228, 230, 608 P.2d 635, 637 (1980) (referring to other courts' denial of jurisdiction as "an abdication of the judicial function," the court held that sterilization could be authorized if same is in the best interests of the retarded person). *But see In re* Eberhardy, 102 Wis. 2d 539, 307 N.W.2d 881 (1981) (asserting jurisdiction but refusing to make a determination because of the delicate policy issues involved). For a discussion and comparison of several of these cases, see Comment, *A Conflict of Choice: California Considers Statutory Authority for Involuntary Sterilization of the Severely Mentally Retarded,* 4 WHITTIER L. REV. 495, 502-10 (1982).

substitution of the court as legal guardian.[36] Reflecting a consciousness of the prior abuses, each court has enumerated a myriad of requirements to be complied with and factors to be considered before authorization of sterilization may issue. Adding to the confusion, even these responses have differed widely — some courts confine themselves to a medical necessity standard,[37] while others expand upon their *parens patriae* role by using the doctrine of substituted consent whereby the court seeks to determine what decision would be made by the incompetent if he or she could so choose.[38]

Having thoroughly reviewed judicial responses of other jurisdictions,[39] the court of appeals in *Wentzel* examined Maryland's guardianship statute[40] to determine whether its provisions could be interpreted to sanction guardian consent to sterilization.[41] The guardians argued that section 13-708 of the Estates and Trusts Article,[42] empowering a court to invest a guardian with powers necessary to provide for the "demonstrated need"[43] of the ward and to give consent for medical care,[44] encompassed their right to consent to Sonya's sterilization. The court explored the legislative history of the provision and concluded that the section was inapplicable to the present case as it does not pertain to the guardianship of minors.[45] The court noted, however, that the statute parallels the common law *parens patriae* power which is well-established in Maryland and held that the doctrine was sufficiently pervasive to afford jurisdiction in this case.[46] After specifying the standards and factors to apply,[47] the court upheld the trial court's denial of permission for the operation.[48]

Despite the sparsity of legal precedent in Maryland yielding litigants little guidance for the presentation of their evidence, the court refused to remand the case to the trial court for reconsideration in light of the new standards.[49] By summarily concluding that the guardians could not produce evidence sufficient to meet the standards, the majority took a narrow view of medical necessity, a stance which, according

36. *E.g., In re* C.D.M., 627 P.2d 607, 612 (Alaska 1981) (the statute empowers guardians to "give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care").
37. *E.g., In re* A.W., 637 P.2d 366 (Colo. 1981).
38. *E.g., In re* Moe, 385 Mass. 555, 432 N.E.2d 712 (1982); *In re* Grady, 85 N.J. 235, 426 A.2d 467 (1981).
39. Wentzel v. Montgomery Gen. Hosp., Inc., 293 Md. 685, 691-99, 447 A.2d 1244, 1248-51 (1982).
40. MD. EST. & TRUSTS CODE ANN. §§ 13-101 to -806 (Supp. 1981).
41. 293 Md. 685, 699-701, 447 A.2d 1244, 1252 (1982).
42. MD. EST. & TRUSTS CODE ANN. § 13-708 (Supp. 1981).
43. *Id.* § 13-708(a).
44. *Id.* § 13-708(b)(8).
45. 293 Md. 685, 701, 447 A.2d 1244, 1252 (1982).
46. *Id.* at 701-02, 447 A.2d at 1252-53.
47. See notes 9 & 10 *supra.*
48. 293 Md. 685, 704-05, 447 A.2d 1244, 1254 (1982).
49. *See id.* at 718, 447 A.2d at 1261 (Digges, J., concurring and dissenting).

to dissenting Judges Smith and Davidson, unduly restricts the power of the courts.[50]

Implicit in the court's decision is the fear of repetition of the past reprehensible conduct, the prior abuse which saw the across-the-board sterilization of thousands of individuals. However, this trepidation has resulted in an overcompensation and, unfortunately, a judicial paralysis which leaves many remediless. The court failed to consider the source of the prior abuse — a society in which the protection and improvement of society itself were the ultimate considerations and in which sterilization was compulsory and routinely performed without the benefit of procedural safeguards, now present, affording the incompetent a forum in which his or her constitutional rights could be fully adjudicated. Furthermore, it must be borne in mind that the present request for sterilization emanated from the child's legal guardians who are charged with the responsibility of fulfilling her every need and who, in fact, are in the best position to ascertain what is in her best interests. There is always a danger that the guardian's personal convenience would actuate his or her request for the ward's sterilization; sterilization performed at the mere whim of a guardian would be intolerable and would obliterate the strides made in the recognition and protection of fundamental rights. However, courts, which daily make determinations regarding credibility, are certainly capable of ascertaining whether the principle motivation for the request for sterilization comes from a sincere concern for and a desire to comfort the incompetent.[51] As one commentator noted, "any policy that does not allow parental or guardian consent for sterilization in the most compelling cases is inhumane and ultimately shortsighted."[52]

In its effort to protect the right to procreation, a right which is surely meaningless to a child like Sonya, the court of appeals sacrificed another right, the right to undergo sterilization voluntarily.[53] This presents what one court expressed as a "disturbing paradox" — how to exercise a profoundly personal right for one incapable of making such

50. Both Judges Smith and Davidson concurred in the majority's holding that circuit courts have jurisdiction to consider petitions for sterilization. However, both judges disagreed with the majority's standards and ultimate resolution of the case. *See id.* at 705-18, 447 A.2d at 1255-61 (Smith, J., concurring and dissenting); *id.* at 718-25, 447 A.2d at 1261-64 (Davidson, J., dissenting).

51. The trial judge in *Wentzel* noted that the guardians sincerely believed that sterilizaton was in Sonya's best interests. *Id.* at 689, 447 A.2d at 1247.

52. Sherlock & Sherlock, *Sterilizing the Retarded: Constitutional, Statutory and Policy Alternatives,* 60 N.C.L. REV. 943, 945 (1982).

53. Although the United States Supreme Court has not expressly recognized the right to sterilization, several courts have concluded that such a right exists as a necessary extension of other privacy rights. *E.g.,* Hathaway v. Worcester, 475 F.2d 701, 705 (1st Cir. 1973); Ruby v. Massey, 452 F. Supp. 361, 366-68 (D. Conn. 1978); Peck v. Califano, 454 F. Supp. 484, 486-87 (C.D. Utah 1977); *In re* Grady, 85 N.J. 235, 247, 426 A.2d 467, 473 (1981). See note 30 *supra.*

a choice herself.[54] Judges Smith and Davidson advocated using a substituted judgment standard to answer this difficult question.[55] This standard, which has been used in the past to authorize other serious surgical procedures upon incompetents and to withdraw life support systems,[56] has been criticized as unrealistic since it is difficult, if not impossible, to know what one who has been incompetent and unable to voice his or her opinions and desires would choose.[57] However, substituted judgment is still the best vehicle for focusing upon the incompetent's needs and presumed desires and allowing some judicial discretion without sacrificing fundamental rights. Conversely, the current medical necessity standard, strictly construed, causes undue hesitancy and can only serve to promote further suffering[58] for people like Sonya for whom no alternatives are available.[59]

It is now up to the legislature to provide relief. Prior to the *Wentzel* decision, a bill providing for the voluntary sterilization of incompe-

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54. *In re* Grady, 85 N.J. 235, 235, 426 A.2d 467, 469 (1981).

55. Judge Smith questioned, "Do my colleagues doubt for one instant what Sonya's choice would be under the circumstances here if she 'were in a position to make a sound judgment'?" 293 Md. 685, 717, 447 A.2d 1244, 1260 (1982) (Smith, J., dissenting) (quoting *In re* Weberlist, 79 Misc. 2d 753, 758, 360 N.Y.S.2d 783, 787 (1974)). *See id.* at 723-24, 447 A.2d at 1263 (Davidson, J., dissenting).

56. *E.g.,* Strunk v. Strunk, 445 S.W.2d 145 (Ky. Ct. App. 1969) (authorization for kidney transplant from incompetent to his brother); Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 740, 370 N.E.2d 417 (1977) (chemotherapy treatment); Price v. Sheppard, 307 Minn. 250, 239 N.W.2d 905 (1976) (shock treatment); *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (withdrawal of artificial life support mechanisms), *cert denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976); New Jersey v. Perricone, 37 N.J. 463, 181 A.2d 751 (blood transfusion), *cert. denied,* 371 U.S. 890 (1962); *In re* Schiller, 148 N.J. Super. 168, 372 A.2d 360 (1977) (amputation of leg). *See generally* Robertson, *Organ Donations by Incompetents and the Substituted Judgment Doctrine,* 76 COLUM. L. REV. 48 (1976).

57. *See In re* Storar, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266 (1981).

58. The following case is illustrative of the suffering caused by a strict interpretation of "medical necessity." A New York trial court denied the State's request for an abortion for a 25-year-old institutionalized incompetent woman whose I.Q. was 12. The request was denied because the state had failed to prove that the abortion was medically necessary, despite medical testimony that the woman was frightened and that proceeding with the pregnancy would be "emotionally traumatic" for her. Weeks later, however, using a different standard, the court allowed the abortion on the consent of the parents. N.Y. Times, Sept. 24, 1982, at A1, col. 5. The court's hesitancy caused the incompetent woman to suffer five additional weeks of a pregnancy that she did not understand and to incur a greater risk during and after performance of the abortion.

59. Although there are several available methods of contraception which are less drastic means than sterilization for preventing pregnancy, there is only one known method, injectable Depo Provera, that produces both contraception and an absence of menstruation. The Food and Drug Administration has forbidden its use, leaving sterilization as the only alternative for eliminating menstruation. *See* Sherlock & Sherlock, *Sterilizing the Retarded: Constitutional, Statutory and Policy Alternatives,* 60 N.C.L. REV. 943, 971-72 (1982).

tents was introduced in the Maryland House of Delegates.[60] As currently drafted, in addition to providing procedures which must be followed,[61] the bill allows circuit courts to authorize sterilization upon a finding that it would be in the "best interest" of the incompetent.[62] To make this determination, the court must consider several factors, including the availability of less drastic means of contraception and the petitioner's motivation for seeking the sterilization.[63] Although the bill never reached the house floor for full debate and a vote,[64] it is to be revised and reintroduced for further consideration.[65] In light of the *Wentzel* decision, hopefully the legislators will take a more serious look and enact this remedial legislation.

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60. H.D. 1850, Md. Gen. Assembly, 1982 Sess. The bill, sponsored by Delegate Judith Toth of Montgomery County, was introduced on February 24, 1982.
61. *Id.* lines 147-71.
62. *Id.* lines 178-86.
63. *Id.* lines 188-214.
64. The bill was sent to the Judiciary Committee of the House of Delegates for preliminary consideration. It received an unfavorable vote on March 29, 1982, and was returned to Delegate Toth for revisions. *See* Vote tally sheet in the House of Delegates Judiciary Committee file on H.D. 1850.
65. Telephone interview with Delegate Judith Toth, House of Delegates, Maryland General Assembly (Nov. 4, 1982).